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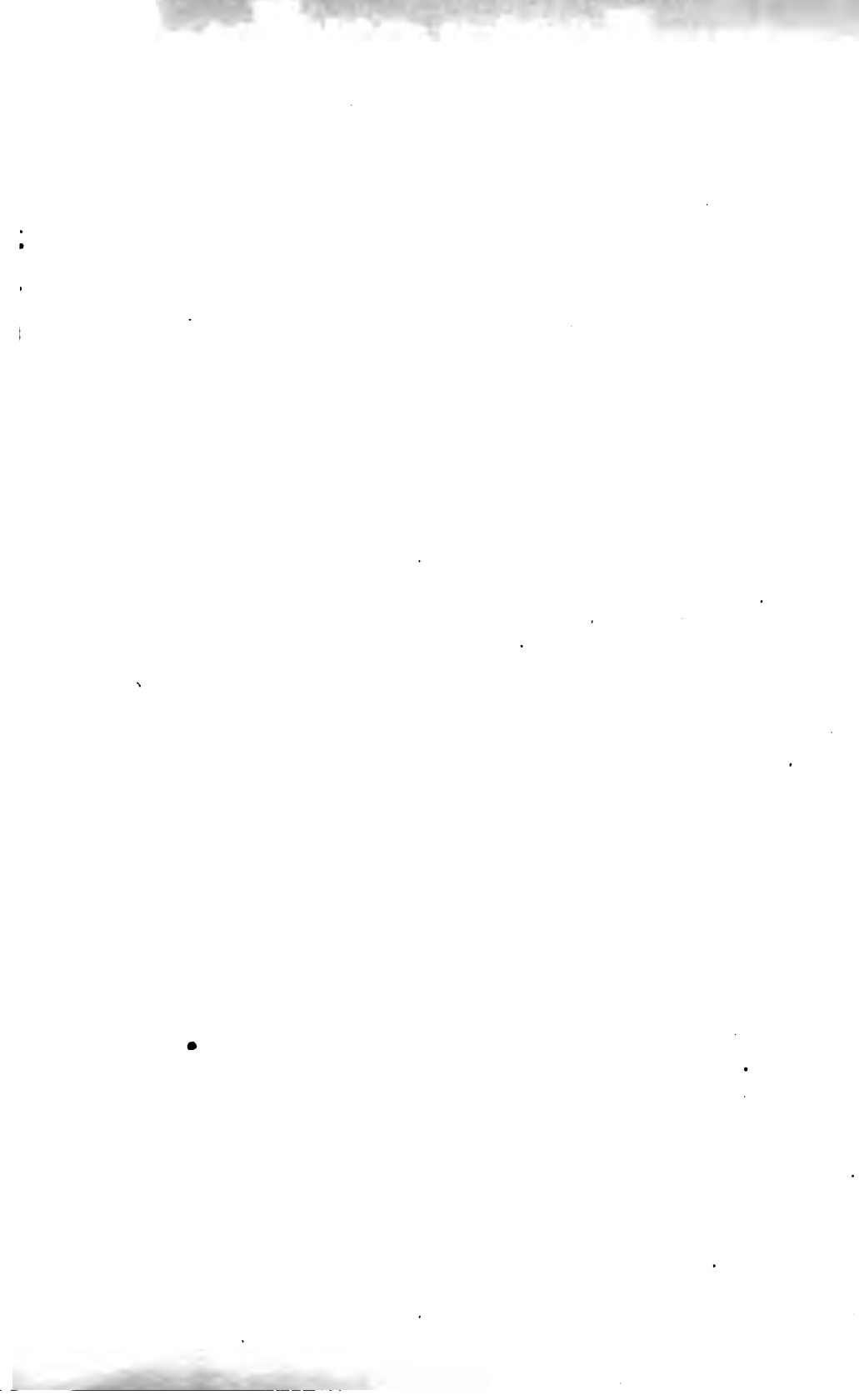
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DIGESTED INDEX,

&c.

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I. WHAT DEFECTS ARE AIDED BY THE STATUTES OF JEOFAILS.

1. The statutes of jeofails are construed liberally. *Jenk.* 21. 288. 295. 306. 335. 340.
2. All statutes of jeofails extend to Wales. *Hall v. Vaughan*, 5 Co. 49 a.
3. The statutes of jeofails extend to the civil suits of the crown. *Rex v. Bishop of Midea*, *Stra.* 62.
4. After verdict, it may be intended no verdict was given for matter insensible; but it shall not be so intended for matter sensible, though insufficient in law. *Clerk v. Martin*, *Salk.* 129. 364.

5. The statute 16 & 17 Car. 2. c. 8. will aid a mistrial where the venue is in a proper county, but not where the county is mistaken. *Naylor v. Sharpless*, 2 Mod. 24.

6. By that statute and the 4 & 5 Ann. c. 16. no judgment after verdict, &c. shall be reversed for want of a *misericordia* or *capitur*, &c. 1 Mod. 73. *notis*.

7. On 16 & 17 Car. 2. an actual amendment is not requisite. *Hacket v. Marshall*, *Stra.* 1011.

8. The statutes of jeofails are by the 4 Ann. extended to judgments by default; but they are protected against such objections only as are cured by the statutes of jeofail after a verdict. *Hayes v. Warren*, *Stra.* 933. 1 *Saund.* 227.

9. An insufficient return of a *devastavit* is aided by verdict. *Brook v. Ellis*, 1 *Salk.* 363.

10. The want of a bill is aided, though the words are "want of an original." *Wilsou's case*, *Hob.* 130. 284. 281. 282. *W. Jo.* 304.

11. Want of an original is aided after verdict by statute of jeofails; but an ill original is not aided. *Dorset v. Chaplain*, 10 Mod. 318.

12. If the writ of trespass be against three, and the count against two, without *simul*

cum, it is aided after verdict as no original. *Hob.* 251.

13. If after verdict it appears that the record recites a vicious original, yet if no original writ is to be found upon the file, the court will intend that there was once a good original which is lost, and that the clerk has mistaken the recital of it, which, after verdict, is not material. *Redman v. Edolph*, 1 *Saund.* 318.

14. A trial *in formedon* between the vouches and demandant is within the statute^a of jeofails, though [*823] they are not both parties to the writ. 2 Dy. 188. pl. 11.

15. An information for usury commenced in C. B. by *subpoena* is aided by the statute of jeofails. 3 Dy. 346. pl. 9.

16. The want of an averment is helped by the statutes of jeofails. *Lee v. Edwards*, 1 Mod. 14.

17. The want of place is remedied after verdict. *Plant v. Thorley*, *Hob.* 176. Mo. 702.

18. In an action by an executor of an executor, if it be not shown that the first executor proved the will, the omission is cured by a verdict. *Cradell v. Tyson*, *Stra.* 716.

19. Want of proffert is helped by verdict, but on demurrer is fatal. *Williams v. Salisbury*, 12 Mod. 30.

20. An action in the *debet* and *detinet* where it ought to be *detinet* only, is aided by the statute. *Burland v. Tyler*, 8 Mod. 356. 2 *Ld. Raym.* 1393.

21. Declaration of copyhold lands without saying *ad voluntat. domini*, held well after verdict, because alleged to be parcel of the manor. *Crouther v. Oldfield*, *Salk.* 364.

22. A bargain and sale of land pleaded, but no consideration shown; it is cured by verdict on an issue of *non concessit*. *Mannington v. Guillian*, 1. *Lev.* 308.

23. After verdict, no advantage can be taken of an ill plea, but it may be aided by the statute of jeofails. *Anon.* 11 Mod. 2.

24. Want of alleging a presentation in *quare impedit*, is cured by verdict. *Rex v. Bishop of Llandaff*, *Stra.* 1011.

25. On a policy of assurance, the declara-

tion was *quod navis et bona submersa fuit*, where only the goods were insured; yet held good, and the false Latin cured by the verdict. *Cambridge v. Lee*, 380.

26. On a promise to pay in consideration of forbearance, averring that he did *extunc totaliter abstinere*, &c., the omission of *hujusque* is aided by the verdict. *Edwards v. Roberts*, 2 Mod. 24.

27. In debt for rent, the lessee pleaded that the lord *intravit*, which is insufficient, but after issue joined upon it, and the defendant had a verdict, held good. Hob. 326.

28. In debt upon a lease for three years' rent, the want of an averment of the continuance in possession is aided by the verdict. *Gostwick v. Mason*, 1 Mod. 3.

29. In ejectment for corn-mills, and so many acres of heath and furze generally, the omission of stating the kinds of mills, and the different quantities of heath and furze, is aided by a verdict. *Fitzgerald v. Marshall*, 1 Mod. 90.

30. If by the plaintiff's own showing it appear he has no cause of action for part, the writ which ought to have abated is helped after verdict. *Earl of Clanrickard's case*, Hob. 281. 282.

31. Want of a traverse is aided. *Bradburn v. Kennardale*, 3 Mod. 319.

32. In an action on the case on a promise to give a bond with sufficient penalty, the omission of stating the penalty is aided by a verdict. *Cotterall v. Marshall*, 1 Mod. 70.

33. In an action for levying a plaint without cause, and procuring the plaintiff to be arrested thereon, without alleging that the plaint was determined, this defect is aided after verdict. *Skinner v. Gunton*, 1 Saund. 229.

34. Want of form to be remedied by the statute of 18 Eliz., is in such matters of course as the clerk might have supplied without information of the party. *Playter v. Warne*, 5 Co. 34 b.

35. These statutes aid all discontinuances both before and after verdict, and as well in inferior as in the superior courts. *Holman v. Collins*, Cro. Eliz. 489. Hob. 187. Mo. 709. *Walwin v. Smith*, 4 Mod. 87.

36. Where the issue is material, but larger than needed, it is helped by statute 32 Hen. 9. *Jeffery v. Barrow*, 10 Mod. 19. *Wood v. Budden*, Hob. 119.

37. The name of plaintiff for defendant in the joining issue is aided. *Rawbone v. Hickman*, Stra. 551.

38. So, if the day and place are made parcel of the issue where they ought not. *Bennett v. Holbeck*, 2 Saund. 317. *Cumber v. Wade*, 11 Mod. 342. Mo. 695.

39. An informal or misjoined issue is cured by a verdict, but an immaterial issue not. *Banks v. Parker*, Hob. 76. 1 Lev. 183. *Peck v. Hill*, 2 Mod. 137. Cro. Eliz. 470. Mo. 693.

40.* But an immaterial issue is [*823] aided after verdict if it be good in form. *Harris v. Ferrand*, Hardw. 42, 43. *Vide* 68, 69. *Staple v. Heydon*, 6 Mod. 10. Mo. 574.

41. If the issue as it is joined be uncertain and confused, or taken upon a thing confessed in pleading, yet a verdict upon it will help it. *Stukeley v. Underhill*, Hob. 113. Mo. 696.

42. In waste by pulling up a copper fixed to the soil by the lessee, and plea of a devise thereof by the lessee, issue on the devise is a jeofail. 3 Dy. 272. pl. 33.

43. Where the *venire* bears date out of term, or on a Sunday, or the return-day is omitted on the roll, after verdict it is aided by the statute of jeofails. *Willoughby v. Gray*, Cro. Eliz. 467. Mo. 684. 710.

44. Where the return-day of the *ven. fac.* is misstated on the roll, the mistake is aided. Mo. 696.

45. The want of a *ven. fac.* is helped by the statute of jeofails, but not an erroneous one. *Marsh*, 26, pl. 60.

46. Want of writ of inquiry is aided. *Mallory v. Jennings*, Stra. 878.

II. WHAT ARE NOT AIDED.

1. The statutes of jeofails do not extend to inferior courts. 1 Saund. 74. n. (1). *Contra*, *Philer v. Boon*, 3 Salk. 130.

2. The statute of jeofails does not extend to Ireland to amend defects of record. 2 Ro. 168.

3. Nor to actions on penal statutes. Hob. 328.

4. None of the statutes of jeofails help an insufficient indictment. *Rez v. Sparks*, 3 Mod. 79.

5. Nor an information on a penal statute by a common informer. *Wyat v. Aland*, Salk. 325.

6. The want of or defect in an original writ is now aided by the 38 Eliz. c. 14. though formerly otherwise. 1 Mod. 3. *notis* *Taylor v. Brindley*, 3 Mod. 136. W. Jo. 304. *Cannon v. Abbot*, 1 Lev. 210. *Redman v. Edolfe*, 1 Mod. 3. Cro. Jac. 479.

7. A verdict will not aid a bad title when shown, though it need not be shown; but it will aid a title where defectively set forth. *Crowther v. Oldfield*, Salk. 365. and note.

8. If issue be joined upon an award of presentment, and it be found for the plaintiff, yet if the plaintiff have not alleged a breach or a refusal (though such a breach be not traversable) he can have no judgment, notwithstanding the statute. *Brickhead v. Abp. of York*, Hob. 197, 198, 233.

9. The statutes of jeofails do not help when the court cannot give judgment. 1 Mod. 67.

10. The assize found a thing triable in another county, which ought not to have been tried by the assize, but by pais; this is not remedied by the statute. Mo. 91.

11. Matter of substance is not helped by the statutes on a general demurrer. *March*, 121. pl. 200. *Id.* 49.

12. These statutes do not aid where no issue is joined by an affirmative and negative. 2 And. 103.

13. An immaterial issue is not aided by verdict. *Read v. Dawson*, 2 Mod. 139.

14. Misjoining of issues is aided; but if issue be joined but as to part, and nothing said of the rest, that is not. *Gomersall v. Gomersall*, 2 Leon. 195. 3 Leon. 67.

15. If issue be joined upon a thing which either is in law not possible or not issuable, the verdict upon it is against law, and not helped. *Tasker v. Saller*, Hob. 112, 113. *Secus*, if only part of the issue be impossible. Hob. 117.

16. Issue joined by him who made traverse is no issue, and is not aided. 2 And. 6, 7.

17. Want of a *similiter* was held to be not aided or amendable. *Cooper v. Spencer*, 1 Stra. 641.

JOINT AND SEVERAL.

An interest cannot be granted jointly and severally, but a power or authority may be joint and several. *Slingsby v. Beckwith*, 5 Co. 16a. 3 Leon. 160. 2 Leon. 47 Jenk. 262.

[*824] JOINT-TENANT* TENANT IN COMMON AND PARCENERS.

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- (d) *Pleading partition*, p. 831.

I. RESPECTING JOINT-TENANTS;—

(a) *Who are joint-tenants.*

1. There may be a joint-tenancy by way of use where lands vest at several times. *Hales v. Risley*, Poll. 373.

2. Release from those in remainder to those in first remainder makes them joint-tenants. *Anon.* 1 And. 32. pl. 78.

3. Lands are given to a man and woman upon consideration of marriage; if the marriage does not take effect, they are joint-tenants. *Jones v. Boyleston*, W. Jo. 345.

4. If a man make a feoffment to the use of a female and the heirs of their bodies, and then has issue three sons, they will be joint-tenants. *Blandford v. Blandford*, 1 Ro. 321.

5. Grant of 100l. rent to five equally to be divided, to hold to them, *vis.* 20l. to each, &c.; they are joint-tenants. *Ward v. Everard*, 1 Salk. 390. 1 Ld. Raym. 423. S. C.

6. So a grant to A and B, *habend.* one acre to A and the other to B, they are joint-tenants. S. C. Salk. 391.

7. If twenty acres are granted to two, *scilicet* ten acres to one, and ten to the other, the *scilicet* is void, and they are still joint-tenants. *Stukeley v. Buller*, Hob. 172.

8. After the 27 H. 8., A makes a feoffment to the use of his wife, and if he survived her, to the use of himself and such woman as he shall afterwards marry, for the term of their lives, remainder to B, such second wife shall take in joint-tenancy with him, though they come to their estates at different times. 3 Dy. 339. pl. 48.

9. A levies a fine to the use of himself and such wife as he should marry, and then marries, his wife takes an estate in joint-tenancy with him. 3 Dy. 274. pl. 42.

10. There can be no joint-tenancy in occupancy. *Holden v. Smallbrooke*, Vaugh. 189.

11.* A corporation and a natural person cannot be joint-tenants. 2 Saund. 318. n. (4).

12. Lease to two, *habendum* to them for their lives, and the life of the longest liver, successively one after the other, and not jointly, is no joint-tenancy, but they must take in succession. 3 Dy. 361. pl. 8.

(b) *When and how a joint-tenancy is severed.*

1. A lease is made to two, and afterwards the reversion is granted to one of them, the joint-tenure is severed. *Hill v. Bolton*, Lutw. [477.]

2. If one joint-tenant bargain and sell to his companion, it is a severance of the joint-tenancy. *Eustace v. Soyen*, 2 Ro. 473.

3. Chattels personal cannot remain in jointure after marriage. *Miles v. Williams*, 10 Mod. 162.

4. But choses in action may. *Id. ibid.*

5. By descent of the reversion to a joint-tenant for life, the joint-tenancy is severed. 2 And. 202.

6. Two joint-tenants in fee; one makes a lease to a stranger yielding rent; here the lessor has a reversion in fee, and the other joint-tenant has a freehold and inheritance in possession, and yet the joint-tenure of the inheritance is not severed, and he shall have the reversion, but not the rent. *Hill v. Bolton*, Lutw. [477, 478.]

7. If a lease is made, and afterwards the reversion is granted to two, and the lessee grants his estate to one of them, they are not joint-tenants of the reversion. *Hill v. Bolton*, Lutw. [477.]

8. Husband and wife, joint-tenants in tail before the coverture, shall take by divided moities. *Symond's case*, Moore, 92.

9. Husband and wife being joint-tenants of a lease for years, each takes the whole. *Hales v. Petit*, Plow. 259.

(c) *Relative to actions between joint-tenants.*

1. One joint-tenant of a chattel cannot bring trover against his companion, but may against a stranger. *Brown v. Hedges*, Salk. 290. 2 Saund. 47 h.

2. But if the thing be destroyed, trover lies. 2 Saund. 47 h.

3. If one joint-tenant bring an action against the other, unless he plead the joint-tenancy in abatement, the plaintiff will recover. *Upton v. Dawking*, 3 Mod. 97. *Sed vide* 2 Saund. 47 h.

(d) *Proceedings by them, jointly or severally, against third persons.*

1. One joint-tenant cannot bring debt alone for rent, but he may distrain alone, and avow in his own right, and as bailiff to the other. *Pullen v. Palmer*, 5 Mod. 73.

2. Each cannot have *quare impedit* for a moiety of an advowson, but all must join. 2 Saund. 116 b.

3. If three are joint-tenants, and two bring the action, it may be pleaded in abatement; but on the general issue pleaded, they shall recover for two parts. *Nelthorpe v. Dorrington*, 2 Lev. 113.

4. If one out of several joint-tenants bring trover against a stranger, he must plead the joint-tenancy in abatement. 2 Saund. 47 h.

5. They cannot join in an ejectment. Salk. 423.

6. Joint-tenancy must be pleaded in abate-

ment, and not in bar. *Kemp v. Andrews*, 12 Mod. 3.

7. If a man pleads joint-tenancy with a stranger, who comes in also, and it is found against him, still he cannot have attain, because he is not party to the writ. 1 Ro. 943.

(e) *Proceedings against them.*

1. Joint-tenants need not sever in an avowry, but if rent is behind, one may avow in his own right. *Pullen v. Palmer*, 5 Mod. 72. 150. *Sed vide* *Stedman v. Bates*, Salk. 390.

2. One joint-tenant may distrain, but he cannot avow alone, because that goes to the right. 3 Salk. 207.

3. If one joint-tenant of a rent-charge cannot avow alone, he must make himself bailiff to his companion. *Pullen v. Palmer*, cited Lutw. [500.] 1311.

4. If an action real is brought against joint-tenants or coparceners, the death of one of them shall abate the writ. *Rex v. Dryden*, Cro. Car. 574. 583.

5. But the action is not thereby gone. *Leigh v. Brown*, Cro. Jac. 19.

6. If in trespass defendant plead not guilty, he cannot give joint-tenancy in evidence. Mo. 466.

7.* The moiety of lands shall [*826] be liable to the charges of one joint-tenant, notwithstanding the survivorship of his companion. *Careswell v. Vaughan*, 2 Saund. 28.

(f) *Effect of the death of one joint-tenant.*

1. It is a rule amongst joint tenants, that nothing accrues to the survivor but what was in jointure at the time of the death of his companion. *Miles v. Williams*, 10 Mod. 163.

2. If baron and feme and a third person purchased jointly, the baron alien the whole, and he and his wife die, the third person surviving shall have an assize of all. Hob. 3.

3. Husband and wife joint-tenants of a lease for years, the husband dies, the wife claims by the first lessor, and not by her husband. Plow. 259.

II. RESPECTING TENANTS IN COMMON;—

(a) *Who are tenants in common.*

1. If a tree spreads its roots into another's soil, they are tenants in common of the tree. *Waterman v. Soper*, 1 Ld. Raym. 737.

2. No precise words are requisite to make a tenancy in common. *Fisher v. Wigg*, Com. 88.

3. Devise to three sons in tail, and after as follows: "I will that every one of them be the other's heir by equal portions;" under this devise they are tenants in common, not joint-tenants. *Fowler v. Ousley*, 1 And. 194.

4. A devise to two and their heirs, part and part alike, or to hold by equal parts, creates a tenancy in common, and not a

joint estate. *Thoroughgood v. Collins*, Cro. Car. 75. *Anon.* 3 Mod. 210.

5. A man having issue three sons devised his land to them; and if they died without issue, then to the heirs of the deviser; it was held they were tenants in common. 2 Ro. 281.

6. The words "equally to be divided," in a will, make a tenancy in common; but not so in a deed. *Ward v. Evans*, Holt, 368, 369. 12 Mod. 227. S. C. Mo. 588.

7. In cases of interest, as a lease to two to be equally divided, they are tenants in common. *Wherewood v. Shaw*, Yelv. 24.

8. A lease to two, *habendum* to the one for life, remainder to the other for life, alters the general implication of joint-tenancy of the freehold. *Duckler's case*, 2 Co. 55 a.

9. By the words "equally to be divided," either in a deed to uses, or in a deed at the common law, a tenancy in common is created. *Goodtitle v. Stokes*, Say. 71, 72.

10. Surrender of a copyhold to the use of A and B, equally to be divided, &c. and their heirs, makes a tenancy in common. *Fisher v. Wigg*, 12 Mod. 296. 1 Ld. Raym. 622. Com. 88. 3 Salk. 206. 1 Salk. 391. S. C.

11. A leased for years, and then devised the land to B and to his sister, and the heirs of every of their bodies; they have several inheritances. 3 Dy. 326. pl. 1.

12. Feoffment in trust for payment of the profits to A and B in equal manner, and in like manner to convey the inheritance to them and their heirs when they come to twenty-one, is a tenancy in common of the inheritance, as it would be in a will. *Bois v. Russell*, 1 Lev. 232.

13. If the king and another purchase lands jointly, they shall be tenants in common. *Willion v. Berkley*, Plow. 239.

14. No subject can be tenant in common with the king of an advowson. *Chancellor, &c. of Cambridge v. Wallgrave*, Hob. 127. 435.

15. A bill to A to pay 10*l.* to C, to be divided between A and B, and to their use; they are several debts, and they are not tenants in common. *Wherewood v. Shaw*, Yelv. 23, 24.

16. Tenants in common of an advowson make only one person. 1 Ro. 242.

17. A grant of a rent-charge by two tenants in common shall enure as several grants. *Browne v. Beaton*, Plow. 140. 161. 171.

18. Otherwise of a reservation by them. *Hill v. Grange*, Plow. 171.

(b) *When and how they may proceed against each other.*

1. If one tenant in common of a tree cuts it, the other may have an action for the damage. *Waterman v. Soper*, 1 Ld. Raym. 737.

2. One tenant in common may have an^a action of trespass against [*827] his companion. *Crope v. Abbot*, Noy, 14.

3. Case lies not for one tenant in common against another, for fraudulently misusing part of a ship or other entire thing, or for a fraudulent sale of the whole. *Graves v. Scuser*, 1 Keb. 38. pl. 102. T. Raym. 15. 1 Lev. 29. S. C.

4. One tenant in common cannot bring trover against the other for a thing still in his possession; and the defendant may take advantage of this under the general issue. 2 Saund. 47 h.

5. One tenant in common may distrain upon another. *Sir H. Snellgar v. Hewston*, 2 Ro. 212. 255. Cro. Jac. 611.

6. One tenant in common cannot maintain an action of account at common law against another as his bailiff, unless that other were appointed bailiff; but under the statute 4 & 5 Ann. c. 16. he may. *Wheeler v. Horne*, Willes, 208.

7. If it appears to the court in trespass that the plaintiff and defendant are tenants in common, the action will abate. *Anon.* Mo. 123.

(c) *Relative to suits by them against third persons.*

1. Devise of £40 to two equally to be divided; one cannot sue alone for £30. *Shaw v. Norwood*, Mo. 667.

2. One tenant in common can have account without joining with the other. *Hackwell v. Eastman*, 1 Ro. 421.

3. Tenants in common cannot join in prescription, though the action be possessory. *Sir H. Snellgar v. Brograve*, Palm. 161.

4. Each cannot have a *quare impedit* for a moiety of an advowson, but all must join. 2 Saund. 116 b.

5. One tenant in common cannot bring debt for his portion of the rent. *Blanchard v. Dyer*, 2 Show. 446.

6. Tenants in common of a reversion and rent may join in debt for the rent, or sever for their moieties, &c. *Martin v. Crompe*, 1 Ld. Raym. 341. Carth. 289.

7. If two tenants in common make a lease for years rendering rent, and then one of them dies, the executor and survivor may join in debt, or sever at their pleasure. *Kitchin v. Buckley*, T. Raym. 80.

8. But if the lease be for life they ought to sever. *Ibid.*

9. Tenants in common can join in *parce fracto*. Mo. 452.

10. They may, but need not, join in an action of waste, and in detinue. T. Raym. 80. *Curtis v. Bourne*, 2 Mod. 62.

11. If tenants in common make a lease for years, and the lessee commit waste, they must join in the action; or if a reversion be granted to two and the heirs of one of them,

they must join in an action of waste. *Curtis v. Bourne*, 2 Mod. 62.

12. So, if a person have only a third part of a reversion in common, he shall not have an action of waste alone, because it would be very inconvenient that the third part should be delivered in execution. 2 Mod. 62.

13. Tenants in common may join in an action upon the case for obstructing a water-course. *Kitchin v. Buckley*, T. Raym. 80.

14. Or in an action of covenant for not repairing of a house, &c. *Id. ibid. Midgley v. Lovelace*, Carth. 289.

15. Tenants in common must join in all personal actions. *Martin v. Crump*, Comb. 330. 474.

16. But it is otherwise in real actions; for though their estates are several, yet the damages to be recovered survive to all. *Anon.* 3 Mod. 109.

17. Tenants in common must jointly sue for injury done to the land; but for a particular injury which one suffers, he may sue alone. *Hamon v. White*, W. Jo. 142. Mo. 40. *Contra*, Mo. 34.

18. Tenants in common may join or sever in debt. *Pullen v. Palmer*, 3 Salk. 207.

19. Tenants in common cannot join in ejectment. *Anon.* Comb. 2.

20. In ejectment by tenants in common or parceners, there should be several demises. Mo. 682.

21. Where one tenant in common declares against another as receiver, it ought to be shown by whose hands he receives it, otherwise he ought to be charged as bailiff. *Walker v. Holyday*, Com. 272. 11 Mod. 187. n.

22. If one part-owner or tenant in common bring trespass without his companion, it must be pleaded in abatement. *Leglies v. Champante*, 2 Stra. 830. 2 Saund. 47 a. 1 Mod. 102.

23. If one tenant in common sue without* his companion, and the defendant do not plead co-tenancy in abatement, yet he shall only recover his moiety. *Blackborough v. Greaves*, 1 Mod. 102.

(d) *Relative to proceedings against them.*

1. Where two tenants in common are bound to set out tithes, and one only sets them out, the action ought not to be brought against both, but against him only who omitted to set them out. *Sir J. Gerrard's case*, Hutt. 121.; cited, 3 Mod. 322.

2. One tenant in common cannot avow for damage feasant, but he must make cognizance as bailiff of his companions. W. Jo. 253.

3. They must sever in an avowry, because it goes to the right. *Pullen v. Palmer*, 3 Salk. 207.

III. RESPECTING PARCENERS;—

(a) *Who are parceners.*

Where a man dies seised of land, having two daughters and no son, both daughters

shall inherit as parceners. *Willion v. Berkeley*, Plow. 246, 247.

(b) *Of suits by them.*

1. If two copartners lease a house, and the rent is in arrear, and one brings an action and recovers, judgment will be arrested, because both ought to join. *Anon.* 3 Mod. 109.

2. Coparceners make but one tenant in a *præcipe*. *Stedman v. Page*, 12 Mod. 86.

(c) *Of suits against them.*

Parceners must join in an avowry. *Stedman v. Page*, Comb. 347. Salk. 390. 12 Mod. 86. 1 Ld. Raym. 64. S. C. 1 Salk. 187.

IV. DISTINCTION BETWEEN JOINT-TENANTS AND TENANTS IN COMMON.

1. Tenants in common have a several freehold but joint occupation; joint-tenants, one undivided freehold and occupation. *Fisher v. Wiggs*, 12 Mod. 301.

2. Joint-tenants claim by one title, but tenants in common by several titles. S. C. Com. 91.

V. RELATIVE TO GRANTS MADE BY JOINT-TENANTS OR TENANTS IN COMMON.

1. Lease made by them, rendering rent to one of them, both shall have the rent. *Richmond's case*, Owen, 9.

2. If warranty be to them and their assigns, the assignment must also be joint. *Roll v. Osborn*, Hob. 25.

3. If a woman joint-tenant with another take husband, and she and the husband make a lease, and the wife dies, the lease is good against the survivor. *Smalman v. Agburren*, 1 Ro. 401. 441.

VI. RELATIVE TO GRANTS BY ONE JOINT-TENANT TO HIS COMPANION.

1. If one joint-tenant accept a lease of the land from his companion, he is estopped to claim by survivorship. *Bleadle's case*, 2 Leon. 159.

2. The proper conveyance from one joint-tenant to the other is by release, and not by grant or feoffment. *Barker v. Lade*, 4 Mod. 151. *Anon.* 10 Mod. 444. *Jennor and Herdie's case*, 1 Leon. 283.

3. Yet if one grants all his estate to his companion, it shall be understood, by operation of law, to be a release. 10 Mod. 444. *Chester v. Willan*, T. Raym. 187. 1 Vent. 78. S. C.

4. But in such case, if the party should plead *quod concessit*, it would be bad. 10 Mod. 444.

5. They may release or confirm to each other, and thereupon those privileges which did belong to both shall pass to one of them. *Dixon v. Harrison*, Vaugh. 45.

6. A joint-tenant may by fine yield up his part to his companion. *Eustace v. Scowen*, W. Jo. 55.

7. If lands be given to two upon condition that they shall not alien, and one releases to the other, it is no breach of the condition. *Harrison v. Belsey*, T. Raym. 413, 414.

8. If there be two joint-tenants in fee, and one grants a rent-charge in fee, and afterwards releases to the other and dies, the survivor shall not avoid the rent. *Lord Abergavenny's case*, 6 Co. 78 b.

[*829] VII.* WHERE THE ACT OF ONE JOINT-TENANT, &c. WILL AFFECT HIS COMPANION;—

(a) *In the case of joint-tenants.*

1. The possession of one joint-tenant is the possession of the other. *Ford v. Grey*, 6 Mod. 44. Salk. 285. S. C.

2. Every act done by one joint-tenant for the benefit of himself and his companion, saures for both; but one cannot prejudice the other as to the inheritance or freehold, though it is otherwise as to the profits. *Trotter's case*, 2 Co. 66. b.

3. A joint-tenant covenants that a stranger shall enjoy his moiety from the death of his companion, and the other moiety from his own death for years; it is void, because only a possibility. Mo. 776.

4. Two joint-tenants for life; one leaves his moiety for years, rendering rent and dies; the term continues, but the rent is gone. 2 Dy. 187. pl. 5.

5. A lease for years by joint-tenant, to commence immediately after his death, is good, though his companion survives. Mo. 395. 2 And. 16. 1 Ro. 253. 2 Ro. 171.

6. Husband and wife being joint-tenants of a lease for years, the husband may grant or forfeit the term in his life-time. Plow. 260.

7. Husband and wife being joint-tenants for life, the husband alone accepts a new lease; this is a surrender, but avoidable by the wife if she survive. Mo. 636.

8. Husband and wife are joint-tenants of a lease for years, the husband charges the land; after his death she shall avoid the charge. *Hales v. Petit*, Plow. 259.

9. Husband and wife joint-tenants for a hundred years; the husband makes a lease for twenty years, to commence after his decease, and dies; the lease is good. Mo. 395.

10. Where husband and wife are joint-tenants of a term for years, and the husband dies; the term in the hands of the wife shall be subject to the execution of the king for a debt due to him by the husband. Plow. 261. 263. 321.

11. If a copyholder in fee surrenders to the use of his will, and dies before it is presented, it will bind the survivor. *Porter v. Porter*, Cro. Jac. 100.

12. A joint-tenant can assign auditors to take an account, and the account will be good. Mo. 188.

13. In personal actions, one joint-tenant may release the whole: *secus*, if the personality be mixed with the realty. *Trotter's case*, 2 Co. 66 b.

14. When judgment is given against one

of two joint-tenants for life in an action of debt, and afterwards that one releases to the other before execution, such release shall not bar the execution of the plaintiff; but if such joint-tenant had died before execution, the survivor should hold the land discharged of any execution; and where the joint-tenant for life to whom the release is made dies, and the reversioner enters, the estate of the other who is yet living has continuance as to the plaintiff. *Lord Abergavenny's case*, 6 Co. 78 b.

15. A joint-tenant cannot be disseised by his fellow, without an actual ouster. *Smales v. Dale*, Hob. 120.

16. If there be two joint-tenants in fee, and one of them levies a fine of the whole, this does not amount to an ouster of his companion, but it is a severance of the jointure, although he be in of the old use again. *Ford v. Grey*, 6 Mod. 45. 1 Salk. 286. S. C.

17. Joint-tenants cannot prejudice each other's freehold. Jenk. 114.

18. The bankruptcy of one joint trader shall not effect the interest of his companion. *Ason*, Holt, 94.

19. Release by a joint-tenant for life to another, shall not destroy a contingent remainder depending thereon. *Harrison v. Beesey*, T. Jones, 136.

20. One joint-tenant may receive the profits for all the rest, and his receipt is good. *Pullen v. Palmer*, 5 Mod. 72.

21. If one joint-tenant takes all the profits, the other has no remedy by the common law. *Willion v. Berkley*, Plow. 247.

22. One joint-tenant may distrain for the whole rent; but when he avows, it must be for part in his own right, and make conscience as bailiff to his companion for the residue. *Anon*. 12 Mod. 96.

(b) *In the case of tenants in common.*

1. One tenant in common may disseise his companion by actual ouster only. *Reading's case*, 1 Salk. 392. Hob. 120.

2. In an assize between two tenants in* common, a forbidding [*830] by word of mouth to the tenant to pay his rent was adjudged a disseisin. Cited in *Hunt v. Danvers*, T. Raym. 371.

3. Release of one tenant in common from an award, will bar the other before severance. *Fairbank v. Durham*, 1 Ro. 243.

(c) *In the case of coparceners.*

1. One parcener cannot be disseised by another, without an actual ouster. *Smales v. Dale*, Hob. 120.

2. One coparcener may let her moiety, yielding the moiety of the accustomable rent. *Shepherd v. Blackaller*, 5 Co. 3 b.

VIII. RELATIVE TO PARTITION;—

(a) *When and how it can be made.*

1. Since the statute 31 Hen. 8. c. 1., joint-tenants are compellable to make partition by writ; nevertheless they may make partition

by the common law. *Morrice's case*, 6 Co. 12 b.

2. A purchaser of the share of one parcener cannot join in a writ of partition with another of the parceners. 2 Dy. 128. pl. 58.

3. A writ of partition does not lie for an advowson. 2 And. 21.

4. Joint-tenants of an advowson may make partition to present by turns by deed of covenant between themselves. *Bishop of Salisbury v. Phillips*, Carth. 505. 1 Ld. Raym. 536. S. C.

5. Partition with rent, &c. between joint-tenants or tenants in common, is not good without deed. Mo. 29. 1 And. 50. *Johnston v. Wilson*, 7 Mod. 345.

6. Devise to two in tail, who by parol make partition; this is void, and the survivor shall take the whole; *secus*, if they had only a term. 3 Dy. 350. pl. 2.

7. Coparceners of an advowson may make partition by parol. *Bishop of Salisbury v. Phillips*, 1 Ld. Raym. 537.

8. Tenant in fee of one moiety of land, and tenant for life of the other moiety; the tenant in fee brought a general writ of partition against the tenant for life, and made the count general, and held good. *Hicks v. Wittichell*, Lutw. [433.] 1015.

9. The writ was *quare tenent quatuor mille acras*, where it ought to be *quatuor mille acrarum*, yet held good. *Harper v. Berriefford*, 3 Leon. 94.

10. In the writ the title ought to be shown, and a release of errors by one is no bar to the rest. *Yate v. Windnam*, Cro. Eliz. 64.

11. In a writ of partition brought by a husband and wife, declaring that the wife is co-heiress with the defendant in tail, they need not show the commencement of the estate. 1 Dy. 79. pl. 51.

12. The declaration may be amended. 2 Saund. 45. f. n. [i].

13. To such writ of partition special bastardy is a good plea, without traversing the coparcenary, and the trial shall be where the birth is alleged. 1 Dy. 79. pl. 52.

14. So, it is a good plea that defendant has already the same writ against the plaintiff, and judgment of partition still unexecuted upon it. 1 Dy. 92. pl. 21.

15. In a writ of partition the tenant cannot vouch. 2 Saund. 32.

16. In partition there needs no return of an *habere fac. possess.*, for the party that recovers may execute his judgment by his entry. *Countess of Warwick v. Lord Berkeley*, Noy, 17. Dy. 67 a.

17. In a writ of partition no damages are recovered. S. C. Noy, 68. *Baylie v. Knighton*, Noy, 143.

18. The sheriff ought to execute the writ upon the land in person, as in waste and re-disseisin, but after return made and the writ filed, the party can have no averment

against it, nor error. *Clay's case*, Cro. Eliz. 9, 10.

19. If a parcener have leased her share, and upon a writ of partition too little be allotted her, the lessee has no remedy; *secus* perhaps on partition without writ. 1 Dy. 52. pl. 20.

20. Tenants in common of a house and land make partition thereof within the house, the land not being within the view; it is good for the house, but not for the land. *Docton v. Priest*, Cro. Eliz. 95.

21. One tenant in common of a manor purchases freehold lands so intermixed with the demesnes as not easily to be known; on a writ of partition against him, he is to show to the jury the bounds of his freehold; but if no one show them, and they make partition^a as well as they can, it is [*831] sufficient. 1 Dy. 26. pl. 5.

22. If of three coparceners one alien, no writ of partition lies upon the statute by the others because they have a writ at common law; if both join in the writ against the alienee, and one is non-suited, still she shall be summoned and severed, and her part set out as well as the rest: if of three the eldest purchase the part of the youngest, or if her husband die, the writ lies for them at common law against the other. 2 Dy. 243. pl. 55.

(b) Effect of partition.

1. A parcener granted a rent-charge out of an acre, which upon partition was allotted to the other parcener; she shall hold it discharged. Mo. 95.

2. If one parcener grant rent for equality to the other two of 5*l.*, viz. 5*0s.* to one, and 5*0s.* to the other, yet it is an entire rent. Hob. 172.

3. A partition for one parcener to have the land from Easter to Lammas, and the other from Lammas till Easter, binds as to the possession and taking of the profits, but is no severance as to the estate. *Corbet's case*, 1 Co. 83 b.

4. If joint-tenants make partition, the warranty annexed to their estate is destroyed at common law. *Roll v. Osborn*, Hob. 25.

5. A rent granted for equality of partition may be in fee simple without the word "heirs." 1 Plow. 134.

(c) How it may be defeated.

1. Partition being made by deed (before 31 H. 8. c. 1.) between the alienee of one coparcener in tail, and A the other coparcener, if it be unequal, the issue of A may defeat it. Qu. if equal. 1 Dy. 98. pl. 54.

2. An eviction of an estate for life defeats it. *Bustard v. Bolter*, Yelv. 8.

(d) Pleading Partition.

Pleading that upon partition between A and B, the lands in question were allotted to A, is good, without showing what lands were allotted to B. *Lord Sheffield's case*, Palm. 354.

JOINTURE.

1. On a limitation to three persons, and to the heirs of one of them, yet the jointure continues: *secus*, when three are joint-tenants for life, and afterwards one purchases the reversion; or if he who had the fee dies, and one of the survivors purchases the remainder. *Wiscot's case*, 2 Co. 60 b.

1. A limitation to a woman in satisfaction of part of her jointure is no bar. *Vernon's case*, 4 Co. 1. n.

3. An estate limited to the husband for life, remainder to the wife for life, is a good jointure; for the cases in the statute are proposed only as examples; and though the letter of the act, and especially the word "jointure" therein implies a joint estate, yet this limitation is within the intent of the act, it being equally beneficial to her. *Vernon's case*, 2nd res. 4 Co. 1 a.

4. A limitation to the husband for life, remainder to B for life, or to the use of A for life, remainder to the wife for life, is no jointure, though A dies living the husband: so of an estate to the wife for the life of another. *Vernon's case*, 4 Co. 1 a.

5. An estate to husband and wife, and the heirs male of their bodies, or to the wife during her widowhood, or in fee, are good jointures; but on eviction of a jointure in fee, the widow shall be endowed for life only. *Vernon's case*, 4 Co. 1 a.

[See *ante*, tit. DOWER, div. V. p. 547.]

JOURNEY'S ACCOUNTS.

1. Although a writ cannot be said to be brought by journey's accounts, yet it may be within the equity of the last proviso of 21 Ja. 1. c. 16. to prevent a bar by that statute. *Kinsey v. Heyward*, Lutw. [97, 98.]

2. Thirty days is the time for a writ by journey's accounts. *Eaton v. Thorwood*, 1 Ld. Raym. 284.

3. A temporary executor brings an action, the next executor (when the executorship is not determined by condition broken) may have a writ by journey's accounts, or a *scire facias* upon a judgment. *Id. ibid.*

4.* Where a bill of Middlesex [*832] is taken out by four, and one dies, it abates the writ, and a new writ should be taken out by the survivors by journey's accounts. *Temple v. Bishop*, 12 Mod. 188.

5. Journey's accounts can only be brought by a plaintiff in the first writ. *Kinsey v. Heyward*, 1 Ld. Raym. 432.

6. It only lies where the first writ is returned. 1 Ld. Raym. 433. 12 Mod. 576. S. C.

7. It does not lie for the executor on abatement of the testator's writ. *Anon.* 12 Mod. 229.

VOL. II.

JUDGE.

[Respecting the creation and salaries of the judges and barons, see Com. Dig. tit. COURTS, (B 4.) & (C 2. ;) Pet. Abr. Vol. 5. p. 402.; 12 & 13 W. 2. c. 2.; 1 G. 3. c. 23.; and the late act of 7 G. 4.]

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I. OF THE FITNESS OF JUDGES.

1. When the king has constituted any man a judge, his ability, parts, and fitness for the place, are not to be reflected upon or censured by any other person, being allowed by the king, who only is to judge of the fitness of his ministers. *Bushell's case*, Vaugh. 138.

2. We must not upon supposition only admit judges deficient in their office, for so they would never do right: nor, on the other side, must we admit them unerring in their judgment, for so they would never do any thing wrong. S. C. Vaugh. 139.

3. It is not a good objection to a judge that the corporation of which he is a member is interested in the cause. *Harris v. Wakeman*, Say. 255.

[See also *post*, div. IV. pl. 1. &c.]

II. WHO ARE THE JUDGES IN PARTICULAR COURTS.

1. In a writ of right directed to the lord of a manor, and in a writ of right close, and in a writ of *justicies*, the suitors are judges. *Gentleman's case*, 6 Co. 11 a.

2. In a hundred court the suitors are judges. *Id. ibid.*

3. In some cases, by act of parliament, the sheriffs are judges; in the court of piepowder, the steward is judge; in the tourn, the sheriff; in the court of the Marshalsea, the steward and marshal of the king's house. *Id. ibid.*

[See also *ante*, tit. COURTS, p. 395. *per totum*.]

III. RELATIVE TO THE POWER OF THE JUDGES.

1. Judges can levy forces *virtute officii* to suppress rebels and invaders. 2 And. 67.

2. Judges of B. R. or C. B. may by the common law take recognizances. *Anon.* 11 Mod. 53.

3. A judge may take a recognizance in or out of term in any part of England. 2 Saund. 8 i. n. 5. Hob. 196.

4. A judge may take bail at his chambers on an attachment for contempt. 2 Saund. 59.

5. A judge cannot fine and imprison a jury for giving a verdict contrary to his di-

rections. *Bushell's case*, Vaugh. 146, 147, 148, 149.

6. If the mayor of London recover in the sheriff's court in an action on a bye-law, a bond given by the defendant to the mayor to prosecute a writ of error thereon in the court of hustings with effect, is a good bond; for although in the court of hustings the lord mayor is judge, yet it may be held before six aldermen, without the mayor, and it shall be presumed that he was absent when the errors in his own cause were determined. *Mayor of London v. Markweek*, 11 Mod. 164.

[*833] IV.* CONCERNING THEIR DUTY.

1. No man can be a judge in his own cause, &c. *Earl of Derby's case*, 12 Co. 114. Holt, 396. *City of London v. Wood*, 12 Mod. 672. 690.

2. A mayor was committed for sitting in judgment where he was party, though by the charter he was the only judge there. *Anon.* Salk. 396.

3. But the chief justice of C. P. may sue in his own court. *Wood v. The Mayor of London*, 1 Salk. 397.

4. Judges must take notice *ex officio* of statutes concerning the king. Jenk. 215.

5. Also of counties. Jenk. 325.

6. And of the terms. Jenk. 331.

7. Where it appears to the court upon the record, that the plaintiff has no cause of action, they ought *ex officio* to give judgment against him, although the defendant has admitted the action to be good. *Dive v. Manningham*, 66. 69. 84, 85. 264.

8. Where the law is known and clear, although it is inequitable and inconvenient, yet judges must adjudge it as it is. *Dixon v. Harrison*, Vaugh. 37. *Craw v. Ramsey*, Vaugh. 285.

9. But where it is doubtful and not clear, there they must interpret it to be as is most consonant to equity. Vaugh. 38. S. C.

10. Where the judges of K. B. in error are equally divided in opinion, they cannot adjourn the cause either to the Exchequer Chamber, or to parliament, without the king's writ for that purpose; but they will, upon consent, allow the judgment to be affirmed, so that it may be carried up to the House of Lords. *Thornby v. Fleetwood*, 1 Stra. 379.

11. The judge's direction to the jury ought to be upon supposition, and not positive, *viz.* if you find the fact thus, then it is for the plaintiff; if you find it thus, then for the defendant. *Bushell's case*, Vaugh. 144.

12. If a point of law arises at a trial, the judge is bound to direct the jury accordingly, whether the counsel insist upon it or not. *Reg v. Kelstone*, 10 Mod. 202.

13. The judge can never direct what the law is in any controverted matter, until he first knows the fact. *Bushell's case*, Vaugh. 147.

14. Judges ought not to deliver their opi-

nion but in open court. *Lord Morley's case*, J. Kely, 54.

15. An opinion given in court, if not necessary to the judgment given upon record, is no judicial opinion, no more than a *gratis dictum*. *Bole v. Horton*, Vaugh. 382.

16. But an opinion, though erroneous, concluding to the judgment, is a judicial opinion, because delivered under the sanction of the judge's oath upon deliberation, which assures that it is, or was, when delivered, the opinion of the deliverer. *Bole v. Horton*, Vaugh. 382.

17. For the proper mode for him to leave a question of libel to the jury, see 1 Saund. 132 b. n. [k].

18. Judges ought not to abate writs *ex officio*. *Edgcomb v. Dee*, Vaugh. 95. 97.

19. If they sit at a wrong place, the proceedings are void. Jenk. 212.

V. RELATIVE TO THEIR LIABILITY.

1. A judge is not answerable, either civilly or criminally, for any act he may do as a judge. *Groenvelt v. Burwell*, Com. 79. 12 Mod. 388. 392. Holt, 395. 2 Ld. Raym. 767. 1 Leon. 395. 323, 324. *Bushell's case*, 1 Mod. 119. *Hammond v. Howell*, 2 Mod. 218, 219. 1 Mod. 184. S. C. *Wright v. Crump*, 7 Mod. 2. *Lumley v. Quarry*, 7 Mod. 9. n. 1 Salk. 397.

2. Though formerly it was otherwise. *Semb. Bushell's case*, Vaugh. 139.

3. Where one acts as a judge, his act is not traversable; *aliter* with respect to an officer, as a constable, &c. *Groenvelt v. Burwell*, Salk. 396. *Bonham's case*, 8 Co. 121 a. *Grenville v. College of Physicians*, 12 Mod. 388.

VI. RESPECTING CASES SENT TO THEM FOR THEIR OPINION, AND THE CERTIFICATE.

1. Where a reference is to the judges on a case, no writ of error lies on the judgment; but if they certify their reasons, the court may consider of it. *Gore v. Gore*, 9 Mod. 5.

2. The lord chancellor is not concluded* by the opinion of the [*834] judges, when sent for to assist at the hearing of a cause. *Gore v. Gore*, 10 Mod. 502.

3. But when a case is stated and referred to them for their opinion, their certificate binds. S. C. 10 Mod. 501, 502.

4. Upon motion for a new trial, a judge since displaced may certify what his opinion was. *Wood v. City of London*, Holt, 397.

[See also ante, tit. CERTIFICATE, div. II. p. 263.]

JUDGMENT.

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(A) IN CIVIL PROCEEDINGS.

I. OF THE DIFFERENT KINDS OF JUDGMENTS, &c.;

(a) *Generally*.

There are two sorts of judgment after verdict: final, and interlocutory. *Silk v. Hill*, 10 Mod. 83.

(b) *Respondens ouster*.

Judgment of a respondeas ouster will be given on a failure of record. *Cremer v. Wicket*, 1 Ld. Raym. 550.

(c) *Upon confession*.

1. Where a defendant in his plea has confessed the duty or cause of action, or the plea is bad, or an immaterial issue has been joined, and verdict for the plaintiff, the judgment shall be upon his confession, and not

upon his bad plea. *Jones v. Bodingham*, 1 Com. 11. 1 Ld. Raym. 90. 300. 1 Com. 8. note.

2. If an executor pleads bonds and judgments, and no assets ultra the judgments, and the plaintiff replies that the bonds were fraudulent, and it is found against him, he cannot have judgment, though the assets are found to be ultra the judgments pleaded. *Chambers v. Shaw*, Com. 206.

3. A judgment may be confessed on terms, and the court will see them performed: not so of an agreement made after the judgment. *Anon.* Holt, 400. Salk. 40.

4. If a defendant confess a trespass, and avoid it by pleading matter in justification, which, if well pleaded in form, would have been a good bar to the action, judgment shall not be given against him on the confession. *Staple v. Heydon*, 6 Mod. 10.

5. But if in an action of slander for calling the plaintiff "a thief," the defendant, in justification, says, that the plaintiff "received a thief," and pleads it, judgment [*836] shall be given on the confession; * for the receiving of a thief could not, if well pleaded, have justified the calling him "a thief," and so could not bar the action. 6 Mod. 10.

(d) *By default.*

1. A judgment by default is protected by stat. 4 & 5 Ann. against such objections only as are remedied after verdict by the statute of jeofails. 1 Saund. 227.

2. All defects of form are cured thereby. *Semb.* 1 Saund. 228. n. [b.]

(e) *Non-obstante veredicto.*

1. When the cause of action is fully confessed, and the plea is bad in substance, judgment shall be given for the plaintiff, notwithstanding a verdict for the defendant. *Staples v. Heydon*, 2 Ld. Raym. 924. 2 Barnes, 206.

2. Where a justification in trespass is bad in point of law, the court will order the judgment to be entered up for the plaintiff, notwithstanding a verdict for the defendant on the plea of justification. *Broadbent v. Wilks*, Willes, 364.

(f) *As in case of a nonsuit.*

1. Judgment as in the case of a nonsuit ought not to be given unless all the defendants apply for it. *Watson v. Jackson*, Say. 23. 101.

2. It may be given in an action *qui tam* for a penalty, if no part of the penalty be given to the king. 8. C. Say. 22.

3. It may be given on a traverse of the return to a *mandamus*. *Wigan v. Holmes*, Say. 110.

4. The like judgment was given, where the cause was not tried by reason of a mistake in the declaration. *Baltie v. Brown*, Say. 75.

II. WHAT JUDGMENT SHOULD BE GIVEN IN THE FOLLOWING INSTANCES;—

(a) *In an action of conspiracy.*

In a writ of conspiracy against three, if two are acquitted, the plaintiff cannot have judgment against the third. *Thurly v. Plant*, 1 Saund. 239.

[See ante, tit. CONSPIRACY, div. (c.) p. 337.]

(b) *In an action of ejectment.*

1. If the lessee of tenant in common bring an *ejectione firmæ* for the whole land, yet he shall have judgment for that part which belonged to the lessor. *Smales v. Dale*, Hob. 120.

2. In ejectment, judgment cannot be entered on a confession of the casual ejector. *Cooper v. Beale*, 8 Mod. 109.

3. Plaintiff had regularly obtained judgment in ejectment; but it appearing that the tenant had concealed the matter from the landlord, judgment was set aside. *Doc dem. Troughton v. Roe*, Prac. Ca. K. B. 127.

4. Ejectment for a hundred acres of bog and other things: the plaintiff released his demand "to the other things," and took judgment for the residue. *Cusforthay v. Taylor*, T. Raym. 395.

5. In ejectment, if no execution be sued within a year, the judgment must be revived by *scire facias*. *Withers v. Harris*, 7 Mod. 50.

6. Judgment in *ejectione firmæ* is to recover the term and damages. *Wilkes v. Gosden*, Hob. 5.

7. And it may be so given, though the lessor (being seised in right of his wife) die before. 8. C. Hob. 5.

8. Judgment may be given for damages only where the term is expired. *Badham's case*, Hob. 328.

[See also ante tit. EJECTMENT, div. XVI. p. 567.]

(c) *In real actions.*

1. There is properly no final judgment but in a writ of right after the *mise* joined; and see the form of that judgment, *Hugh v. Clutham*, Lutw. [344.]

2. In a writ of right, if the tenant make a default after the *mise* joined, the jurors shall not be demanded, but final judgment given; but whether demandant shall have seisin without a *petit cape*, *quare*. 1 Dy. 98. pl. 51.

3. On default of the vouchee after the *mise* joined upon the mere right, judgment shall be final against the vouchee and tenant and the heirs of both. 1 Dy. 56. pl. 17.

4. Where the tenant appears in chief on the summons, and the demandant counts against him, and the tenant *nil dicit*, but makes default in the same term, peremptory judgment of seisin shall [*837] be given against him without any award of a *grand* or *petit cape*. *Williams v. Guym*, 2 Saund. 46.

5. In a writ of right the tenant chose trial by battle; but when every thing was prepared at the day and place appointed, the demandant made default; judgment shall be final against him. 3 Dy. 301. pl. 40.

6. Judgment ought not to be given on a default in real actions; but a *grand cape* before appearance, or a *petit cape* on a default after appearance. *Slaughter v. Tucker*, 1 Lev. 105.

7. In real actions upon a second default, judgment shall be given against the defendant to lose his land. *Reg. v. Simpson*, 10 Mod. 379.

8. If an *essoins* is cast for a tenant in a *formedon*, which is challenged, and judgment given (on a demurrer to the challenge) that the challenge was good, judgment shall be given for the demandant to recover seisin, and not a *petit cape* awarded. *Sleigh v. Chilham*, Latw. [338. 357.]

9. Judgment in a real action was reversed, because it was *quod tenet tenementa*, where it should be *quod recuperet seisinam de tenementis*. *Gwynne v. Gwynne*, 1 Lev. 99.

(d) On a plea in abatement.

1. In an action of debt, if the defendant plead in abatement of the writ, and, on an imperance, the plaintiff make default for not appearing at the *dies datus*, final judgment shall be given on the default. *Staple v. Hayden*, 6 Mod. 5.

2. On a plea in abatement, plaintiff may enter a *nil capiat per breve* without leave; otherwise, in other cases. *Osborne v. Hadcock*, 1 Barnes, 190.

(e) Upon demurrer.

1. Upon demurrer, judgment is to be against him who made the first fault. *Marsshall v. Freake*, Palm. 287.

2. Upon demurrer to a replication, though the defendant's plea be faulty, yet it appears that the action is not maintainable, defendant must have judgment. *Booth v. Garnett*, Andr. 31.

3. The plea being idle, and the declaration good, the plaintiff shall have judgment upon demurrer. *Smith v. Cudworth*, Holt, 447. 548.

4. Where there are several pleas, and all go to destroy the action, and one is demurred to, and the demurrer determined for defendant, judgment of *nil capiat* shall be entered, though there be issues in fact on the other pleas, and they be decided for plaintiff. 1 Saund. 80. n. (1).

(f) Where there are several issues.

1. Where defendants plead several pleas, and there is judgment for plaintiff on one, the other pleas must be tried before plaintiff can recover. *Baker v. Barlow*, 2 Barnes, 211.

2. If there are three replications, and one of them is superfluous, yet the plaintiff may have his judgment upon the two others, which are sufficient. *Hancocke v. Frowd*, 1 Saund. 338.

(g) Where there are several defendants who plead separately.

1. Of two defendants, one demurred, the other pleaded to issue; the plaintiff had judgment on the demurrer, and it was held that he might relinquish the issue and have a writ of inquiry of damages against the other. *Countess of Warwick v. Atwood*, Mo. 624.

2. Where one of two defendants in *ejecution firma* pleads an entry of the plaintiff, to which he demurs, there cannot be judgment against the other pleading only the general issue, which is found against him. 2 Dy. 226. pl. 40.

(h) Where the pleadings are defective;—

1. When the declaration is partly good and partly bad.

1. If a declaration contain two counts, one good and the other bad, an entire judgment that the plaintiff do recover his damages as aforesaid, is erroneous. *Cutting v. Wilkins*, 11 Mod. 24. *Cock v. Vivian*, W. Kely. 203.

2. In an action where damages are to be recovered, if the declaration be partly good and partly insufficient, and the defendant demurs on the whole declaration, the plaintiff shall have judgment for that which is well laid, and shall be barred for the other. *Pinkney v. Inhab. of Rotel*, 2 Saund. 379, 380.

2.* When the plea is bad. [*838]

1. Judgment shall be for the plaintiff on a verdict if the plea is insufficient. *Jenk. 70. 186.*

2. But though the plea be informal, yet the plaintiff shall not have judgment, if sufficient appears in the plea to give judgment against him. *Liford's case*, 11 Co. 46. b. 1 Ro. 95. S. C.

3. When the declaration and plea are bad. Where the defendant pleads an insufficient plea, the plaintiff shall take no advantage of that (upon demurrer) if his own declaration be bad also, but judgment will be against the plaintiff. *Tregonwell v. Sherwin*, 2 Vent. 262.

4. When the plea and replication are bad.

1. If the plea be bad and the breach is ill assigned in the replication, the plaintiff shall not have judgment. *Anon.* 12 Mod. 407.

2. When by the replication it appears that the plaintiff has no cause of action, he shall not have judgment, although the bar is insufficient; but where the defendant's bar is insufficient in substance, and the plaintiff in his replication shows no matter against himself, the court shall adjudge upon the whole record, and judgment shall be given for the plaintiff. *Turnor's case*, 8 Co. 132. a.

5. When it appears upon the whole record that there is no title in one of the parties.

1. When it appears upon the whole record the plaintiff has no cause of action, he shall not have judgment, although the bar or rejoinder, &c. be sufficient in matter. *Bonham's*

case, 8 Co. 120 b. 1 Leon. 186, 187. 2 Leon. 99, 100. 3 Leon. 86, 87.

2. So, though the plaintiff makes it appear to the court that the defendant's title is not good, if he does not set forth a good title for himself, the court shall not give judgment for him. *Rez v. Bishop of Worcester*, Vaugh. 60.

3. If the defendant destroy plaintiff's title, but give to him a new title, the plaintiff shall have judgment. *Rez v. Bishop of Norwich*, 1 Ro. 235.

4. If in ejectment it appears by the record of a special verdict that the plaintiff had priority of possession and no title was found for the defendant, the plaintiff shall have judgment. *Allen v. Rivington*, 2 Saund. 112.

III. BY WHAT COURT JUDGMENT SHOULD BE GIVEN.

1. Judgment is never given in B. R. upon a conviction in another court. *Rez v. Baker*, Carth. 6.

2. If judgment for defendant on a special verdict be reversed in the Exchequer Chamber, that court shall give the new judgment; *aliter* if on a demurrer. *Phillips v. Berry*, 1 Salk. 403.

3. Where judgment for the defendant in ejectment in B. R. is reversed in parliament, there ought to be a new judgment *quod quer. recuperet terminum*. *Phillips v. Bury*, Comb. 314.

4. If a *scire facias* be brought in the King's Bench on a recognizance in Chancery, and there be a demurrer as to part, and an issue as to part, yet the King's Bench shall give judgment on the whole record. *Jefferson v. Dawson*, 1 Mod. 29.

5. Judgment may be given in the Exchequer, upon the trial of an issue joined there in the county palatine of Durham, and a certificate from thence. Hob. 136, 139.

IV. WHEN FINAL JUDGMENT MAY BE GIVEN.

1. In debt on bond, if the defendant plead a release, and, after demurrer, a default be made, final judgment shall be given. 6 Mod. 5.

2. Judgment is final on quashing an *essoin*. *Burghill v. Abp. of York*, 1 Ld. Raym. 80.

3. If issue be taken upon a dilatory plea, and found against the defendant, final and peremptory judgment shall be given; otherwise it is upon a demurrer. *Amcols v. Amcols*, T. Raym. 118, 119.

4. Where the defendant after imparlance pleads outlawry, and upon *non tuel record* pleaded, fails of the record, judgment shall be absolutely given, and not a *respondeas ouster*. *Dawson v. Lee*, Cro. Car. 566.

5. If a plea commences in bar, but concludes in abatement, yet judgment is final. *Cole v. Green*, 1 Lev. 312.

[*839] 6.* So, where matter in abatement is pleaded in bar, final judgment ought to be given. 6 Mod. 103.

7. In replevin, if the defendant plead in bar, and demur to the replication in abatement, the plaintiff, after joinder in demurrer, shall have final judgment on the demurrer being overruled. *Crosse v. Bilton*, 6 Mod. 102.

8. Upon a plea in abatement and demurrer, judgment for the plaintiff is not final. 2 Saund. 210 c. 210 f. n. (3), 211.

V. WHEN JUDGMENT MAY BE GIVEN FOR DAMAGES.

1. Judgment in an assize for estovers may be given to recover seisin and damages, though the wood be grubbed up. *Cowper v. Andrews*, Hob. 43.

2. Judgment in *scire facias* against bail, that the plaintiff "do recover his damages sustained by occasion of a delay of execution," is erroneous; for the court cannot award damages, but only costs of suit. *Fanshawe v. Morrison*, 6 Mod. 157.

3. In *ejectione custodie terræ et hereditis*, though it does not lie for the heir, if the jury assess entire damages, the plaintiff releasing them may have judgment for the land. *Clifforde's case*, 3 Dy. 369. pl. 56.

4. Though the replication concludes "*petit judicium et debitum*," omitting *damna*, yet the court can give damages as incident. *Pit v. Knight*, 1 Lev. 222.

5. But it is ill on a special demurrer. 1 Lev. 245.

6. In a bill of debt, the plaintiff declares of three bonds; the jury find that one bond was not yet due, and assess damages and costs entire; yet upon releasing of the damages and costs, the plaintiff may have judgment for the other two bonds; *quare*, if it had been by original. *Andrews v. Delahay*, Hob. 178.

VI. WHEN JUDGMENT MAY BE GIVEN FOR PART.

1. In trespass, the declaration alleged a taking of his mare by the defendant as well as the goods and chattels following, &c., but did not say that they were the goods of the plaintiff; on demurrer, it was held that the plaintiff might have judgment for the mare, and release the action for the residue. *Cutforthay v. Taylor*, T. Raym. 395.

2. If debt be brought against executors upon a bond and simple contract together, and they demur to the whole declaration, the plaintiff shall recover his debt upon the bond, and be barred for the other. *Duppa v. Mayo*, 1 Saund. 286.

3. In an *avowry*, part for rent, and part for penalty, a judgment of return is good, though but part be for the avowant, and the other against him. Hob. 133.

4. Upon fully administered pleaded, and the issue whether assets or no, and assets found for part only, yet judgment to recover the whole shall be good. *Aleyn*, 37.

5. In an action of debt for 100*l.*, if the plaintiff declare part for rent, and part for

penalty, the judgment may be divided, part for him, and part against him. *Grobham v. Thornborough*, Hob. 82.

6. If in debt by bill upon three bonds, it appears that one of the three is not forfeited, yet the plaintiff shall have judgment for the other two bonds. *Duppa v. Mayo*, 1 Saund. 286.

7. Where the defendant is found not guilty as to part, there must be a judgment for him as to that. *Smith v. Fuller*, Stra. 786.

VII. RELATIVE TO THE FORM OF A JUDGMENT.

1. If a judgment on a demurrer to a plea be entered "and therefore it is considered, &c." instead of "and because it appears to the court, &c." it is erroneous. *Athwood v. Burr*, 7 Mod. 7. 1 Salk. 402. S. C.

2. Judgments ought to be complete and formal, and a dismissal is no judgment. *Rex v. Knollys*, 2 Salk. 511, 512. *Banbury's case*, cited 3 Salk. 213.

3. In entering judgments upon demurrer in debt in C. P., they give the costs in the name of the *damna pro detentione*. *Daveant v. Raftor*, 2 Ld. Raym. 1047.

4. *Videtur curia* is no essential part of the judgment. *Bellew v. Scott*, 2 Stra. 440.

5.* If a declaration on a statute [*840] conclude *contra formam statuti*, and the defendant be found guilty, the judgment need not so conclude. *Myddleton v. Wynn*, Willes, 599.

6. Judgment *quod recuperet damna sua predicta attingentia ad 17l.*, where there were only 15l., the *attingentia* is void. *Gayer v. Goler*, Palm. 509.

7. Where in debt for 500l. the jury find 357l. 11s. not paid, and nothing as to the residue, and the judgment is that plaintiff recover "his said debt," this is ill. *Shepherd v. Hooker*, Andr. 157.

8. A judgment ought to be positive and not conditional. Fort. 250.

9. When judgment is given against baron and feme, for words spoken by the feme, both must be *in misericordia*, and both be amerced. *Scarfe v. Nelson*, Hob. 127. Mo. 869.

10. In an action for rescue of a debtor, which may be either *vi et armis*, or upon the case, or general, and applied to either, the judgment must precisely follow the original, and be suitable to it. *Wheatley v. Stone*, Hob. 180.

11. The judgment in *audita querela* is to be discharged of executions. Hob. 2.

12. The judgment in an action on the case on a statute, brought by the party grieved, may be *in misericordia*. Willes, 600.

13. Where the party denies the deed of his ancestor, and it is found against him by verdict, a *misericordia* shall be entered against him, and not a *capiatur*. *Mortlake v. Charlton*, 2 Saund. 192.

14. In trespass, part was found for the

plaintiff and part against him: judgment as to the latter that plaintiff *sit in misericordia*, not *quod nihil capiat*, was held correct. Mo. 692.

15. If the defendant be acquitted of the special matter by judgment upon demurrer, the *vi et armis* shall not be tried, although there be an issue thereon, but he shall be fined, and a *capiatur* awarded against him. *Lowe v. King*, 1 Saund. 81, 82.

16. Judgment *quod sit in misericordia* if the plaintiff deny another man's deed, but if his own, *quod capiatur*. *Walker v. Hancock*, Cro. Eliz. 844, 845. *Mortlake v. Charlton*, 2 Saund. 192.

17. A *capiatur* need not be entered where the fine is taken away by the statute. *Westbooke v. Andrews*, 2 Ld. Raym. 927.

18. Where defendant pleaded a release by the plaintiff, and when issue was taken thereupon confessed the falsity of his plea, judgment was entered for plaintiff, with a *capiatur* as to defendant. 1 Dy. 67. pl. 19.

19. Judgment on a conviction of forcible entry may be entered by *quod finis imponatur*, or *ideo consideratum*; if the former, it is removable by *certiorari*; if the latter, by writ of error. *Rex v. Layton*, 11 Mod. 236.

VIII. RESPECTING THE PRAYER OF JUDGMENT.

1. Though a plaintiff or defendant pray a wrong judgment, the court must give such judgment as the party is entitled to. *Rayner v. Pointer*, Willes, 410. 2 Saund. 200 d. n. [g]. 1 Saund. 97.

2. And therefore if the defendant in a demurrer to a declaration, pray judgment of the declaration, and that it may be quashed, and the plaintiff join in demurrer, and the declaration be good, the court will give judgment in chief in favour of the plaintiff. Willes, 410.

3. But in the case of a plea in abatement, the court will give no other than is prayed for by the party. 2 Saund. 209 d. n. [g].

IX. ENTRY OF THE JUDGMENT.

1. Judgments ought to be entered of the same term they are given. Holt, 400, 402.

2. If judgment be given in term, it may, at any time after, be entered upon the roll, as of the term in which it was given. *Hodges v. Templar*, 6 Mod. 191.

3. If there be a rule for judgment, it must be entered before the *essoin* day of next term, or else must go over by continuance. *Hov v. Acton*, 12 Mod. 493.

4. Judgment may be entered in the vacation as of the precedent term. *Anon.* Hob. 117.

5. If *audita querela* be brought after the day in bank, the judgment shall be entered* up as of that day. [*841] *Lampiere v. Meredith*, 1 Mod. 111.

6. If the court take time to consider, judgment shall be given as if it had been given upon the return of the *postea*, though the

plaintiff die in the intermediate time. 1 Mod. 38.

7. Judgment may be entered within two terms, where the plaintiff dies after verdict. *Duke of Norfolk's case*, 7 Mod. 39.

8. A rule was made to enter judgment *nunc pro tunc*, for fear of the death of the parties. Palm. 256.

9. It may be entered *nunc pro tunc*, where the party dies pending the advising of the court. *Cumber v. Wane*, Stra. 427. 917.

10. The court will not give leave to enter up a judgment of twenty years standing, *nunc pro tunc*. *Flower v. Earl of Bolingbroke*, Stra. 639.

11. Where it appears that the signing in-jerlocutory judgment was after the defendant's death, the same, and the *scire facias* thereon, will be set aside. *Sibbet v. Russell*, C. T. Hardw. 183.

12. The rule that "a judgment above a year old must be revived by a *scire facias* before execution can be taken out on it," was intended to prevent the defendant's being surprised; and therefore, if the year be exhausted by delays occasioned by the plaintiff, it is good, although no *scire facias* be taken out. *Michel v. Cue*, 6 Mod. 288. n.

13. The words *videtur curia* in the entry of the judgment were held to be implied in the "*ideo consideratum est*." 1 Saund. 342.

14. A verdict being given on one issue for the plaintiff, and on another for defendant, defendant may enter judgment on that found for him, if the plaintiff will not on his. 2 Dy. 194. pl. 34.

15. If the plaintiff will not enter up his judgment, the court will give the defendant leave to do it. *Andrews v. —*, Hard. 219, 220. Palm. 281.

16. Where defendant will not pray judgment on a verdict found for him, plaintiff may enter it up though against himself, for the purpose of attainting the jury. 2 Dy. 194. pl. 34.

17. There must be four days exclusive between the day in bank and the signing of judgment. *Clerk v. Rowland*, Salk. 399.

18. There should be four days before the return of the *postea* and judgment entered, if there are so many days of the term; but judgment may be entered that term. *Anon.* 12 Mod. 250.

19. So after a rule to sign judgment there ought to be four days exclusive of the day on which the rule is made, and the judgment signed. *Reignots v. Tipping*, 6 Mod. 241.

20. If a rule be made for a cause to stay until the court be further moved, and the court is divided, there needs no new rule from the court, and the plaintiff without more may enter judgment upon the verdict. *Walmley v. Russel*, 6 Mod. 204.

21. Where a thing is made a *concilium*, judgment cannot be entered or any altera-

tion made without leave of the court. *Vincent v. Preston*, 12 Mod. 667.

22. After not guilty pleaded, the court will not let the plaintiff enter judgment on a *relicta verificatione* signed by the defendant's attorney, unless he acknowledge it in the master's presence. *Anon.* 1 Id. Raym. 345.

23. If a judgment in B. R. be reversed in parliament, the new judgment must be entered in parliament. *Phillips v. Berry*, Salk. 403.

24. If judgment upon a warrant of attorney be not entered within the year, it cannot be without leave of the court on motion. *Anon.* 6 Mod. 212.

X. JUDGMENT ROLL.

The roll of the judgment was carried in and docketted, but before it was filed was lost; the court gave leave to file a new one. *Evans v. Thomas*, Prac. Ca. K. B. 153.

XI. RELATIVE TO THE CONCLUSIVENESS OF A JUDGMENT.

1. On an action brought by a party convicted, he cannot falsify the fact upon which the judgment was grounded if within the consuance, &c. *Fullers v. Fitch*, Holt, 288. Carth. 346.

2.* The judgment of a foreign [*842] court of admiralty on a matter of which it has cognizance, is conclusive until reversed. *Lumley v. Quarry*, 7 Mod. 9.

3. A judgment is the act of the court, and compulsory on the defendant. *Edgcomb v. Dee*, Vaugh. 94, 95.

4. A judgment in the king's court upon a judicial and ordinary proceeding is of a higher degree than a statute or recognition, and in payment of debts by executors is entitled to precedence. *Sadler's case*, 4 Co. 54 b.

5. If the ecclesiastical judge by sentence declares the contract and marriage to be void and of no effect, it is conclusive that there was just cause of divorce. *Kenn's case*, 7 Co. 43 b.

6. Credit is to be given to the sentences of ecclesiastical courts in things of which the cognizance belong to them. Id. *ibid*.

7. By statute 15 G. 2. c. 16. for rebuilding Blandford, then lately burned down, commissioners were appointed (who were made a court of record) to settle all differences and demands, &c. between all persons, their heirs, executors, administrators, successors, or assigns, touching the building, &c. and authority was given to them to direct any alterations in the foundations of the new building, &c. by taking or giving ground from one to another, and ordering satisfaction to be made by one to the other, &c.; under this act the court ordered the sum of 100l. to be paid by A, the executor of the late vicar of B, (whose house was burned down in his life time,) to C the suc-

ceeding vicar : held, 1st, that the order (the judgment) was conclusive on A personally, though it did not appear on the record that A had received assets *ultra*. *Sollers v. Lawrence*, Willes, 413.

XII. OF THE RELATION OF A JUDGMENT, AND HOW IT AFFECTS LANDS, &c.

1. In K. B. the continuances are *de termino in terminum*, and judgments relate to the first day of the term. *Palm*. 312. *Graves v. King*, 8 Mod. 310. *Ayres v. Lenthall*, 1 Mod. 112.

2. Though in fact taken out after, or in the middle of the term, or in the subsequent vacation. 1 Saund. 219 f. 2 Saund. 8 k. 148 d. Andr. 309. *Fenn v. Atkinson*, Willes, 427. *Savill v. Wiltshire*, Willes, 428. n. a.

3. Unless there be a memorandum to the contrary. 2 Saund. 148 d. Holt. 397.

4. And except as against purchasers. *Duke of Norfolk's case*, Holt, 400.

5. And therefore the court will not set aside a judgment signed after the death of the defendant, when by such relation it becomes a judgment of the preceding term when the defendant was alive. Willes, 428. n. a.

6. In this respect there is no difference between an adverse judgment and a judgment signed under a warrant of attorney. *Hall v. Moss*, Willes, 428.

7. At common law, a judgment bound all the land of which defendant was seised on the first day of term in which it was signed. 2 Saund. 8 k.

8. A judgment is not in itself an incumbrance affecting lands. *Barnwall v. Barnwall*, 3 Ridgw. 59. *Earl Fauconberg v. Birch*, 2 Ridgw. 163. *notis*.

9. It does not bind the land till the extent, and therefore is not a debt or incumbrance within the statute of 2 Anne. S. C. 3 Ridgw. 59.

10. At common law, a judgment bound goods from the teste of the *feri facias*. 1 Saund. 219 f., 219 f. n. [i.]

11. In a *warrantia chartæ*, it binds the land from the teste of the writ. *Pitts v. James*, Hob. 122.

12. Upon voucher, it binds the land only from the time of the voucher. *Roll v. Osborn*, Hob. 23.

13. By 29 Car. 2. c. 3., the time of signing judgment shall be docketted, and as against purchasers shall only bind lands from that time. 1 Mod. 253. *notis*. 2 Saund. 8 k. 9. 3 Salk. 159.

14. If the judgment be not docketted as required by the 4 & 5 W. & M. it is considered as a simple contract debt. 2 Saund. 9.

15. The cognizee of a judgment shall have no relief against a purchaser, unless he proves that express notice was given him

of the judgment. *Churchill v. Grove*, Nels. 91.

16. Subsequent judgment shall be relieved against any preceding statute upon payment of what is justly due. *Churchill v. Grove*, Nels. 90.

17.* Judgment final in a writ [*843] of right in C. B. binds all strangers who do not make their claim within the proper time; yet the common law excepts infants and those beyond sea, or imprisoned, &c. *Lechford's case*, 8 Co. 100 a.

18. Judgment given by default upon a *scire facias* returned against one not subject to the first judgment, shall bind him. *Day v. Guilford*, T. Raym. 19.

XIII. HOW IT AFFECTS IRREGULARITIES IN THE PREVIOUS PROCEEDINGS.

1. After judgment, it is too late to complain of an irregularity in appearance. *Moore v. Farnham*, 1 Barnes, 165.

2. Or of an irregularity in process. *Wetherall v. Hawes*, 2 Barnes, 211.

3. But where the declaration left in the office (before appearance) was not marked *de bene esse*, the judgment was held bad. *Evans v. Tillan*, 1 Barnes, 189.

XIV. EFFECT OF DEATH :—

(a) Of a plaintiff.

1. Judgment may be given after the plaintiff's death, if it be within two terms after verdict. *Duke of Norfolk's case*, Salk. 401. Holt, 400.

2. If plaintiff dies after the term begin, though before judgment entered, yet judgment may be entered. *Anon. Prac. Ca. K. B.* 150.

3. Where husband and wife sue in trespass, and the husband dies between the day of *niisi prius* and the day in bank, no judgment can be entered. *Anon. Cro. Car.* 509.

4. Judgment may be entered as of the term, if the plaintiff lives over the day in bank. *Parker v. Steers*, Keny. 378.

5. Judgment may be signed after plaintiff's death, if it appears to be entered up as of the term in which he was living. *Anon. Prac. Ca. K. B.* 123.

6. Plaintiff's representative must enter final judgment within two terms after plaintiff's death. *Well v. Spurrell*, 1 Barnes, 192, 193.

7. If judgment be signed within two terms, it is such an entering of the judgment that it can be entered on the roll after the party's death. *Helie v. Baker*, 1 Sid. 395.

8. If judgment await the deliberation of the court, and the plaintiff die before an opinion is given, yet judgment shall be entered as if it had been immediately given on the return of the postea. 1 Mod. 38. 10 Mod. 325.

9. And the continuances need not be entered. *Lure v. Rest*, 10 Mod. 30. 1 Mod. 38.

10. But the time when in fact the judgment was given must be marked on the roll, that purchasers of land may not be overreached. *Taylor v. Matthews*, 10 Mod. 325.

(b) *Of a defendant.*

1. If a judgment be recovered against two, and one dies, the charge survives. *Trelheury v. Ackland*, 2 Saund. 50.

2. A judgment may be regularly entered after the defendant's death. *Odes v. Woodward*, 2 Ld. Raym. 766. 849.

XV. RELATIVE TO JUDGMENT BEING SIGNED BY THE PLAINTIFF.

(a) *When and for what cause the plaintiff may sign judgment.*

1. If defendant pleads another action depending in the same court, plaintiff may pray oyer of the record, and if refused, sign judgment. *Theobalds v. Long*, Prac. Ca. K. B. 152. 1 Ld. Raym. 347. S. C. Carth. 453. Keilw. 95.

2. If a release be pleaded, and the plaintiff crave oyer of it, and the defendant will not grant it, the plaintiff may sign judgment for want of a plea. *Anon.* 6 Mod. 123.

3. In covenant the plaintiff by his replication assigns several breaches, to which the defendant does not rejoin; though the plaintiff cannot waive the breaches, (being entered on the roll,) yet he may take judgment for want of the rejoinder. *Walker v. Priestly*, Com. 370.

4. Where plaintiffs enter the appearance, judgment may be signed without calling on the defendant's attorney for a plea. *Jones v. Wilkinson*, 1 Barnes, 177.

5. Where defendant, under or [*844] der to plead* an issuable plea, pleaded in abatement, held, plaintiff was regular in signing judgment, and not obliged to apply to the court to set aside the plea. *Wagstaffe v. Long*, 2 Barnes, 200.

6. A non pros signed irregularly, and the plaintiff entitled to judgment, he may sign it without first setting aside the non pros. *Bray v. Booth*, Prac. Ca. C. P. 125. 1 Barnes, 181.

7. Defendant, under a judge's order to plead issuably, rejoin *gratis*, &c., instead of rejoining, demurred; plaintiff signed judgment, and held regular. *Maurice v. Engier*, 2 Barnes, 213.

8. If an attorney be sued time enough to give him two rules to plead, judgment may be signed within the term. 1 Mod. 8.

9. If a declaration be delivered in Hilary term, and rules of pleading given, and the defendant do not plead before the essoin day of Easter term, the plaintiff may sign judgment for want of a plea; but if the plaintiff in that case has not given rules in Hilary term, he must give them in Easter term, before he can sign judgment. *Anon.* 6 Mod. 22.

10. Judgment cannot be signed without a rule to bring in the record. *Anon.* 7 Mod. 47.

11. After a rule to sign judgment, there ought to be four days, exclusive of the day on which the rule is made and the judgment signed. *Reignott v. Tipping*, 6 Mod. 241. 3 Salk. 112. *Stamford v. Chamberlaine*, 5 Mod. 205. 3 Salk. 215.

12. A judgment was set aside because signed within four days, i. e. before the *quarto die post*. *Martin v. Henriquez*, 8 Mod. 237.

13. Judgment cannot be signed till the afternoon of the day after the rule to plead is out. *Broome v. Woodward*, Ca. Prac. C. P. 54.

14. Where a judge's order is obtained for two days' time to plead, a judgment cannot be signed till the third day in the afternoon. *Southerton v. Greenfield*, 2 Barnes, 205.

15. Judgment is not to be signed for want of a plea, till the afternoon of the next day after a demand thereof in writing. Ca. Prac. C. P. 17.

16. Declaration left in office of Hilary term; afterwards appearance entered, and notice of declaration given in Easter; judgment in Trinity held good. *Matthews v. Stone*, 1 Barnes, 164.

17. The plaintiff might formerly have signed judgment if the issue money was not regularly paid. 1 Barnes, 159. Say. 9. Prac. Ca. K. B. 124. 159. 2 Barnes. 199. *Anon.* 7 Mod. 50. (*Vide ante*, tit. ISSUE, div. III. Vol. I. p. 820.)

18. So, for non-payment for copy indentures, of which oyer was prayed. *Theedam v. Jackson*, 1 Barnes, 157, 158.

19. Judgment should be signed before a writ of error is spent. *Aidem v. Lumley*, 1 Barnes, 177.

20. Judgment may be regularly signed after the defendant's death. *Parson v. Gill*, 1 Ld. Raym. 695.

21. Judgment was allowed to be signed *nunc pro tunc*, defendant dying pending the argument. *Craven v. Hornley*, 1 Barnes, 186.

22. Satisfaction was entered *nunc pro tunc*, plaintiff being dead, and his administrator being a lunatic. *Darlou v. Wharton*. 1 Barnes, 191.

(b) *When not.*

1. If an attorney undertake to appear and accept a declaration *de bene esse*, the plaintiff, on the attorney's refusing to appear, cannot sign judgment for want of a plea. *Wigg v. Rook*, 6 Mod. 86.

2. *Nil debet* pleaded in an action upon a promissory note, although ill upon demurrer, is an issuable plea within the meaning of a judge's order for time to plead, and upon which the plaintiff cannot have leave to sign judgment. *Bailey v. Edwards*, C. T. Hardw. 179.

3. If agent gives time, country attorney

cannot sign till that time is out. *Wallace v. Willington*, 1 Barnes 189.

4. If judgment in ejectment be signed for want of a plea in a country cause, but no possession delivered, the plaintiff may be compelled by a judge, at any time before the assizes, to accept of a plea; *contra* if possession be delivered. *Anon.* 2 Salk. 516.

[*845] XVI.* RESPECTING THE SETTING ASIDE OF A JUDGMENT:—

(a) *When a judgment may be set aside for irregularity.*

1. If no appearance be entered, judgment will be erroneous. *Goodwin v. Harlow*, 1 Mod. 2.

2. Judgment was set aside after inquiry executed, one of the defendants having no notice of the writ or declaration. *Coulson v. Turnbull*, 1 Barnes, 171.

3. A judgment was set aside in Trinity term; in Michaelmas new notice of declaration and second judgment; this was also set aside, the writ being returnable in Easter. *Bertholomew v. Gould*, 1 Barnes, 204, 205, 224.

4. Judgment signed for want of affidavit on a *parol* demurrer put in by an infant, was set aside, it not being requisite. *Ford v. Odem*, 2 Barnes, 206.

5. Judgment and inquiry set aside, declaration being intitled of Michaelmas instead of Hilary term. *Cooke v. Dethick*, 2 Barnes, 219.

6. Where a judgment is erroneous in fact, it may also be deemed irregular; the application to set it aside should be recent; bail ought not to be put in to an *audita querela*. *Whitehead v. Gale*, 2 Barnes, 224.

7. Judgment set aside, without costs, defendant, on craving *oyer*, not having had a perfect copy of the bond, &c. given him. *Langmen v. Rogers*, 2 Barnes, 200.

8. Judgment set aside, the demand of a rejoinder being made on a former agent concerned for the defendant's attorney, and not on the agent concerned in the cause. *Reed v. Brown*, Ca. Prac. C. P. 71.

9. Judgment set aside, because defendant had pleaded in abatement without taking out declaration. *Atterbury v. Troward*, 1 Barnes, 179.

10. Judgment set aside, plaintiff, after *superseas* of exigent, having delivered a declaration, without notice to plead indorsed, and signing judgment in four days, when defendant was entitled to eight. *Turnley v. Woodhouse*, 2 Barnes, 214.

11. Judgment set aside for want of a demand of a plea in writing, the demand of a plea indorsed on declaration delivered not being sufficient. *Eames v. Gew*, 2 Barnes, 222.

12. A juror, after being challenged, appeared, and was sworn, and for this cause

judgment was stayed. *Hargate v. Hammond*, Prac. Ca. K. B. 141, 142.

13. Judgment and all subsequent proceedings against bail were set aside, it not having been signed till about two months after the death of the original plaintiff. *Whitehead v. Gale*, 2 Barnes, 223.

(b) *When, and on what terms a regular Judgment may be set aside; and when defendant will be allowed to plead de novo.*

1. A judgment may be set aside, though strictly regular, in order to try the merits. *Wood v. Cleveland*, 2 Salk. 518.

2. A regular judgment and inquiry was set aside, and plea amended on payment of costs, and bringing the damages found into court. *Broadbent v. Wilks*, 2 Barnes, 9.

3. A regular judgment was set aside on payment of costs, pleading an issuable plea, and taking short notice. *Matthews v. Stone*, 1 Barnes, 164, 166, 168, 178.

4. So on payment of costs, and pleading the general issue. *Bickerton v. Lewis*, 2 Barnes, 221.

5. So on pleading an issuable plea, without confining defendants to the general issue. *Randle v. Ware*, 2 Barnes, 114, 298.

6. On payment of costs, judgment will be set aside, though regularly entered, if the plaintiff has not lost a trial. Salk. 402.

7. Judgment set aside on terms, though time to plead was out; judge's summons for further time having been served before judgment could regularly be served. *Smithson v. Broughton*, 2 Barnes, 204.

8. Judgment signed for want of new pleas after amendment of declaration, was set aside; for defendant may, or may not, plead *de novo*, as he thinks proper. *Wilcox v. Sharpe*, 2 Barnes, 217, 219.

9. The statute of limitations was not allowed to be pleaded. *Leaver v. Whitcher*, 1 Barnes, 183, 188.

10.* But where a plea of justification [*846] was absolutely necessary to try the merits and the plaintiff had not been delayed of a trial, the court have admitted the defendant to make such defence, though the judgment set aside was regular. *Leaver v. Whitcher*, Com. 561. *notis*.

11. An administrator was permitted, after a regular judgment was set aside, upon payment of costs, to plead *plene administravit* generally, which was looked upon as the general issue. *Id. ibid.* 1 Barnes, 195.

(c) *When the court will not set aside a judgment.*

1. Judgment confessed by a feme covert was refused to be set aside on motion. *Anon.* 1 Salk. 400.

2. Regular judgments are not to be set aside but in order to give the defendant an opportunity of pleading to the merits. *Forbes v. Id. Middleton*, Stra. 1242.

3. A judgment was refused to be set aside, on account of the declaration being de-

livered, and pleas demanded, in the country. *Gylbert v. Gylbert*, 2 Barnes, 207.

4. Where the judgment by default is regularly signed, the court will not set it aside on the ground of a release of the debt before action brought. *Lockwood v. Beaumont*, C. T. Hardw. 157.

5. If A take a judgment in the name of B, and enter satisfaction thereon, the court will not vacate such record after B's death. *Anon.* 7 Mod. 13.

6. A judgment acknowledged for a just debt shall not be set aside, though entered up, and executed contrary to the agreement of the parties. *Read v. Tregear*, 7. Mod. 49.

(d) *Of the motion for that purpose.*

1. Motion to set aside a judgment must be two days before inquiry executed. *Grimes v. Cleaver*. 1 Barnes, 187.

2. No motion to set aside a judgment on the last day of term, if the defendant could have applied sooner. *Southouse v. Pye*, Ca. Prac. C. P. 130.

XVII. RELATIVE TO THE ARREST OR REVERSAL OF A JUDGMENT;—

(a) *What is a sufficient cause for arresting or reversing a judgment.*

1. A judgment was reversed for mistaking the name of one of the officers who executed it. *Carth.* 443.

2. In debt, the issue was *non dimisit*; and the finding was of a demise for parcel, not for the residue; judgment was arrested. *Mo.* 80.

3. Judgment obtained by forgery was vacated. 1 Vent. 78.

4. So, if procured by fraud and deceit. *Parris's case*, 1 Vent. 49.

5. Judgment may be arrested for the uncertainty of the verdict. *T. Raym.* 200.

6. Judgment will be arrested where there appears to be no cause of action. 1 Vent. 310. *Hob.* 14. 128. 199. *Cro. Car.* 575.

7. Judgment was reversed in debt, where the defendant pleaded payment of 21*l.* 6*s.* 8*d.*, and the plaintiff replied *non solvit* the said 51*l.* 6*s.* 8*d.*, and so there was no issue. *Cro. Car.* 593.

8. The judgment which is given upon a *petit cape*, being awarded instead of a *grand cape*, will be set aside as irregular. *Harding v. Harding*, *Com.* 148.

9. In *assumpsit* against an heir on his promise to pay money due on his father's bond, judgment was stayed after verdict, for want of an averment that the heirs of the obligor were bound. 2 *Saund.* 136.

10. So, in debt against an administrator, where it was alleged in the declaration that administration was committed to the defendant by P, arch-deacon of C; but it did not say that administration of the goods belonged to him, or that he was ordinary of the place. 2 *Ro.* 124.

11. So, where an attorney brought his

action in C. P. by a bill of privilege, and the judgment was *quod querens nihil capiat per breve*, where it should have been *per billam*. *Cro. Car.* 580.

12. Judgment was reversed in an *ejectione firma*, because the declaration was of a messuage and forty acres of land, meadow and pasture, without distinguishing how much of every one. *Cro. Car.* 179.

13.* When a juror is misnamed [*847] in the panel of the *venire facias*, after verdict for the plaintiff, the judgment shall be arrested. *Codwell v. Parker*, 5 *Co.* 42 b.

14. After verdict, it is a good cause for arresting the judgment, that on the *venire facias* no return was indorsed, and that the name of the sheriff did not appear on the back of the writ. *Roseland v. James*, 5 *Co.* 41 b.

(b) *What is not.*

1. Judgment shall not be arrested for mispleading in a point collateral to the issue. *Baker v. Spain*, *Hob.* 8.

2. If two are jointly bound, and the action is against one only, yet after verdict if it appear not on the record that the other delivered the bond, the judgment shall not be arrested. *Cloud v. Nicholson*, 8 *Mod.* 242.

3. It was moved in arrest of judgment upon the face of the record, after an issue found for the plaintiff on a plea of *plene administravit*, that administration was committed by the archbishop of York when the intestate had *bona notabilia* in London; if it had been upon a demurrer the court would have taken notice of it, but not after the cause has been tried. *Anon.* *Skin.* 237.

4. It was moved in arrest of judgment, that after verdict one of the parties was dead, but the court refused to stay the judgment. *Blaby and Estwick's case*, 4 *Leon.* 15. *Prac. Ca. K. B.* 216.

5. If the avowry be insufficient, and the jury find against the avowant, judgment shall not be reversed for error in the plea in bar or other subsequent proceedings. *Bennet v. Holbeck*, 2 *Saund.* 319.

6. Judgment shall not be arrested after a verdict where entire damages are given, though part of the time was to come at the time of trial. *Yalden v. Hubbard*, *Com.* 231.

7. Where there is a verdict for part, and a demurrer to other part, the court will not arrest a judgment on the verdict before the demurrer is determined. *Goodright v. Hodgson*, *Andr.* 284.

8. Nor stay the plaintiff from entering up judgment. *Goodright v. Hodgson*, *Andr.* 284.

9. By 18 *Eliz. c. 14.*, no judgment shall after verdict be stayed or reversed for any defect of form in or for the want of any original writ. *Redman v. Edolfe*, 1 *Mod.* 3. *notis.*

10. By 16 & 17 *Car. 2. c. 8.*, and 4 & 5 *Ann. c. 16.*, no judgment shall be stayed or reversed after verdict, &c., for want of a *capias* or *misericordia*, &c. 1 *Mod.* 73. *notis.*

(c) *When a judgment may be reversed in part only.*

1. A judgment is in general entire, and such judgment cannot be reversed in part, or affirmed in part. *Parker v. Harris*, Carth. 235. 3 Salk. 112.

2. If there are several counts, and the damages are entire, and verdict entered generally, judgment will be arrested if any one count be bad. *Cutting v. Williams*, 7 Mod. 155. 2 Saund. 171 a.

3. Judgment will be arrested *in toto*, if words not actionable are joined with words that are actionable, and entire damages given. *Graves v. Blanchett*, 6 Mod. 148.

4. So, where entire damages are assessed, and some of the trespasses are ill laid. *Jose v. Mills*, 6 Mod. 14.

5. But a judgment may be reversed for part, and stand good for the rest, when the damages are several, though the costs are entire. Hob. 5. See 1 Ro. 24.

6. So, if part is by common law and part by statute. Salk. 24.

7. And judgment may be reversed *quoad judicationem executionis* only upon an *elegit*. Hob. 90.

8. Judgment for the queen and an informer was reversed for the informer, but held good for the queen. Mo. 565.

(d) *Of the motion for that purpose.*

1. In civil cases, a party may move in arrest at any time before judgment signed. *Rex v. Hayes*, Stra. 845.

2. Sundays and holidays are no days within the rule to move in arrest of judgment. *Ashmeale v. Goodwin*, Prac. Ca. K. B. 151.

3. No moving in arrest of judgment after judgment on demurrer. *Edwards v. Blunt*, Stra. 425.

4. A motion in arrest of judgment cannot be made until the *postea* is brought in, and the defendant should give a rule thereon, which is in itself a notice to bring it in. *Wood v. Shepperd*, 6 Mod. 24. *Anon.* 11 Mod. 3.

[*848] 5.* By the practice of the Common Pleas, the clerk of the assize keeps the *postea* until the days for moving in arrest of judgment be past, and therefore in that case the notice must be given to the clerk of the assize to attend with it; for he ought not to deliver it to any but the clerk in court. *Wood v. Shepperd*, 6 Mod. 24.

(e) *Consequence of the reversal of a judgment.*

1. If an erroneous judgment be for the defendant, and it is reversed, and the merits appear for the plaintiff, he shall have judgment; but if not, the defendant shall have a new judgment. *Anon.* 7 Mod. 3.

2. After judgment reversed upon error, he who recovered the land by force of such judgment shall have an action against all trespassers in the interim; but the plaintiff in the writ of error after the reversal shall not have

an action of trespass for a trespass meane. *Menvil's case*, 13 Co. 19.

3. By reversal of an erroneous judgment by writ of error, collateral acts executory are barred, but not collateral acts executed. *Bray v. Drury*, 8 Co. 141 b.

4. Meane acts done in the execution of justice which are compulsory, are not affected by the reversal of the judgment by writ of error; otherwise, if they are voluntary. *Drury's case*, 8 Co. 141 b.

XVIII. WHEN NO JUDGMENT CAN BE GIVEN.

1. Where after action brought against baron and feme the feme died, (though it was after verdict), held no judgment could be given. *Cowley v. Poulton*, Hob. 129.

2. If the party come in upon process in a personal action, or upon a *cepi corpus*, or upon the *exigent*, and a day is given by consent, no judgment can be given on a default made at such day; but if such a default be made after a declaration delivered, it is peremptory, and final judgment shall be given. *Steeple v. Heydon*, 6 Mod. 8.

3. If a verdict be incomplete, no judgment can be given upon it. *Rex v. Simons*, Say. 36.

4. Judgment shall not be given for the plaintiff upon an insufficient bar, if the replication be insufficient too, and no title is shown for the plaintiff. Hob. 14. 128.

5. Judgment may be given against a man, although it appear upon the proceedings that he is out of court; but it cannot in such case be given for him. 6 Mod. 10.

6. In the King's Bench, Common Pleas, and Exchequer, if the judges are equally divided, no judgment can be given; and so also in the court of Parliament. *Proctor's case*, 12 Co. 11 b. 6 Mod. 204.

7. It is sufficient if the judges be of the same opinion, though for different reasons. Palm. 257.

XIX. OF VOID JUDGMENTS.

The judgment of a superior court is only voidable, though a private statute says it shall be void. *Prigg v. Adams*, Salk. 674.

XX. ERROR ON A JUDGMENT.

1. Where several judgments are to be given, one dependent upon the other, a writ of error does not lie till the last judgment. 2 Ro. 126.

2. The misnomer of a Christian name in a judgment is error, and amendment was refused. Prac. Ca. K. B. 13.

3. On a writ of error to reverse an erroneous judgment given in Ireland or Wales, the court of B. R. shall give such judgment as the courts there ought to have given. *Greene v. Cole*, 2 Saund. 257.

4. Where a judgment in B. R. was reversed by writ of error in parliament, the court of B. R. refused to give a new judgment; and

the new judgment was given in parliament. *Phillips v. Bury*, Skin. 514, 515, 516.

5. Where an improper judgment is prayed on a writ of error, the proper judgment shall be given. *Street v. Hopkinson*, Stra. 1055.

[See ante, tit. ERROR.]

XXI. RELATIVE TO THE PLEADING A JUDGMENT.

1. If judgment be given against a plaintiff upon the insufficiency of his declaration, the defendant cannot plead [*849] this* judgment to a second action for the same cause, although the entry be a *nil capiat* instead of *eat sine die*. *Lampen v. Kedgwin*, 1 Mod. 207.

2. To debt on bond against one obligor, a plea of "judgment recovered against the other" is bad, for a co-obligor cannot plead any thing but satisfaction. *Dyke v. Mercer*, 2 Show. 394.

3. In pleading a judgment it is not necessary to set forth the whole record, but to say that in such a court such a judgment was obtained with a *taliter processum est*. *Vaugh.* 92. 1 Saund. 91, 92.

4. Judgment of a hundred court may be pleaded by *taliter processum fuit*. *Jones v. Bodiner*, 1 Ld. Raym. 80.

5. A plea in bar alleged that a judgment was obtained in the court at Chichester, held before the mayor, in debt upon land, but the judgment as pleaded did not show that the mayor had jurisdiction or power to hold a court, and the declaration in the inferior court stated that the action of debt was for 100*l.* without mentioning any bond, but the defendant in the inferior court in his bar confessed that the debt was due by bond; held that the defendant's bar as to the judgment recovered in the said court was insufficient. *Turnor's case*, 8 Co. 132 a.

6. If an Irish judgment be pleaded, a replication denying it must conclude to the country. 1 Saund. 92 b. n. [c]. 5 East. 473. 2 M. & S. 565.

7. The assignee of an Irish judgment may sue here in his own name. 1 Saund. 201 a.

8. In pleading a judgment, it may be as well pleaded *quod recuperaret* as *recuperet*. *Vaugh.* 93.

9. Judgment may be avoided by plea without a writ of error. 2 Mod. 308.

XXII. RELATIVE TO PROCEEDING UPON A JUDGMENT BY ACTION OF DEBT;—

(a) When it lies.

1. If a prisoner voluntarily escape, the plaintiff may have his action of debt upon the judgment. *Vintner v. Allen*, Carter, 212.

2. Debt lies on a judgment after part levied by *elegit*. *Glascock v. Morgan*, 1 Lev. 92. *Contra*, 1 Keb. 465. pl. 68.

3. Debt lies upon a judgment or recognition, although the plaintiff have judgment upon a *scire facias*. *Lovelesse's case*, 2 Leon. 14.

4. Debt lies upon a judgment as well after a writ of error brought as before. *Adams v. Tomlinson*, T. Raym. 100. 1 Sid. 236. S.C. *Draper v. Bridwell*, 1 Mod. 121. *Anon.* 7 Mod. 62. Lutw. 231. *Anon.* 11 Mod. 78. *Sed vide ib.* note.

5. It lies in K. B. upon a judgment after a writ of error allowed, because the transcript only is removed into the Exchequer Chamber; but otherwise in C. P., because there the record itself is removed. *Deighton v. Grawil*, 4 Mod. 247.

6. The court will stay proceedings in debt on a judgment, pending a writ of error, if the action be vexatious. *Gough v. Cross*, 11 Mod. 283.

7. Leave was given to imparl in an action of debt upon a judgment until a writ of error brought upon the judgment should be determined. *Newton v. Twymmer*, Say. 44.

8. An action of debt will not lie on a judgment given by commissioners of excise. *Hall v. Wombet*, 1 Mod. 7.

9. An action of debt upon a judgment ought to be discouraged. Say. 44. 161.

[b] In what court it lies.

1. Debt lies in the King's Bench for damages recovered in dower in a court baron. *Shaw v. Thompson*, Cro. Eliz. 426.

2. Debt lies upon a record removed into B. R. by *certiorari* from an inferior court. *Herbert and Alcock's case*, 1 Sid. 214.

3. If recovery be in debt on bond in the county court by *justices*, the plaintiff may have an action of debt on the bond in a court of record. *Higgen's case*, 6 Co. 44 b.

4. It does not lie in an inferior court on a judgment in B. R. *Middleton v. Wheeler*, Comb. 220. *Contra*, *Anon.* 1 Salk. 209. *Anon.* Salk. 439.

5. Debt lies not in Ireland on a judgment in England. *Ottway v. Ramsey*, 2 Stra. 1090.

(c)* Parties to the action;— [*850]

1. Plaintiff.

If a plaintiff recover against an administrator, and die, his executor may maintain debt on the judgment upon the suggestion of a *devastavit* by the defendant in the lifetime of the testator. *Berwick v. Andrews*, 6 Mod. 126.

2. Defendant.

It lies not against the heir. 2 Saund. 7.

(d) Bail.

1. In debt on a judgment for damages, and costs above 10*l.*, the defendant may be held to special bail, although the original action was for a sum under 10*l.* *Lewis v. Potte*, 6 Mod. 268. n.

2. On a judgment pending a writ of error, the court will discharge the defendant on common bail; but it was formerly otherwise. *Anon.* 3 Salk. 55. Say. 44.

(c) *Plea.*

1. To debt on a judgment, it is a good plea in bar that plaintiff has levied the sum on defendant's goods. *Rokes v. Wilmore*, 1 And. 247.

2. In debt on a judgment after a writ of error brought, the plaintiff in error must not demur, but plead a writ of error depending, and pray judgment if he shall be compelled to answer. *Mason v. March*, 3 Salk. 397. See 1 Salk. 520.

(f) *Motion to stay proceedings on the judgment.*

A motion to stay proceedings on a judgment for that part of the money, was paid, was denied, unless the defendant brought all that was due, &c. into court. *Anon.* 8 Mod. 236.

(g) *Consequence of bringing the action.*

1. Bringing debt upon a judgment is no waiver of the lien created by that judgment. *Erly v. Erly*, Salk. 80.

2. So long as a judgment recovered in an action of debt upon a bond remains in force, the obligee cannot have a new action on the same bond. *Higgen's case*, 6 Co. 44 b.

XXIII. RELATIVE TO PROCEEDINGS BY SCIRE FACIAS ON THE JUDGMENT.

1. At common law, no execution could be had of a judgment after a year and a day, but the remedy was to bring an action of debt upon judgment. *Obrian v. Ram*, 3 Mod. 187. 189.

2. Now a scire facias is given upon a judgment after the year, by the statute of West. 2. Id. *ibid.*

3. Judgment of above a year's standing must be revived by sci. fa., though the plaintiff was tied up by an injunction out of Chancery. *Simpson v. Gray*, Ca. Prac. C. P. 82. *Anon.* 11 Mod. 2.

4. If judgment be signed under an agreement to stay execution for a year, execution may, after the year, be taken out without a scire facias, but not if the stay is only for three months, and the execution hindered by injunction. *Booth v. Booth*, 6 Mod. 288.

5. If judgment be given against five, and pending the writ of error, one dies, and the year expires, a *capias* may be taken against the survivors without scire facias or remittitur. *Howard v. Pitts*, 1 Show. 402. 404.

6. Where there is a joint judgment against two, and one dies before execution, the scire facias must be brought against the survivor, and against the heir and terre-tenants of the dead man. *Panton*, terre-tenant of *Hall*, Carth. 107.

7. A purchaser for value of the lands against which the sci. fa. issued can only be considered as a terre-tenant. *Earl Fauconberg v. Birch*, 2 Ridgw. 147.

[See also post, tit. SCIRE FACIAS.]

(B.) IN CRIMINAL CASES.

I. PRELIMINARIES TO JUDGMENT.

1. Before judgment of attainder given, the prisoner ought to be asked what he has to say, &c. *Holt*, 269.

2. Judgment for corporal punishment cannot be pronounced against a man in his absence. *Rex v. Harris*, 1 Ld. Raym. 267. Comb. 447, 448. S. C. *Rex v. Harrison*, 12 Mod. 156. *Holt*, 399. *Skin*. 684. *Reg. v. Simpson*, 10 Mod. 250.

3.* But (after appearance,) though [*851] a court in prudence ought not perhaps to give judgment in the absence of the party, yet it may be done. *Semb. Reg. v. Simpson*, 10 Mod. 344.

4. Judgment for a fine may be given in the defendant's absence, but not for any corporal punishment. *Reg. v. Templeman*, Salk. 56. 400. *Contra*, 2 Ld. Raym. 937.

5. A defendant may submit to a fine though absent, if he has a clerk in court that will undertake, &c. *Duke's case*, *Holt*. 400.

6. A justice of the peace convicted of a misdemeanor in his office is obliged to appear personally at praying judgment. *Rex v. Harwood*, 2 Stra. 1088.

II. WHAT JUDGMENT OUGHT TO BE GIVEN.

1. A prisoner on standing mute, or not answering directly on his arraignment for high treason, shall have judgment as if convicted. 2 Dy. 205. pl. 4.

2. In piracy, defendants standing mute formerly had judgment of *peine fort et dure*. 2 Dy. 241. pl. 49.

3. The judgment in treason for clipping the coin is to be drawn and hanged only. 2 Dy. 230. pl. 55.

4. In an appeal a mute has the same judgment as on indictment. *Anon.* J. Kely. 37.

5. A judgment to ask pardon and to publish an advertisement is illegal. *Rex v. Collyer*, Say. 41.

6. Upon every conviction, in indictments, the judgment ought to be *quod capiatur*. *Cro. Car.* 505.

7. If there be a general indictment for felony, and a special verdict is found in which the facts do not amount to felony, but prove the person to be guilty of a great misdemeanor, judgment cannot be given against him for this trespass. *Rex v. Weather*, Stra. 1133.

III. RELATIVE TO THE SETTING ASIDE A JUDGMENT.

1. A judgment on indictment signed by surprise for want of a plea is not to be set aside; otherwise in a civil action. *Rex v. Mayors*, Andr. 209.

2. Judgment may be arrested after judgment by *nil dicit* upon an indictment, but not after a judgment upon demurrer. *Reg. v. Deman*, 2 Ld. Raym. 1221.

3. A judgment though acknowledged in

the name of another shall not be set aside in a summary way until the offender be convicted. *Rawlins's case*, 1 Mod. 40.

IV. OF ARREST OF JUDGMENT.

1. In a criminal case, the motion in arrest of judgment may be made at any time before judgment is pronounced. *Rex v. Hayes*, 11 Mod. 3. n.

2. A person convicted of subordination of perjury may, after judgment *quod capiatur pro fine*, move in arrest of such judgment when brought into court upon the *capias*. *Rex v. Darley*, 7 Mod. 100.

3. Judgment on an indictment removed by *certiorari* cannot be arrested until the defendant appears. 7 Mod. 39.

V. HOW IT RELATES.

The judgment has relation to the conviction only. *Lisle's case*, J. Kely. 91.

JURISDICTION.

[Respecting the jurisdiction of particular courts, see ante, tit. COURT, p. 395. et seq.; and tit. INFERIOR COURT, Vol. I. p. 795.]

I. RESPECTING THE JURISDICTION OF COURTS IN GENERAL, AND THE DISTINCTION BETWEEN SUPERIOR AND INFERIOR COURTS, p. 852.

II. CONSEQUENCE OF A COURT'S DECIDING WITHOUT JURISDICTION;—

(a) *Relative to the validity of the judgment*, p. 852.

(b) *Remedy for the defendant*;—

1. Against the judge, p. 852.

2. Against the officer, p. 822.

3. Against the party, p. 853.

III. RESPECTING A PLEA TO THE JURISDICTION, p. 853.

[*852] I. RESPECTING THE JURISDICTION OF COURTS IN GENERAL, AND THE DISTINCTION BETWEEN SUPERIOR AND INFERIOR COURTS.

1. The superior courts have authority in all cases, though not specially named, unless they are prohibited by express negative words. *Agard v. Candlish*, Sav. 135.

2. The courts at Westminster may hold plea upon a contract made here in England, for things to be done in *partibus transmarinis*; otherwise in case of any particular court or limited jurisdiction. March, 3. pl. 5.

3. It shall never be presumed, that any court has exceeded its own jurisdiction, unless it is apparent that it has done so. *Anon.* 10 Mod. 71.

4. Nothing shall be intended to be out of the jurisdiction of a superior court but that which specially appears to be so; but, on the contrary, nothing shall be intended to be within the jurisdiction of an inferior court but that which is so expressly alleged. *Peacock v. Bell*, 1 Saund. 74. *Whitehead v. Brown*, T. Raym. 75.

5. In the admiralty court, it shall be intended after sentence that they had jurisdiction. *Ladbroke v. Crickett*, 11 Mod. 5. n.

6. Wherever it appears on the face of the proceedings that the subject-matter was not within the jurisdiction of the inferior court, a prohibition shall go, although sentence below has been pronounced. *Gardner v. Booth*, 11 Mod. 5. n.

7. No averment is necessary that the cause of action arose within the jurisdiction of a superior court. 1 Saund. 73. n. (1.)

8. Every subject has the liberty of removing his suit into a superior court. *Anon.* 1 Vent. 46.

9. It is the defendant, not the plaintiff, must take exceptions to the jurisdiction of the court. *Edgcomb v. Dee*, Vaugh. 93.

10. If there be several contracts at several times for several sums, each under 40s., and altogether amount to a sum sufficient to entitle the superior court, they shall be there put into suit, and not into court that is not of record. *Anon.* 1 Vent. 65. 73.

11. Inferior courts ought to certify their jurisdiction. *Peacock v. Bell*, 1 Saund. 74.

12. But it is not necessary for a court of a county palatine to certify its jurisdiction, or for the courts of the great sessions in Wales. *Id.* *ibid.*

13. A court which has jurisdiction of the principal shall have jurisdiction of the accessory also. March, 52. pl. 80. & 66. pl. 103. [See also ante, tit. COURT, div. I. p. 395.]

II. CONSEQUENCE OF A COURT'S DECIDING WITHOUT JURISDICTION.

(a) *Relative to the validity of the judgment.*

1. A cause judged by the court that has no jurisdiction of the cause, is utterly void, and *coram non judice*. *Foster v. Jackson*, Hob. 58.

2. If a particular and limited jurisdiction hold plea of a thing out of their jurisdiction, all is *coram non judice*, and void. March 8. pl. 20.

3. Where the judges have jurisdiction in the matter, and they award an erroneous execution, the party cannot avoid it without a writ of error, or an *audita querela*; otherwise, where they have no jurisdiction. *Mo.* 275.

(b) *Remedy for the defendant*;—

1. Against the judge.

1. If an inferior judge errs in a matter not within his jurisdiction, he is punishable. *Holt.* 185.

2. Although a court have original jurisdiction of a cause, yet, if it award process which it has no jurisdiction to award, an action for false imprisonment lies against the judge and officers. *Smith v. Boucher*, C. T. Hardw. 69.

3. But if the judge have jurisdiction to do an act, and he do it mistakenly, no action will lie. *Id.* *ibid.* *Hill v. Hill*, *Holt.* 184. 537.

[See also ante, tit. JUDGE.]

1. A precept to arrest from an illegal court will not save the officer from an action of false imprisonment. *Martin v. Marshal*, Hob. 63.

2.* In false imprisonment [*853] brought against an officer of an inferior court, if he justifies the arrest by virtue of a warrant directed to him out of the court, he ought to entitle the court to jurisdiction, or otherwise his plea is naught, and the action will lie against him. *Dye and Olise's case*, March, 117. pl. 195.

[See also post, tit. OFFICER.]

3. Against the plaintiff.

A plaintiff who prefers a plaint for a cause not arising within a particular jurisdiction, and procures the defendant to be arrested there upon it, is liable to an action. *Olliet v. Bessey*, T. Jones, 214, 215.

III. RESPECTING A PLEA TO THE JURISDICTION.

1. A plea to the jurisdiction must come in proper time. *Jennings v. Hankyn*, Carth. 11.

2. It cannot be after a general imparlance. 2 Saund. 2 b. *Andrews v. Clarke*, Holt, 179, 180. 3 Leon. 214, 215.

3. Nor after any imparlance but a general special one. 2 Saund. 2 b.

4. It must be pleaded in person. *Sparks v. Wood*, 6 Mod. 146. 2 Saund. 2 b. 209.; but see note [i.]

5. A plea to the jurisdiction is good without making any defence. Comb. 319. 2 Saund. 209 b.

5. Such plea need not be sworn, as a foreign plea must. *Chunley v. Broom*, Carth. 402. See also 6 Mod. 146., contra.

7. If this plea is pleaded after imparlance, a *respondens ouster* will be awarded. *Anon.* Holt, 343.

8. If an inferior court disallow a proper plea to the jurisdiction, prohibition lies. *Lucking v. Denning*, Holt, 186.

JURY.

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XVII. RELATIVE TO THE LIABILITIES OF JURYMEN, p. 858.

I. WHO ARE EXEMPT FROM SERVING ON JURIES

1. A lord of parliament shall not be impanelled without special necessity, or command of the king. 3 Dy. 315. pl. 98.

2. A gentleman pensioner, being an officer on the cheque-roll, is exempt from serving on juries. *Blagney's case*, C. T. Hardw. 2.2.

II. WHO ARE NOT EXEMPT.

1. A juror, before the return of the panel, became a minister of the church, and therefore prayed to be discharged, according to the privilege of those of the ministry; but it was not granted, because he was a layman at the time of the panel made. *Beecher's case*, 4 Leon. 190.

2. A Quaker was fined for refusing to be sworn on a jury. *Irwin v. Goldsmith*, Ca. Prac. C. P. 103.

3.* If the king grant to divers [*854] persons to be exempt from juries, they shall not be exempt from serving in B. R. without express words. *Bambridges v. Bates*, T. Raym. 113, 114. 42 Ass. 5. 35. H. 6. 42. *Rex v. Percival*, 1 Sid. 243.

4. Parties must come in and claim their privileges in person, for the sheriff is not bound to return them. 1 Sid. 243.

5. Where it was necessary to have two knights of the jury, and there happened to be only two knights in the county, both were returnable, though one of them was a serjeant at law, and in other cases privileged from serving on juries. *Lady Northumberland's case*, 2 Mod. 182.

6. A custom to be exempt from serving on juries, where there are not sufficient remaining, is void. *Rex v. Clark*, 1 Sid. 272.

III. RELATIVE TO THE QUALIFICATIONS OF JURYMEN.

1. All persons having 40s. freehold, or 100l. in chattels, are sufficient *parces* for the trial of an esquire for treason. 1 Dy. 99. pl. 67.

2. It is not a principal challenge that one returned of the jury was chosen commissioner by the other party for examination of witnesses in the court of Chancery; but it is a principal challenge, that one returned of the jury was an arbitrator for the other party. *Peacock's case*, 9 Co. 106.

[See also ante, tit. CHALLENGER, Vol. I. p. 270.]

IV. BY WHOM THE JURY SHOULD BE STRUCK.

1. The master, by consent, may strike a jury in cases of misdemeanors, but not in capital cases. *Rex v. Duncomb*, 12 Mod. 224.

2. In capital cases, the jury shall not be struck by the clerk of the crown. *Farrington's case*, T. Jones, 222.

3. If any lawful objection be to the sheriff, a special jury may be struck by the master without consent. *Rex v. Burridge*, 8 Mod. 248.

V. FROM WHAT PLACE THEY SHOULD COME.

1. Held, that jurors must be returned out of the vicarage where the cause of action arises. *Bushell's case*, Vaugh. 148.

2. Though the indictment on 5 El. c. 1. be found in Middlesex, the jury who try it shall be of the place where the oath was tendered. 2 Dy. 234. pl. 15.

3. By the 3 G. 2. c. 25., and 24 G. 2. c. 18., the jury shall be drawn de corpore comitatus. See 2 Stra. 1085. Andr. 99. 2 Tidd, 641.

4. The court will award process into the next hundred, upon the suggestion of counsel that there are not sufficient freeholders in the hundred; but that must be returned by the sheriff. 1 Dy. 25. pl. 156.

VI. RESPECTING THE NUMBER OF JURYMEN.

1. Only twelve persons ought to be returned for the trial of a cause in an inferior court; but if twenty-four are returned, it is not error. *Harris v. Wakeman*, Say. 256.

2. More than twenty-four may be returned in criminal cases. *Sir H. Vane's case*, J. Kely. 16.

3. Twelve are necessary on a writ of inquiry, as well in a superior as an inferior court. *Anon.* 1 Vent. 113.

4. A writ of inquiry, though executed by more than twelve jurors, is good. *Chester v. Crawley*, 7 Mod. 450. 2 Ro. Abr. 673. 2 Bac. Abr. 234.

5. There must be sixteen jurors on the grand assize with the four knights. 1 Dy. 98. pl. 51.

VII. OF A JURY DE MEDIETATE.

1. An alien tried for high treason shall not have a jury de medietate. 2 Dy. 144. pl. 59.

2. The jury de medietate must be prayed before any of a common jury be sworn. 3 Dy. 304. pl. 51.

3. And before any venire awarded. 3 Dy. 357. pl. 45.

VIII. OF SPECIAL JURIES.

1. A special jury is grantable at common law. *Wilks v. Eames*, Andr. 52.

2.* A special jury may be with [*855] or without consent, and cannot be challenged. *Rex v. Burridge*, 8 Mod. 245. 248.

3. There must be a rule for that purpose. S. C. 229.

4. The motion for special jury is too late after venire facias and return filed. *Clark v. Shepherd*, 2 Barnes, 385.

5. For bringing up a special jury to London, twelve guineas were allowed. *Wilks v. Eames*, Andr. 52.

6. The charges of striking a special jury are to be paid by the party who applied for the special jury, but the other necessary charges are to be allowed. *Egley v. Smart*, Ca. Prac. C. P. 138. *Hamellon v. Style*, and *Wilks v. Eames*, 2 Stra. 1080. See the 3 G. 2. c. 25. s. 16., and 24 G. 2. c. 18. s. 1.

7. Where a trial is to be by medietate lingue, a special jury must be returned. *Anon.* Comb. 20.

IX. OF A TALES.

1. Defendant in replevin taking out a venire cum proviso, may pray a decem tales as well as the plaintiff himself. 2 Dy. 193. pl. 28.

2. If a full jury do not appear, and the plaintiff pray a distringas without praying any tales, the court ought to grant it at the prayer of the defendant. 3 Dy. 359. pl. 2.

3. A cause was suffered to remain for want of jurors, though twelve were sworn, where plaintiff's counsel refused to pray a tales. *Jenkins v. Purcell*, 1 Stra. 707.

4. The justices of nisi prius may direct a tales de circumstantibus to the coroners. 3 Dy. 376. pl. 24.

5. The talesman can only be appointed at the request of one of the parties. 2 Saund. 349.

6. In assize, the justices of assize cannot by virtue of the 35 H. 8. c. 6. award a tales de circumstantibus. *Denbawd's case*, 10 Co. 102 b. Cro. Jac. 316. Jenk. 288. S. C.

7. Though the jury appear on a habeas cum proviso, still defendant cannot pray a tales till the plaintiff make default in that also. 3 Dy. 318. pl. 10.

8. Where two hundredors only appear on the first panel, the tales for default of hundredors need only consist of two others, who shall be added to eight of the principal jurors not objected to. 2 Dy. 200. pl. 61.

9. One of the principal panel may be joined to eleven tales, or one talesman to eleven of the principal, notwithstanding 35 H. 8. c. 6. speaks in the plural number only. *Denbawd's case*, 10 Co. 102 b. 2 Dy. 244. pl. 64.

10. The jurors and decem tales are not to be promiscuously returned upon the panel, after the view, &c. Holt, 404.

11. A juror challenged cannot be sworn on the tales. *Parker v. Thoreton*, Stra. 640.

X. RELATIVE TO THE SUMMONING OF THE JURY, AND HOW THE PROCESS SHOULD BE.

1. The persons upon the panel for a special jury ought to be summoned a sufficient time before the trial is to come on. *Rez v. Owen*, Say. 30.

2. After venire returned, and jury summoned, if the cause be compromised without countermanding the summons, the jurymen who appear shall have their usual charges. *Caldicot v. Pembroke*, 2 Show. 248.

3. One of the four knights being challenged in banc and withdrawn, an alias summons was awarded for another, and habeas corpus for the residuo. *Lord Windsor v. St. John*, 2 Dy. 103. pl. 9.

4. In a writ of right, if after service of the writ of summons, all the knights do not appear, an habeas corpora shall be awarded to the sheriff to have them at a day certain. 1 Dy. 79. pl. 50.

5. In the record of an information *quo servavit*, it is sufficient if the names of the special jurors are inserted in the panel, and annexed to the habeas corpus. *Rez v. Pritchard*, 7 Mod. 233.

6. When the panel in the grand assize is returned, the process is a *venire facias*, with the names of the jurors inserted, in the nature of an habeas corpora. 3 Dy. 270. pl. 24.

7. If the Christian name of a juror be mistaken, it is error. *Willis v. Crosby*, 1 Leon. 276.

8. If a juror be named "Kill" in the panel, and "Kell" in the habeas corpus, yet the variance is not fatal if he was not one of the jurors who tried the cause. 7 Mod. 232.

9.* The array made by a former sheriff being quashed for coimaging, plaintiff may have a *ven. fac. de novo* to the new sheriff, or to the coroner, at his election. 2 Dy. 188. pl. 11.

10. After issue joined, the king died, and a precept was made to the sheriff, without writ or teste of the chief justice, to re-attach the defendant, and a habeas corpus against the jury, and holden good in B. R. 2 Dy. 118. pl. 78.

11. The high sheriff may return the jury, the under sheriff being both attorney and bail for the defendant. *Rez v. Burridge*, 8 Mod. 247.

12. A *venire facias cum proviso* is not grantable to the defendant but where he is actor, or there are laches or default in the plaintiff; yet one laches suffices for the whole suit; but if after defendant has sued them out, the plaintiff sue out a *venire facias*, which is served, and not defendant's, he shall not have a habeas corpora cum nisi prius cum proviso without fresh laches, since none at all appears on the record. 2 Dy. 215. pl. 51.

13. In attain, the grand jury were returned summoned by the sheriff, who was

related to one of the petit jury, but the summons distress and tales were returned by a new sheriff: the grand jury being quashed, the tales were quashed also. 1 Dy. 78. pl. 41.

14. The title of the panel was of ten talesmen, when in fact eleven talesmen had been added; but after verdict, it was held that the title was the misprision of the sheriff, and it could not be taken that the justices granted a tales only of ten, and that the misprision of the sheriff might be amended and "ten" put out of the title. *Denbaw's case*, 10 Co. 102 b.

XI. OF SWEARING THE JURY.

If the jurors come out of two counties, they must be sworn first one of one county, then another of another, or it is error. *Anon.* Hob. 330.

XII. OF WITHDRAWING A JUROR.

1. A juror being ill may be discharged, and another sworn by consent. *Jeffrys v. Tyndall*, Palm. 411.

2. Jurors having lain all night, and not agreeing, one of them by consent was withdrawn. *Moulin v. Sir G. Dallison*, Cro. Car. 484.

3. Juror cannot be withdrawn in an assize. 1 Mod. 123.

4. A juror cannot be withdrawn in capital cases, though with consent of parties; otherwise, in all other cases. *Rez v. Perkins*, Holt, 403. *Contra*, T. Raym. 84.

XIII. OF DISCHARGING THE JURY.

1. The jury will be discharged where on a cause being called on neither party appears. *Smith v. Whistler*, C. T. Hardw. 305.

2. Upon the *distringas* in attain the sheriff impealled the jury, but did not return them till the essoin-day of the return next following that of the writ; and though both parties requested the court to take them, the jury were discharged and the sheriff amerced. 2 Dy. 198. pl. 52.

3. If the jury is discharged at the assizes for a view, there is no need of a *venire facias de novo*. *Anon.* Com. 248.

XIV. WHAT MATTERS COME WITHIN THE PROVINCE OF THE JURY.

1. It is the office of a jury to inquire of matters of fact, and not of matters of law. *Twinsen's case*, Plow. 114. 231. 259. 496.

2. It is with the jury to find whether the money brought into court be sufficient or insufficient to cover the plaintiff's demand. *Comyns v. Allen*, C. T. Hardw. 260.

3. It shall be left to a jury to determine merely from circumstances, without any positive proof, whether the witnesses to a will (being all dead) set their names in the presence of the testator. *Hands v. James*, Com. 531.

4. The question of what is reasonable, and what unreasonable, is a question of law for the court, and not of fact for the jury. *Catterall v. Marshall*, 1 Mod. 70.

5. Whether a deed was in fact executed, shall be determined by the jury. *Jones v. Estol*, 7 Mod. 456.

6. No evidence can be given to a jury of what is law: the jury, and not the judge, resolve and find what the fact is. *Bushell's case*, Vaugh. 144

7.* The jury must take the law [*857] from the judge, unless they are satisfied he is wrong. 1 Saund. 132. b. n. [k].

8. To put a matter of law in issue to a jury is void. 11 Mod. 46.

9. If a statute creates an offence without saying how it shall be tried, it shall be tried by a jury. *Rex v. Sturney*, 7 Mod. 99.

XV. DUTY OF THE JURY IN RESPECT OF THEIR GIVING A VERDICT.

1. The jury ought not to meddle with matter not in issue. — v. *Pepy*. 1 Leon. 67.

2. They ought to give a positive verdict. *Jenk*. 332.

3. Where the jury find more than they ought, yet the plaintiff shall have judgment in the action; but if a declaration state that the plaintiff was possessed of a term of years in a house, and demised the same to the defendant for seven years, and issue be joined on the plea of *non demisit modo et forma*, and the jury find that the plaintiff was possessed of the house, and demised the house to the defendant for seven years, except that part called the New House, and which said New House was let to him as tenant at will, such finding will not support the declaration. *Cudlip v. Rundal*, 4 Mod. 10.

4. The jurors of an inferior court, if they cannot agree in their verdict, must, like the jurors of a superior court, withdraw, and be kept without meat, drink, fire, and candle, until they agree. *Wright v. Crump*, 7 Mod. 1.

5. In case of life and member, if the jury cannot agree before the judges of assizes depart, they are to be drawn after them in carts. *Rex v. Ledgingham*, 1 Vent. 97.

6. The jury may give a verdict contrary to the witnesses. *Plow*. 8.

7. The jury may have evidence from their own personal knowledge. *Bushell's case*, Vaugh. 147. *Holt*, 404.

8. The jurors ought to acquaint the court that they can give evidence before they are sworn. *Anon*. Salk. 405.

9. A juror who knows any fact in the cause, ought to be sworn, and deliver it on oath as a witness. 7 Mod. 2 *Holt*, 404.

10. The jury are not bound by a determination of the House of Commons, nor by any law in the world but their own consciences. *Kendall v. John*, Fort. 117.

11. Jurors once impanelled cannot be

discharged until they have given their verdict. *Wright v. Crump*, 7 Mod. 2.

12. Jurors having once given their verdict, although it be imperfect, shall not be sworn again on the same issue, unless in case of assize. *Cro. Jac*. 210.

13. If the jury find the matter of fact at large, and further conclude against law, the verdict finding the matter of fact is good, and the conclusion void. *Townsend's case*, *Plow*. 114.

14. The jury finding an indenture of bargain and sale *verbatim*, may find another joint consideration for it which is not expressed in the indenture. 2 Dy. 146. pl. 69.

15. They may find the treason at another time than in the indictment. *J. Kely*. 16.

16. After a privy verdict given, the jury remain in the custody of the bailiff until it is pronounced openly in court. *Saunders v. Freeman*, *Plow*. 212.

17. After privy verdict, the jury may eat and drink at their own expense until, &c. *S. C. Plow*. 211.

18. The jury can never find *ignoramus* upon a trial. *Bushell's case*, Vaugh. 154.

XVI. WHAT MISCONDUCT OF A JURY AVOIDS A VERDICT.

1. A verdict was set aside where the jury cast lots how they should give it. *Phillips v. Fowler*, *Com*. 525. 2 Lev. 140. 205.

2. Such conduct was held to be a great misdemeanor in the jury. *S. C. Com*, 527. note 2.

3. A new trial was granted, because the jury had given their verdict by cross or pile. *Fry v. Ward*, 11 Jones, 83.

4. Desiring a juror to appear is no cause to set aside the verdict. *Hale v. Core*, *Str*. 643.

5. The court set aside the verdict, because one of the jurymen was not returned on the *nisi prius* panel, but answered to the name of a person who was. *Norman v. Beaumont*, *Willes*, 484.

6.* But where one of the jurors, [*858] whose Christian name was Harry, was named Henry in the *venire habere cor-pora* and the *postea*, the court refused to set aside the verdict given by him and eleven other jurymen properly named. *Wray v. Thorn*, *Willes*, 488.

7. If the jurors receive evidence after they depart from the bar, though the witnesses be the same, and the evidence the same, it is sufficient to quash the verdict. *Palm*. 411. 2 Ro. 262. *Goodman v. Cotherington*, 1 Sid. 235. *Phillips v. Fowler*, *Com*. 527.

8. If the jury eat and drink, but not at the charge of him for whom their verdict is, it shall not be set aside for that cause. *Anon*. 12 Mod. 250. 1 Dy. 37. pl. 45. *Id*. 55. pl. 8.

XVII. RELATIVE TO THE LIABILITIES OF JURYMEN.

1. Where the judges conceive the jury have

been unlawfully dealt with to give their verdict, or if they eat and drink at their own or either party's expense, they are fineable. *Bushell's case*, Vaugh. 153. 1 Dy. 55. pl. 8.

2 Jurors are fineable for having sweetmeats about them, though not given them by either party, and though they have not eaten any. *Rogers v. Smith*, Palm. 380.

3 The jury was fined for drinking between the time of their agreeing in the verdict and giving it into court. 1 Dy. 37. pl. 45.

4 Jurors were severally fined and imprisoned for giving their verdict in an appeal of murder by mal-practice, contrary to pregnant evidence and the direction of the court. *Wats v. Brains*, Cro. Eliz. 779. *Empeon's case*, T. Raym. 98. 134.

5 A juror was fined in bank, who at the assizes having eaten, would not agree, though on being sent back he afterwards did agree, and the verdict allowed. 3 Dy. 218. pl. 4.

6 A juror kept his fellows a day and a night without any reason or assenting, and therefore sent to the Fleet. *Bushell's case*, Vaugh. 151.

7 It is a misdemeanor punishable in a juror challenged to speak with the rest, after their departure from the bar. *Parke's case*, 2 Ro. 85.

8 A jury was never punished upon an information, either in law or the Star Chamber, for finding an untrue verdict, unless embracery, subornation, or the like, were joined. *Bushell's case*, Vaugh. 152.

9 Although a jury find contrary to evidence, yet they are not fineable, but an attain only lies against them. *Bushell's case*, Vaugh. 144 to 149. *Greenwell v. Burwell*, Com. 81.

10 Neither are they fineable where an attain does not lie. *Bushell's case*, Vaugh. 145.

11 An action lies not against a jurymen for a malicious indictment or presentment. *Stemhall v. Ansell*, Comb. 116.

12 Issues of Jurors will be saved if there is a reasonable excuse for their non-attendance. *Anon.* 1 Ro. 174.

13 Where so many are challenged that there is not a full jury, those who make default will lose their issues: but not if jurors are drawn by consent after a full jury has appeared. *Coselove v. —*, 1 Ro. 13.

14 The court will not now receive the affidavit of a juror respecting the misconduct of the jurymen. *Willes*, 487. n. (a).

15 The court will not take notice of the misconduct of jurors in *pais* upon affidavits merely, unless it is endorsed on the *postes*. *Goodman v. Cotherington*, 1 Sid. 235.

JUSTICE OF THE PEACE.

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1. WHO MAY BE A JUSTICE OF THE PEACE.

* 1. No brewer, vintner, innkeeper, distiller, &c. shall act as a justice of the peace. 7 Mod. 332. n.

2. A mayor is not a justice of the peace without a particular grant in the charter. *Rex v. Langley*, 2 Ld. Raym. 1030.

3. One cannot be a justice of the peace by prescription. 4 Leon. 149.

II. RELATIVE TO THEIR NAME OF OFFICE.

"*Conservatores pacis*" is a good name for justices of peace. *Rex v. Bonnet*, 11 Mod. 141.

III. IN WHAT CASES JUSTICES OF THE PEACE HAVE JURISDICTION; AND HOW THEY SHOULD EXERCISE THEIR POWER.

1. Justices of peace have authority over offences mentioned in their commission; libels, conspiracies, frauds, and nuisances. *Reg. v. Varrington*, 1 Salk. 406. n. 1 Lev. 99.

2. Justices of the peace have power by the general words of their commission to hear and determine offences upon any statute which concerns the peace. 4 Mod. 51. Holt. 405.

3. But they have no jurisdiction in sessions to punish an offence created by any statute not being against the peace, unless they are named. *Rex v. Clough*, 5 Mod. 149. *Rex v. James*, 2 Stra. 1256. *Rex v. Buggs*, 4 Mod. 379. *Rex v. Alsop*, 4 Mod. 50. 1 Salk. 406. n.

4. Offences against the statute of 23 Eliz. c. 1. for not coming to church, may be inquired of by justices in their sessions. *Rex v. Sparkes*, 3 Mod. 79.

5. Justices of the peace may inquire of murder, because it is a felony. 1 Dy. 69. pl. 29.

6. Their jurisdiction extends to the wages of no other servants but those employed in

husbandry; yet if they order wages to be paid generally, the court will intend it was for husbandry, and admit of no collateral proof to the contrary. *Reg. v. Wootton*, 10 Mod. 68. *Rex v. Soane*, Andr. 73.

7. Justices could not formerly make an order on 5 Eliz. c. 4. to pay servant's wages on the oath of the servant, but by the 20 G. 2. c. 19. the justices are empowered, in the cases within the act, to examine the servant upon oath, and make an order therein for the payment of wages; and by 31 G. 2. c. 11. s. 3., this power is extended to the cases of all servants in husbandry, though hired for less time than a year. *Rex v. Cecil*, 11 Mod. 266, 267. n.

8. A justice of the peace may inquire into and hear barratry without a commission of oyer and terminer. 2 Saund. 308.

9. A justice of the peace may bind over to his good behaviour any person who behaves contemptuously to him while in the due execution of his office, and may commit him until he find sureties for the same. *Rex v. Rogers*, 7 Mod. 29.

10. Justices have no power to award giving security for the performance of their orders, until such time as their orders have been contemned. *Rex v. Miles*, 10 Mod. 271.

11. A justice may take money to lie in deposit for the security of the peace. *Moyset v. Gray*, Cro. Car. 446.

12. Justices of the peace may make a special warrant to constables, &c. to have the bodies of parties who are to take the oath according to the statute 7 Jac. c. 6. before them. 12 Co. 130.

13. A magistrate may out of sessions issue a warrant to apprehend a person charged on oath with the publication of a libel. 1 Saund. 132 b. n. [k].

14*. A justice that has power to [*800] set a fine, has power to bail. *Anon.* 11 Mod. 52.

15. The justices may discharge poor prisoners against all creditors to whom notice is given; but where a creditor is left out of the list, he is not discharged against him though notice be given. *Anon.* Skin. 116.

16. The justices in sessions have discretionary power of suppressing ale-houses without showing any cause or misdemeanor. *Rex v. Harris*, 2 Ld. Raym. 1303.

17. A justice of the peace has power to commit idle and disorderly persons to hard labour, and he is judge who are lewd persons. *Rex v. Talbot*, 11 Mod. 415. *Claxton's case*, 12 Mod. 566. Holt, 406.

18. The merely being found in a disorderly house, is not a sufficient reason to assign for requiring sureties for the good behaviour, but no reason need have been assigned. *Claxton's case*, Holt, 406, 407. 12 Mod. 566.

19. A justice of the peace may take examination of criminals by virtue of his office. *Rex v. Peaine*, 5 Mod. 164.

20. Justices of the peace may appoint overseers after the time mentioned in 43 Eliz. c. 2. is expired. *Rex v. Sparrow*, 7 Mod. 393.

21. He may commit without oath, but it is not prudent so to do. *Rex v. Pain*, Holt, 395.

22. A justice of peace can by word of mouth command one in his presence to take another, and keep him to be examined the next day. Mo. 408.

23. Where an authority is given to justices of peace, it must be exactly pursued. *Inhabitants of Chittinston v. Penhurst*, Salk. 475.

24. A want of authority to commit to prison is not to be intended in a justice of the peace, but the authority of a justice of the peace to convict must be shown. *Rex v. Goodall*, Say, 129, 130.

25. Justices of peace may supersede their own order *quia improvide emanavit*. *Parishes of Pancras and Rumbald in Sussex*, Stra. 6.

26. Justice of peace may appoint a session without a precept, but people are not compellable to appear at it. *Rex v. Bailiffs, &c., of Ipswich*, 2 Ld. Raym. 1238.

27. Justices of gaol delivery who have respited a prisoner, may in vacation, after adjournment of the sessions, make order for further respite by the custom of the realm. 2 Dy. 205. pl. 5.

28. After commitment in default of distress, they cannot discharge on paying the penalty. *Rex v. Green*, Gilb. 232.

29. A justice cannot detain a suspected person in prison but a convenient time for his examination, which is three days, and he ought not to keep him in his house, but to send him to the common gaol. *Scavage v. Tuteham*, Cro. Eliz. 530.

30. By the statute of 13 Hen. 4. c. 7. justices of the peace cannot impose a fine upon rioters, without the sheriff join in it. *Rex v. Tempest and others*, T. Raym. 386.

31. Justices of peace cannot command the sheriff but where they have special power. *Rex v. Wyatt*, 2 Ld. Raym. 1192.

32. A justice of peace cannot grant a warrant to search for goods on a claim of right to them by the party requiring the warrant. *Anon.* 7 Mod. 99.

33. He cannot commit one for making a contract against law. *Anon.* 2 Leon. 210.

34. Justices cannot indict and try the same day. *Rex v. Lamferne*, W. Jo. 379.

IV. WHEN THEY HAVE NOT JURISDICTION.

1. Justices of peace have nothing to do with contracts, and their orders in respect of them are void. *Probe's case*, T. Raym. 433.

2. Where property is in question, the justices of peace have no jurisdiction. *Rex v. Burnel*, 3 Salk. 217.

3. They have no jurisdiction upon the statute of usury. *Rex v. Smith*, Salk. 690.

4. An indictment for forgery lies not before justices of the peace. *Rex v. Yerrington*, 1 Salk. 406.

V. HOW FAR THEIR JURISDICTION EXTENDS.

1. Justices cannot compel any to [*861] enter* into a recognizance, nor can they use any coercive power out of the county. *Cro. Car.* 213.

2. If the charter of a city give to the justices exclusive jurisdiction, the justices for the county cannot interfere. *Talbot v. Hubble*, 7 Mod. 326.

3. Justices of the peace for the county may do an act where it is said it shall be done by those of the division in an act of parliament. *Anon.* 12 Mod. 546.

4. Where two justices have power to do an act, the sessions may do it, unless where an appeal is directed. *Rez v. Inhab. of Rough-ton*, 1 Ld. Raym. 426.

5. Justices of oyer and terminer cannot hold plea, but of indictments taken before themselves; but the justices *ad placita tenend.* sitting by patent may. *Rez v. Leaver*, *Skin.* 32.

6. A justice of the peace for a borough cannot commit a person to the county gaol. *Rez v. Bigemen*, 7 Mod. 321.

7. Where a city has justices with an exclusive clause, the justices of the county cannot act in matters of excise. *Talbot v. Hubble*, *Stra.* 1154.

8. Justices of the peace cannot delegate their authority, and therefore an indictment for not producing parish-books of rates before certain justices, appointed by the rest to examine and make order thereon, will not lie. *Rez v. Glin*, 6 Mod. 87. *Holt*, 341.

VI. WHEN THEY ARE FUNCTI OFFICIO.

The acts of a late justice are good till a new commission is published. — *v. St. John*, Mo. 186.

VII. WHERE THEY ARE INTERESTED.

Where all the justices of a town are concerned in a force, and will not inquire of it, the next justices of the county shall. *Chy v. Hardy*, *Holt*, 407.

VIII. IS THE PERSON SUMMONED DO NOT ATTEND.

1. A justice of the peace is not bound to hear witnesses on behalf of the party accused, unless he, being summoned, shall attend in person. *The King v. Neal*, C. T. *Hardw.* 112.

2. After summons, justices may proceed to conviction without appearance, but they cannot by warrant compel the party to appear, if such a power be not given them by express words in the statute; this being a power that cannot be given by implication, unless where it is absolutely necessary to the doing of justice. *Reg. v. Simpson*, 10 Mod. 345. 381. *Ib.* 250.

IX. HOW TO PROCEED ON GRANTING A WARRANT.

1. A justice of peace ought not to grant a warrant for taking up a person for non-pay-

ment of wages without oath; but in such case the party ought to be summoned and convicted. *Rez v. Sewe*, *Andr.* 272.

2. A justice of peace may direct warrants to any one to execute, though not an officer. *Rez v. Kendal*, 5 Mod. 81. 1 Ld. Raym. 66. S. C.

3. A warrant directed to a constable in one parish to execute in another, is good. S. C. 5 Mod. 81.

4. A commitment by him for a contempt must be by a warrant in writing. 2 *Saund.* 182 a. n. [a].

X. RELATIVE TO THEIR RESPONSIBILITY, CIVILLY.

1. A justice of peace is a trespasser if he proceed irregularly in his office, viz. by sending a warrant to take a felon without oath made of the felony committed. *Crumph v. Halford*, 4 Mod. 349.

2. Trespass and false imprisonment lie against a justice for committing upon a conviction for destroying game, where there was no attempt to distrain first. *Hill v. Bateman*, *Stra.* 710.

3. If a justice of the peace command one to prefer an indictment against a man suspected of felony, he is not chargeable in conspiracy. *Mo.* 6.

4. A defendant justifying as a justice of the peace is not compellable to show his commission. *Chute v. Alport*, 1 Sid. 311.

5. To entitle a justice of peace to costs on an action brought against him, it ought to be suggested on record that he was a justice of the peace. *Devenish v. Barton*, W. Kely, 187.

XI.* RELATIVE TO THEIR RESPONSIBILITY CRIMINALLY;—

(a) When liable to an information.

1. The committing a pauper to the house of correction without any previous summons, or any oath made of his return after removal, is contrary to natural justice, and is therefore a ground for an information against the justices. *Rez v. Angell*, C. T. *Hardw.* 124.

2. If a justice convicts without summons, there shall go an information. *Rez v. Allington*, 1 *Stra.* 678.

3. An information lies against a justice for sending one to the house of correction without cause. *Rez v. Okey*, 8 Mod. 45, 46.

4. The court will grant an information against a justice of the peace for adding another justice's name to an order of removal. *Rez v. Howard*, 7 Mod. 307.

5. A justice, without whom the sessions cannot be held, is liable to an information for a voluntary absence. *Rez v. Fox*, *Stra.* 21.

6. Leave was given to file an information against a justice of the peace for discharging a prisoner upon bail clearly insufficient. *Rez v. Lediard*, *Say.* 243.

7. An information lies against justices of

the peace for refusing to license foreigners, except on the payment of 10s. for each license, although such fines had been taken in the place on the same occasion for twenty-five years, was on the present occasion sanctioned by the approbation of the members of the corporation, and the money thus raised applied to public purposes. *Rex v. Seymour*, 7 Mod. 382.

8. So, for improperly refusing to license a number of public-houses. *Rex v. Justices of Nottingham*, Say. 217.

9. For disobedience to a *mandamus*. *Rex v. Corbett*, Say. 267.

(b) *When not.*

1. An information for refusing to grant a warrant was denied, and the prosecutor ordered to pay costs. *Rex v. Nichols*, 8 Mod. 337.

2. In judicial acts by the justices, all things shall be intended regular till the contrary appear; but *aliter* of ministerial acts, for there all must appear to be right. *Rex v. Venables*, 8 Mod. 378.

3. The court will not give leave to file an information against a justice of the peace, unless he have acted from a corrupt or partial motive. *Rex v. Justices of the Corporation of Rye*, Say. 26.

(c) *When liable to a fine.*

Justices shall not be fined under 13 H. 4. c. 7. without having had notice of the riot. 2 Dy. 210. pl. 25.

KING.

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1. OF THE KING'S NAME AND TITLE.

The name of King crowns every inferior name of dignity which the king may have. Plow. 214. 250.

II. OF THE KING'S ELDEST SON.

The eldest son of every king has been Duke of Cornwall. *The Prince's case*, 8 Co. 19 b.

III. OF THE KING'S WIDOW.

The king's widow cannot marry without the king's consent. 2 Leon. 141.

IV. OF THE PALACE AND VERGE.

1. At common law, the coroner of the king's house has an exempt jurisdiction within the verge, and the coroner for the county cannot intermeddle therein. *Wayte v. Wigges*, 4 Co. 45 b.

2. The justices of K. B., oyer and ter-

miner, gaol delivery, and of the peace, may inquire of, hear and determine all felonies and murders within the verge. *Id. ibid.*

V. RELATIVE TO THE CONTINUANCE OF THE KINGLY DIGNITY.

1. King is a name of continuance, which endures as long as the people itself. *Hill v. Grange*, Plow. 177.

2. The king never dies, but his death is called the demise of the king. Plow. 177. 234. 457.

3. He cannot avoid his grants for nonage. *Jenk. Cent.* 265.

VII. EFFECT OF A DESCENT OF THE CROWN.

1. If the crown descends upon a person attainted, the attainder is *ipso facto* void. Plow. 238. 244.

2. If the crown descends upon one who is seised to a use, the use is *ipso facto* gone, for the king cannot be seised to a use. Plow. 238. 242.

VII. EFFECT OF THE KING'S DEMISE.

1. Formerly the demise of the king determined the commissions of judges, &c., and discontinued all pleas of the crown; but this is now provided for by the legislature. 1 *And.* 44. 2 *Show.* 425.

2. So, also, all originals not returned in his lifetime; but all other writs stood good. 1 *And.* 45.

3. Indictments do not abate by his demise. *Jenk.* 205.

[*864] VIII.* RESPECTING THE KING'S PREROGATIVE, JURISDICTION, POWER, AND DUTY;—

(a) Generally.

1. The king has two jurisdictions; spiritual and temporal. *Res v. Osenden*, Holt. 435.

2. The king is the fountain of justice, and that as well ecclesiastical as civil; and may, by the ancient law of the realm, visit, reform, and correct abuses in the jurisdiction spiritual. *Woodward v. Fox*, 2 *Vent.* 268. *Case of Prexies*, Dav. 4.

3. The king can do no wrong. 10 *Mod.* 5. *Jenk.* 22. 64. 72. 133. 177. 204. 244. 270. 308. 312.

4. *Nullum tempus occurrit regi*. Plow. 243. 261. 264. 321. 559.

5. The stat. *prærogativa regis quod nullum tempus occurrit regi*, is to be intended when the king has an estate or interest certain and permanent, and not when his interest is especially limited when and how he shall take it. *Beakerville's case*, 7 *Co.* 28 a. 1 *Leon.* 180. 2 *Leon.* 50.

6. Of things transitory the king may be put out of possession, but not of things permanent, nor of an inheritance. *Res v. Bp. of Winton*, Cro. Jac. 54.

7. The king may have a port and a toll in it without consideration. *Lutw.* [843.]

8. In cases not of prerogative the king's rights are no more favoured than those of a subject. *Res v. Armagh*, 8 *Mod.* 8.

(b) In relation to his courts of justice.

1. The king in his own person cannot adjudge any case, either criminal, or betwixt party and party; but it ought to be determined and adjudged in some court of justice according to the law and customs of England. *Case of Prohibitions*, 12 *Co.* 64.

2. It is not necessary to summon the king for matters in the King's Bench, for he is there always present. 1 *Leon.* 325.

(c) In relation to his ecclesiastical jurisdiction.

1. The king without parliament may make orders for government of the clergy, and may deprive them if they disobey. *Memorandum*, Cro. Jac. 37.

2. The king has prerogative in churches newly founded, as well as the old. *Res v. Bp. of London*, 3 *Lev.* 378.

3. No canon ecclesiastical can be made without the king's license and assent. *Hill v. Good*, Vaugh. 329.

4. But if the king and clergy make a canon, it does not bind laymen without their assent. *Salk.* 412.

(d) In relation to his subjects.

1. Those under the king's power as king of England in another prince's dominions, are under his laws. *Craw v. Ramsey*, Vaugh. 282.

2. The natives of any of the king's foreign plantations are his majesty's natural subjects, and shall inherit in England. Vaugh. 286. 278.

3. It is lawful for any subject to petition the king. *Wrenham's case*, Hob. 220.

4. The king has a right to the service of his subjects. *Salk.* 168.

5. The king shall have all the lands of a subject who, after summons, refuses to return to his allegiance. *Knowles v. Carter*, 1 *And.* 95, 96.

(e) In relation to his colonies and conquered countries.

1. The king may grant a legislative power in the plantations. Holt, 332.

2. In conquered countries, such laws are to take place as the king pleases. *Blankard v. Galdy*, *Salk.* 412. 666.

(f) In relation to the entireness of his nature.

1. No subject can be tenant in common with him. *Chanc. of Cambridge v. Walgrave*, Hob. 127.

2. If part of a thing entire comes to the king, as by outlawry, he shall have the whole. Plow. 243. 323, 324.

3. In case of the king, a joint chose may be apportioned where it cannot in the case of a subject. 1 *And.* 172. 175.

(g) *In relation to prescriptions by him.*

1. The king who is *persona sacra*, being capable of tithes in perannuity, is capable of prescribing to be discharged from the payment of them. *Wallis v. Pain*, Com. 654. Mo. 486.

2. The king's patentees, being a lay person, cannot so prescribe. *Wallis v. Pain*, Com. 656.

[*865] 3.* The king is a mixed person, and can prescribe to have tithes. Mo. 486.

4. Every prerogative contains in itself a prescription. Plow. 322.

(h) *How affected by a statute.*

1. The king cannot be divested of any of his prerogatives by the general words of an act of parliament. *Rex v. Armagh*, 8 Mod. 8.

2. He is not bound by statutes, unless expressly named. Jenk. Cent. 212. 307. Willis, 535. Hob. 146.

(i) *How affected by a custom.*

1. A custom in London that pawnee may retain goods pawned till he is paid, &c., does not bind the king where his goods are pawned by a stranger, Plow. 243.

2. He is not bound by any custom, nor by fictions of law. Jenk. 83. 287.

(j) *What things belong to him by virtue of his prerogative.*

1. All fines for offences belong to the king, but may be granted. *Groenvelt's case*, 1. Ld. Raym. 214. 3 Salk. 265. 2 Vent. 268.

2. Where a statute inflicts a disability to take lands, or a pecuniary penalty for a public crime, and does not declare who shall take, they shall go to the crown. *Thornby v. Fleetwood*, Com. 211. Stra. 323. 371. 374.

3. In cases of things which are *nullius in bonis*, where no visible right appears, the law gives them to the king, as derelict lands, treasure-trove, extra parochial tithes, &c.; so, where the right is equal between the king and the subject, the king's title has the preference. *Woodward v. Fox*, 2 Vent. 268.

4. Sturgeons and whales are given to the king by reason of his prerogative. Plow. 315.

5. Debts due to wife *dum sola* are forfeitable, and assignable to him by the husband. *Miles v. Williams*, Gilb. 322.

6. The king's prerogative in mines ought to be measured by the value, and not by the quantity only, of the gold or silver ore contained therein. Plow. 328, 329, 339.

7. He cannot take benefit of a devise to superstitious uses, but shall apply it to a charitable use. *Rex v. Lady Portington*, Salk. 163.

(k) *In relation to grants by the king:—*

1. What and how he may grant.

1. The king may grant a chose in action, which no other can do. Plow. 243.

2. The king can grant over the lands of

fugitives, though he has them only till they return. *Haverhill v. Hare*, 2 Ro. 13.

3. He may grant the office of a searcher of a port for life after the death, &c. of tenant at will. *Rex v. Kemp*, Comb. 335, 336.

4. The king can grant to a corporation to have the return of writs. *Corporation of Darby v. Foxley*, 1 Ro. 118.

5. The king may grant by his charter, that all ships coming to such a haven shall be unladen at a certain place, and not elsewhere. *Chamberlain of London's case*, 5 Co. 62 b. 3 Leon. 264. S. C.

6. Books that have no certain author, as the almanack printed before the common prayer, are deemed prerogative copies, and the king may grant the exclusive right of printing them. *Stationers' Company v. Seymour*, 1 Mod. 257.

7. Where the king is deceived in his grant, it is void. Holt, 420.

[See also *ante*, tit. GRANT, div. (A.) Vol. I. p. 731.]

2. What he cannot grant.

1. The king cannot grant the penalty of a penal law to a subject. *Rex v. Tullin*, 1 Ro. 10.

2. He cannot grant a power to make judges, &c. Jenk. Cent. 171. 307.

3. He cannot grant by patent, that the goods of a subject shall be forfeited for doing a thing that his patent prohibits. *Horne v. Joy*, 1 Sid. 441. 1 Show. 137.

4. He cannot grant a monopoly. *Nightingale v. Bridges*, Holt, 473. Comb. 53.

5. The king cannot grant a hundred in a county, with all offices and profits thereunto belonging, and the execution of all writs within the same; for a hundred cannot now be severed from the [*866] county* by grant from the king. *Cole v. Ireland*, 2 Show. 98.

[See also *ante*, p. 731, &c.]

(l) *In relation to gifts or grants to the king.*

1. The king cannot take or part with any thing but by matter of record. Plow. 213. 484. 552. 562. Mo. 193.

2. He cannot entitle himself to any inheritance or freehold devised to him without matter of record. 1 Dy. 74. pl. 13.

3. Nor to any use. 1 Dy. 74. pl. 17.

4. Nor take another's interest in land without matter of record. 3 Leon. 155.

5. A bond to the king, to be paid *dom. reg.* without "heirs and executors," is not within the 33 H. 8. Mo. 193.

6. A bond *in pais* taken for the king, by one who is neither officer nor commissioner, is not good. Mo. 193.

7. A gift to the king, and to his heirs and successors, is good to the body politic in both the limitations, for he may have both heirs and successors in the body politic. Plow. 242.

(m) *In relation to presentations by the king.*

1. The king has prerogative to present by creating the incumbent a bishop in Ireland, but it must be to the first avoidance. *Cro. Eliz.* 790.

2. Where the crown has a title to present, on promoting the incumbent to a bishopric, it is not necessary to be done during the life of the promotee. *Rez v. Abp. of Armagh*, 2 Stra. 841.

3. The king may present to any church which he has in right of wardship, either under the great seal, or under the seal of the court of wards. *Stephens v. Potter*, *Cro. Car.* 99, 100.

4. The king presents to a church void by cession. *Mo.* 399.

5. Presentation to a church belongs to the king by his prerogative, if the incumbent be created a bishop. *Cro. Eliz.* 527. *Comb.* 300.

6. And the king shall present *toties quoties* the incumbent is so promoted. 3 *Lev.* 377.

7. A dispensation to hold in *commendam* for six months shall not serve for the king's turn. 3 *Lev.* 377, 378.

8. A lapse does not incur against the king. *Jenk.* 244.

9. Where the king presents by lapse, and has then other good title to present, yet it is void. *Tufton v. Temple*, *Vaugh.* 14.

10. After institution and induction, a presentation by the king is void, though it be *ad corroborandum*, &c. *Salk.* 162.

11. The king may change his presentation. *Carter*, 37.

12. The king, in right of his prerogative, may revoke his presentation. *Fisherbert v. Reeves*, *Com.* 176.

13. The king's title to a presentation by office may be controverted without traversing the office. 1 *Ld. Raym.* 201.

14. As to an advowson, he has no greater privilege than another person. *Cro. Jac.* 54. 395.

15. The king may, by usurpation (by presentation,) be put out of possession of the next avoidance, &c., but not of a thing permanent, as advowson, land, &c. 1 *And.* 81. *Hob.* 242.

16. Double usurpation does not put the king out of possession of an advowson. *Mo.* 421.

(n) *In relation to dispensations, pardons, and licenses, &c. granted by him;—*

1. What are good.

1. The king can grant a dispensation in cases where the archbishop cannot by the st. 25 H. 8. *Mo.* 542.

2. The queen, by her prerogative, may license a new bishop to retain his parsonage in *commendam*, not with the negative words in the standing statute of 25 H. 8., because not expressly named therein. *Armiger v. Holland*, *Cro. Eliz.* 542. 601.

3. The king's license given by parol to an officer to be absent, is good. *Mo.* 193.

4. The king may dispense with a corporation for any thing which in its nature may be dispensed with, even penal laws. *Thomas v. Sorrell*, *Vaugh.* 347, 348, 349, 350.

5. Where the offence wrongs none but the king, he may dispense with it. *Vaugh.* 344.

6. Where the suit is only the king's for the breach of a penal law, and which is not to the damage of a third person, the^s king may dispense. *Thomas* [*867] *v. Sorrell*, *Vaugh.* 334. 336.

7. He may license with a *non-obstante* what is not *malum in se*. *Jenk.* 164. 307.

8. He might formerly dispense with a statute; and therefore, on a conviction of 25 Car. 2. c. 2., for holding the office of colonel in the army without taking the oaths to government, if the king granted the convict a dispensation, he might plead it in bar to an action brought by an informer for the penalty; but this prerogative is now abolished. *Godden v. Hales*, 2 *Show.* 475. 478. *notis.*

9. He may pardon a disability where it is only the consequence of a judgment; *after* where part of the judgment. *Rez. v. Crosby*, *Salk.* 689.

10. The king's power to pardon cannot be extinguished or granted away. *Dr. Greenwell's case*, 1 *Ld. Raym.* 214.

2. What are not.

1. The king cannot license a nuisance, or a thing *malum in se*. *Rez v. Williams*, *Comb.* 19. *Hob.* 149.

2. He cannot pardon murder except it be by express words. *Rez v. Parson*, *Salk.* 499.

3. The king cannot pardon an offence done to a particular person. *Thomas v. Sorrell*, *Vaugh.* 333.

4. He cannot discharge the right of a subject, or hinder him of a remedy the law gives him. *Lane v. Cotton*, *Salk.* 19. *Ludlam v. Lopes*, 8 *Mod.* 105.

5. Where the suit is the king's only for the benefit of a third person, and the king is entitled by the prosecution and complaint of such third person, the king cannot release or dispense with such suit without the agreement of such party concerned. *Thomas v. Sorrell*, *Vaugh.* 334. 336. 8 *Mod.* 104, 105.

6. He cannot exempt in any case where the subject has an interest, &c. *Hans Sloane v. Pawlet*, 8 *Mod.* 19.

7. The king cannot dispense with future acts of parliament, though he may with things in *future* whereof he has the inheritance. 1 *Dy.* 53. pl. 1.

8. A grant to one under the great seal of the penalty and benefit of a penal statute, with power to dispense with the said statute, and to make a warrant to the lord chancellor or keeper of the great seal to make as many dispensations and to whom he pleased, is utterly void and against law. *Case of Penal Statute*, 7 *Co.* 36.

(o) *In relation to charges and mortgages upon his property.*

1. The king may charge his own revenue by his grant. *Banker's case*, 5 Mod. 47. 53. Salk. 58. S. C.

2. He cannot grant an annuity so as to charge his person. *Anon.* Salk. 58.

3. He cannot charge the revenue of the excise, &c. with a rent or sum beyond his own life. Comb. 271, 272, 273.

4. He cannot dispose of his crown, sea-ports, &c. Jenk. Cent. 79. 171. 190. 304.

5. The crown property can only be granted under the great seal. 1 Saund. 187. 274.

6. But that of the duchy of Lancaster under the seal of the duchy, or county palatine. 1 Saund. 187.

7. If the king mortgages land upon condition of redemption by payment of the money, the mortgages must demand the money at the Exchequer; if he do not, the king, after office found, can re seize the land. Mo. 556.

(p) *In relation to lands held by the king.*

1. The king is presumed to hold all his property in right of the crown, and therefore, in a conviction for stealing deer in the king's forest, it is not necessary to show in what right he was seized of the forest. *Rex v. Smith*, 7 Mod. 78.

2. The king has divers manners of inheritance, some to give only in possession and not in reversion, some to grant as well in reversion as in possession, but which he cannot use or exercise himself; others, as well to use and enjoy himself, as to grant to another the possession, remainder, or reversion. *Earl of Rutland's case*, 8 Co. 55 b.

3. If the king purchase land to him and his heirs, he shall have it in his political capacity. 7 Mod. 78.

4. If the king purchase land and dies, leaving two daughters and no son, the eldest daughter only shall inherit the whole, and not both. Plow. 247.

5. The king may have heirs as [*868] well in* the body natural as in the body politic. Plow. 238.

6. The king may be seized of a less estate than a fee-simple. 1 Saund. 187.

7. He may reserve rent to a stranger. Plow. 243. 3 Leon. 127.

8. The king cannot suffer a recovery, for no *præcipe* lies against him. Plow. 244.

9. He cannot be seized to an use. Cro. Jac. 50.

10. The king cannot make livery of seisin. Plow. 13.

11. None can distrain for or have execution of a seigniority or rent in the land of the king, though he holds it in his natural capacity. Plow. 242. Jenk. 112.

12. If lands come to the king which are charged with a rent, no distress lies, but a petition of right. 1 Leon. 191.

13. An intruder cannot gain any estate or possession against the king. Plow. 546.

14. Usurpation cannot put the king out of possession, nor make his advowson disappendant; *secus* in case of a subject. Hob. 140.

15. Tenant in tail, the reversion in the king, makes a feoffment; this does not discontinue nor divest the reversion out of the king. Plow. 552, 553.

16. A fine levied of land in the king's hands is void, and passes nothing. 2 And. 210.

17. None can enter upon the king, though in case of a subject the entry would be lawful; except in certain special cases. 2 And. 114. 210.

18. If the king's goods are taken wrongfully, he may seize the party's goods until he has made restitution. Plow. 336.

(q) *In relation to lands held of the king.*

1. All lands are held either mediately or immediately of the king. Plow. 498. Id. 13.

2. The king need not demand a rent to entitle himself to a re-entry. 1 Leon. 12. 2 Leon. 134. 3 Leon. 125.

3. The king may take advantage of a forfeiture by re-entry for default of payment of rent without any demand, although he holds the land in the capacity of his body natural. Plow. 213. 243.

4. The king cannot enter for a condition broken until office found. Plow. 213.

5. He is not bound to take notice of a condition made by a common person. 3 Leon. 126.

6. Where a lease is upon condition, the king can defeat it without demand. 1 And. 304, 305, 306.

7. But where an abbot was bound by express words to make a demand of rent, it was held the king ought also to demand it. Mo. 210.

8. A bond for performance of covenants may be assigned to the king, but no execution before the party be warned. 2 Leon. 55.

9. He may distrain for a rent-secck. 3 Leon. 125.

10. The king may distrain for the arrears of rent in all the tenants' lands holden of others, though he has the seigniority in his body natural; so, for the arrears of a rent-charge granted to him. Plow. 239. 242. 323.

(r) *What power the king possesses in other respects.*

1. The king may create an Irish peer under the great seal of England by express words. *Rex v. Knollys*, 2 Salk. 510.

2. He may enable a town not corporate to choose burgesses. *Case of Burgesses of Parliament*, Hob. 15.

3. He may imprison seamen in time of war, but he ought not to imprison them. *Rex v. King*, Comb. 245. See also *Broadfoot's case*, 1 Fort. 154.

4. If the king kills a man, there is no remedy. *Plow.* 247.

5. The king can lay an embargo *pro bono publico* only. *Sir J. Child v. Sands*, 1 Salk. 32.

6. He can restrain merchants by a *ne exeat regno*, without showing cause. *East India Company v. Sandys*, Skin. 166.

7. The king and council may disfranchise any member of a corporation. *Braithwaite's case*, 1 Vent. 20.

8. The king by his prerogative may nominate sheriffs without the usual meeting in the Exchequer. 2 Dy. 225. pl. 35.

9. The crown may enlarge the boundaries of a city or county. *Rex v. Inhab. of Norwich*, 1 Stra. 177.

10.* The king may by proclamation [*800] adjourn a term, or cut off any of its returns. 7 Mod. 1.

(s) *What he cannot do.*

1. He cannot restrain any part of the sheriff's power. *Norton v. Simmes*, Hob. 13.

2. The king cannot take away another man's right against his will. *Tufton v. Temple*, Vaugh. 14.

3. He cannot alter the law by patent. *Jenk.* 97. 285.

4. He can make no new laws, being but one branch of the legislative power. *Case of University of Cambridge*, 10. Mod. 126.

5. The king cannot arrest any man. *Case of Prohibition*, 12 Co. 64.; cites 1 Hen. 7. 4.

6. Nor restrain a ship from trading, nor lay an embargo in time of peace. *Sands q. t. v. Child*, Comb. 215, 216.

7. He cannot make a new course of inheritance. *Plow.* 335.

8. The king cannot unite a manor to the duchy of Cornwall without parliament. 1 Dy. 95. pl. 33.

IX. RESPECTING REMEDIES AT LAW FOR THE KING'S RIGHTS;—

(a) *For the recovery of his debts.*

1. What actions he may bring.

1. The king is ever out of possession of his right, and therefore may bring account against him who takes the profits of his lands. *Reg. v. Vaughan*, Cro. Eliz. 508.

2. The queen by prerogative can have account or debt at her election against executors upon the receipt of their testator. *Mo.* 975. 3 Leon. 198.

3. If the king's debtor dies, he may pursue his remedy against his executor at any time. *Attorney-General v. White*, Com. 433.

2. In what court he should sue.

The king can sue in whatever court he pleases. 1 Ro. 290.

3. Of the process.

A baron's fiat is the commencement of the king's suit. 2 Saund. 70.

4. Venue.

1. By the king's prerogative he can lay his personal actions where he pleases. 1 Sid. 412. 1 Vent. 17.

2. The king by his prerogative may waive the venue before appearance. *Rex v. Webb*, 1 Mod. 2. 1 Vent. 17.

5. Proceedings in such actions.

1. Where there are two obligees, and one grants the bond to the crown, the king may sue alone. *Miles v. Williams*, 10 Mod. 245.

2. A chose in action may be assigned to him; and either he or his grantee may have an action for it in their own names. *Myles v. Williams*, Gilb. 321.

3. The king's counsel are prosecutors in the king's case. *J. Kely.* 8.

4. The king may amend or vary his declaration, but it must be done the same term that it is put in. *Plow.* 243. Vaugh. 65.

5. The king may waive a demurrer, and take issue at his pleasure. *Baker's case*, 5 Co. 104. Cro. Eliz. 752. S. C. *Plow.* 243. *Jenk.* 133. Cro. Car. 347.

6. The king can waive an issue, but then he cannot take the same issue again. *Palm.* 40. *Jenk.* 133. Cro. Car. 347.

7. The king may waive an issue, and demur in law; or *contra*; but if he and the party are at issue, he cannot change his issue in another term. *Plow.* 85. 236. 322. Vaugh. 65.

8. But though the king may waive a demurrer or issue, no other person can (though he claims the king's right) without the attorney-general's consent. *Rex v. Bagshaw*, Cro. Car. 347. 1 Ld. Raym. 211.

9. The king shall be bound by misrecital, misuser, and misconception of action, and for such matters his writ shall abate, as well where he is sole party as where he is party with another. *Plow.* 85.

10. An executor cannot wage his law against the crown. *Attorney-General v. White*, Com. 437.

11. The defendant cannot plead several matters under the statute 4 & 5 Anne. c. 16. when the king is plaintiff. *Rex v. Archbishop of York*, Willes, 533.

12. The king may stay proceedings, and the attorney-general enter a *no.*

*pros.** after the jury are returned. [*870] *Rex v. Benson*, 1 Vent. 33.

13. A *nisi prius* cannot be granted when the king is a party. Willes, 535.

14. The king may have a *distringas* with tales before a default of jurors. *Jenk.* 87.

15. The king need not join in a demurrer to evidence. *Jenk.* 133.

16. He may try his issue at the bar, or by *nisi prius*, at his pleasure. *Soutley v. Price*, Cro. Car. 247.

17. Where several issues are joined, the king may try which he pleases first. *Rex v. Hare*, Stra. 266.

18. He can recover no damages in a *quare impedit*, yet he must declare *ad damnum*. Hob. 23.

19. His execution removes the body and the executions at the subject's suit. *Jenk.* 170. 213.

20. He need not bring a *scire facias* to revive a judgment after the year. *Anon.* 2 Salk. 603.

21. The queen's debtor in Newgate may be turned over to the marshal, in order to charge him in B. R. at the queen's suit. *Rex v. Smith*, 11 Mod. 97.

22. Where the king's debtor, taken in execution for debt in B. R., is brought up into the Exchequer by prerogative writ, tested prior to the arrest, and committed to the Fleet in execution for both debts, B. R. having him brought up by *habeas corpus* will remand him. 2 Dy. 197. pl. 44.

(b) *Relative to the priority of the king's debts over those of other persons.*

1. The king's debts are either of record or not of record; both sorts bind the debtor's land from the time they are entered into. 6 Saund. 70. c. d.

2. A common person shall not have execution against the king's debtor, until agreement for the king's debt. *Stevenson's case*, Cro. Car. 390.

3. The king shall have his debt paid first by an executor, without regard to priority. 1 And. 130.

4. If the king have his debtor in execution, no subject can have execution till the king's debt is satisfied. 3 Dy. 297. pl. 24.

5. If the queen grants to her almoner *catalla felonum de se*, still if the felon be indebted to the queen, she shall have her debt out of the goods before the almoner, if the patent has not the words *licet tangat nos*. Mo. 126.

6. A debt due to a man *jure uxoris* is considered as a debt originally due to him, within the meaning of the statute 7 Jac. 1. c. 15. *Rex v. Thornton*, Park. 71.

7. Land-tax money being in the hands of a collector, he commits an act of bankruptcy on the 7th, and his goods are seized under a warrant from the commissioners for land-tax money the 8th, a commission issues the 17th, the assignment is made the 19th, and the goods are sold under the warrant the 22nd; the assignees cannot bring trover to recover the goods, not having paid or tendered the money for which they were a pledge in the commissioners' hands; but the warrant binds the goods, not from the date, but from the time of seizure. *Brassey v. Dawson*, Stra. 978.

8. A debt by simple contract seized into the king's hands is to be preferred to bonds not paid before seizure; but payment of bonds by an administrator before seizure, or notice of the king's debt, may be well pleaded against the king. *Reg. v. Allanson*, Park. 260.

9. A precedent judgment obtained by a bond creditor shall be preferred to the king by the statute 33 Hen. 8. c. 39.; but a subsequent judgment shall not. *Rex v. Dickinson*, Park. 262.

10. The king shall not have his preroga-

tive to be first satisfied of a debt which comes to him by assignment, if a prior extent be executed. *Curson's case*, 3 Leon. 239.

11. Though a statute be extended, yet if the king come before the *liberate*, he shall be served first. Hob. 339.

(c) *What lands are liable to his executions.*

1. Where a person is accountant to the king, or if any money, or goods, or chattels personal of the king come to the hands of a subject by matter of record or in fact, the land of such subject is charged therewith, and liable to the seizure of the king, into whatsoever hands it comes afterwards, be it by descent or purchase, or otherwise. Plow. 321, 322.

2.* An extent shall go for the king's money against any one who [*871] embezzles it, but not where money due to the king is paid and his security cancelled before a bond given by a deputy to his principal for balance in his hands. *King v. Clark*, Com. 388.

3. An accountant purchases land and sells it, and then becomes in arrear to the queen; she can extend the land for the arrears in the hands of the purchaser, by the statute of 13 Eliz. Mo. 126.

4. If one indebted to the king for customs by covin enfeoff his friend of land purchased by the king's money, himself taking the profits, it shall be seized into the king's hands *quousque*. 2 Dy. 160. pl. 41.

5. If one conveyed his land with a power of revocation, and afterwards became indebted to the king, yet they were extendible by the common law. Hob. 339.

6. If a collector indebted to the king alien his lands and goods, and die without heir or executor, process shall issue against the terre-tenants and possessors of the goods to account. 2 Dy. 160. pl. 41.

7. If the king grant a manor, and a grange, parcel of the manor, and the grantee grant the grange with a clause of distress in case the grantee shall be charged with any rent on account of the said grange, the whole grange is by the reservation chargeable with the rent. *Calthrop v. Heyton*, 2 Mod. 55.

8. The terre-tenants of land wholly belonging to the king's accountant after he became so, are liable to account for the arrears due from such officer; but lands purchased jointly to him and his wife for her jointure are discharged: so if, seized in fee, he convey to both for her jointure before he get the office, she shall not be charged for this land. 2 Dy. 224. pl. 32.

9. If one joint-tenant be indebted to the king, but a moiety shall be extended, and if he die before any extent, no extent shall be made on the land in the hands of the survivors. *King v. Manning*, Com. 619.

10. Upon an extent the king shall have the

whole land, though the conusee could have but a moiety. 3 Leon. 240.

(d) *When and how the land, &c. is discharged from the king's debts.*

1. If the king take land by conveyance from him who purchased it of his debtor, and after re-convey it, yet the land is discharged. Hob. 45.

2. A terre-tenant, though he do not make a title, yet may plead, by way of exoneration and discharge of the land, that the king's debt is satisfied; so may an occupant; so may a disseisor. *Attorney-General v. Stonehouse*, Hard. 229, 230.

3. A rent in the king's case lies in render and not in demand; and therefore, where a grant from the crown contains a clause of re-entry "if the grantee or his heir shall be lawfully charged with any rent," the grantor is lawfully charged after the rent-day is passed. *Calthorp v. Heyton*, 2 Mod. 55.

4. So, where the king is entitled to the goods of a *fele de se*, a subsequent act of indemnity shall not divest the king's right. *Rez v. Turvil*, 2 Mod. 54.

5. The lands of the king's debtor are not discharged by a release of all rights and titles from the king. *Sir W. Fleetwood's case*, Hob. 46.

(e) *Where the king's title is concerned in any issue.*

1. Where the king's title is concerned in an issue to be tried, the king can send his writ to the judges, commanding them not to proceed *rege inconsulto*. 1 Ro. 188. 206. 1 And. 281.

2. If title appears for the king upon pleading between other parties, the court shall *ex officio* adjudge for the king. Plow. 943. Hob. 127. Cro. Car. 590. Vaugh. 299. Jenk. 215. 219.

3. If the king's title be not fully clear, yet by consent of the plaintiff he may have a writ to the bishop. Hob. 127.

4. He may choose whether he will maintain the office, or traverse the title of the party, and so take traverse upon traverse. Vaugh. 62. 64.

5. If the king's title is traversed by the party, the king may maintain his title against the traverse of the other, or may traverse the affirmative of the other. Plow. 243.

6.* He may take a traverse where [*872] his title appears by office. 1 Saund. 22. n. [c].

X. PROCEEDINGS AGAINST THE KING.

1. None can count against the king; but plaintiffs must sue to him by petition. Plow. 241. 553.

2. A writ of error may be brought against him without petition. *Anon.* Holt, 972.

KING'S BENCH.

The king may sit in the King's Bench,

but the court gives the judgment. *Case of Prohibitions*, 12 Co. 64.

[See also ante, tit. COVAT, vol. 1. p. 397.]

KNIGHT.

1. Knight is a name conferred by the king, and cannot come by reputation. *Rez v. Bishop of Chester*, Holt, 493. 1 Ld. Raym. 292, 304. S. C.

2. The word "*miles*," means a knight batchelor. 6 Mod. 106.

3. It is a good plea in abatement, that the plaintiff has received the order of knighthood; but the plea must allege that he was a knight at the time the action was brought. 6 Mod. 106.

LANCASTER.

1. The dutchy of Lancaster has *jura regalia*. Jenk. 27. 160.

2. The name of duke of Lancaster, and all the jurisdictions of the dutchy, are drowned in the name of king and in the jurisdiction royal, by the accession of the estate royal to the person of the duke. *Dutchy of Lancaster's case*, Plow. 214. 217. 222.

3. The lands and possessions of the dutchy of Lancaster are separated from the crown. *Rez v. Smith*, 7 Mod. 78.

4. The possessions of the king in right of his dutchy of Lancaster can only be granted under the seal of the dutchy. 1 Saund. 187. n. (1).

5. A reversion of dutchy lands, lying out of the county palatine, passes by grant, without attornment; but on a feoffment, livery ought to be made. *Carpenter v. Marshal*, 1 Lev. 28.

6. If the king makes a feoffment of land of the dutchy out of the county palatine, to hold of him *in capite*, the feoffee shall hold of him *in capite* as of his crown of England. *Dutchy of Lancaster's case*, Plow. 223.

7. The defect of want of an original, when assigned for error, cannot be supplied as in the courts of Westminster. 2 Saund. 101. s. n. [u].

8. After final judgment in the court of Lancaster, execution may be sued out of the courts at Westminster, if the goods or body of the defendant cannot be found in the jurisdiction. 1 Saund. 98. n. (2).

LANDLORD AND TENANT.

[See post, tit. LEASE.]

LAND-TAX.

1. A man may be assessed to the land-tax, either where he dwells or carries on his employment. *Trowel v. Ellford*, 5 Salk. 616.

2. The corporation of the Royal Exchange Assurance Company in London was held

liable to be assessed to the land-tax in their corporate capacity. *Royal Exchange Assurance Company v. Vaughan*, 1 Burr. 155.

3. A landlord who covenants to pay land-tax shall pay on the rent received, not on that taxed. *Yau v. Leman*, 1 Wils. 21.

4. A tenant may always deduct the money paid by him for land-tax, unless there be an express agreement that money paid for land-tax shall not be deducted. *Cranston v. Clarke*, Say. 79.

LAPSE.

1. Where the bishop refuses to institute because the clerk is not qualified, the living shall lapse if the patron do not present within six months from the avoidance, and [*873] not six months after notice* of the bishop's refusal. *Hele v. Bishop of Exeter*, 4 Mod. 140.

2. Presentation by lapse makes no severance of the advowson. *Fulton v. Temple*, Vaugh. 14.

3. A lapse is not grantable, either before or after it falls. Hob. 154.

4. The title of lapse is rather an administration than an interest. *Colt v. Bishop of Coventry*, Hob. 154.

5. If the king present by lapse, this does not sever the advowson from the manor. Hob. 302.

6. Where a man accepts a second benefice with cure, without a dispensation or qualification, the first benefice is void, and the patron may present; but if he does not present, then if it is under value, no lapse shall incur until there is a deprivation and notice; but if it is above value, then the patron must present within six months. *Shute v. Higden*, Vaugh. 131, 132.

7. The collation for lapse is in right of the patron, and will serve him for a possession in a *darrein presentment*. *Colt v. Bishop of Coventry*, Hob. 154.

8. If the bishop collate wrongfully, yet this makes such a plenarty as shall bar the lapse of the metropolitan and king. *Gawdy v. Bishop of Canterbury*, Hob. 302.

9. If the king has title to present for simony, and the incumbent die or be deprived, the king can present till a new incumbent be instituted and inducted at the suit of the patron, not afterwards. Mo. 877.

10. The patron's title continues against the ordinary, and against the king, till the lapse is executed. *Colt v. Bishop of Coventry*, Hob. 152, 154.

11. If the clerk continue instituted eighteen months without induction, yet no lapse incurs to the king. Hob. 154. S. C.

12. If a lapse incurs to the king, and the patron presents, upon which a new incumbent is made, who afterwards dies or is deprived, the king has lost the benefit of the lapse. Mo. 224.

LARCENY.

1. Larceny cannot be committed by a wife jointly with her husband; *contra* of murder. J. Kely. 31.

2. Bail is requisite upon the removal of an indictment for petty larceny. *Reg. v. Powell*, Gilb. 4.

3. The court will not grant a *habeas corpus* to bail a person charged with larceny. *Rex v. Mickal*, 11 Mod. 261.

LATITAT.

1. A latitat may be sued out before the money is due, or before any cause of action; but the party must not be arrested upon it before. *Hanway v. Merrey*, 1 Vent. 28. 2 Saund. 1 d. 2 Keb. 503.

2. A latitat will run into Wales. 2 Saund. 194.

3. It does not abate by the demise of the king. *Everard v. Black*, Yelv. 52.

4. If sued forth within a year, it is a sufficient commencement of the suit to save the limitation of time. *Culliford v. Blandford*, Carth. 223. 2 East, 574. n.

5. It may be considered by the plaintiff either as the commencement of the suit, or as process to bring defendant into court; but in general, the bill is the commencement, and the latitat process. 2 Saund. 1 a. n. (1). 1 c. n. (1).

6. A latitat is not an original, but in the nature of an execution. *Everard v. Black*, Yelv. 52.

7. A latitat may be pleaded without alleging a bill of Middlesex. *Hollister v. Coulson*, Stra. 550.

8. Continuances of a latitat may be entered at any time. 2 Saund. 1 a. n. (1).

LAWS.

OF LAWS IN GENERAL.

1. The law and customs of England are the inheritances of the subject, which he cannot be deprived of without his assent in parliament. 12 Co. 26.

2. When a law is given to any people, it is necessary that it be conceived and published in words which may be understood, for without that it cannot be obeyed, and the law which cannot be obeyed* is no law. *Hill v. Gould*, Vaugh. [*874] 305.

3. *Lex non cogit ad impossibilia, sed impotentia excusat legem*, how to be understood. *Moore v. Hussey*, Hob. 96.

4. The meaning of the words in any law are to be known either from their use and signification according to common acceptance before the law made, or from some law or institution declaring their signification. *Hill v. Gould*, Vaugh. 305. *Harrison v. Burwell*, 2 Vent. 17.

5. *Leges posteriores leges priores contrarias abrogant.* Cro. Jac. 121. 529.

6. *Lex non curat de minimis*, as the odd hours of the year, or odd farthings of a sum. *Lastlove v. Thompson*, Hob. 88.

7. A law which a man cannot obey, nor act according to, is void, and no law. *Thomas v. Sorrell*, Vaugh. 337.

8. To do a thing which no law can make lawful is *malum in se*. *Thomas v. Sorrell*, Vaugh. 337.

9. When the law is known and clear, though it be unequitable and inconvenient, yet judges must determine as it is, without regarding the unequibleness; but where the law is doubtful and not clear, the judges ought to interpret it as is most consonant to equity. *Dixon v. Harrison*, Vaugh. 37, 38.

10. Whatever is declared by act of parliament to be against God's law, must be so admitted to be by us, because it is so declared by an act of parliament. *Hill v. Gould*, Vaugh. 337.

11. A law not published is not obligatory. *Harrison v. Bursell*, Vaugh. 228. 236.

12. Some presumptions of law are so violent, that though they be false, a man cannot aver against them. *Slake v. Drake*, Hob. 297.

13. To excite the people to the disobedience of a public law is the highest offence under high treason. 2 Vent. 23.

14. Jamaica, Barbadoes, &c. are not governed by the laws of England. 4 Mod. 221.

15. A law canon is the law of the kingdom as much as an act of parliament. *Edes v. Bishop of Oxford*, Vaugh. 21. 132. 327. (*Vide ante*, tit. CANONS, p. 249.)

16. The convocation, with consent of the king, may make canons to bind the clergy, and the disobedience of them is a cause of deprivation; and if also made a temporal offence, may proceed to deprivation, though not punish him as for a temporal offence. *Bishop of St. David's v. Lucy*, 12 Mod. 238, 239.

[See also *post*, tit. STATUTE.]

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I. WHAT MAY BE LEASED.

1. Leases of copyhold lands are void, and a forfeiture. *Salk.* 187. 537.
2. A right cannot be leased. *Bridgman v. Charlton*, 1 Ro. 260.
3. If A by indenture lease lands which are not his, *habendum* from a day to come, this is a good lease by estoppel for that time. *Foot v. Berkley*, Orl. Bridg. 545.

II. RELATIVE TO THE LANGUAGE PROPER FOR A LEASE.

1. "Covenant, grant, and agree," are apt words to make a lease for years. *Whitlock v. Hotton*, Cro. Jac. 92. W. Jo. 231. *Copley v. Hepworth*, 12 Mod. 1.
2. The word "covenant" will make a lease though the word "grant" be omitted. *Richards v. Sely*, 2 Mod. 79.
3. Covenant that the covenantee shall enjoy, &c., is a good lease; *contra*, that a stranger shall, &c. *Littleton v. Pernes*, 1 Leon. 136. Mo. 861. *Sed vide* 1 And. 137.
4. "I will you shall have a lease for twenty-one years, make a lease in writing, and I will seal it," was a good lease *instantly*, before the statute of frauds. Mo. 8.
5. By articles it is covenanted that the lessor doth let, &c.; and he further [*876] covenants to make a lease for twenty-one years; this is a present lease. Mo. 459.
6. A deed that the person shall "hold and enjoy the premises from seven years to seven years, for and during the term of forty-nine years," with a proviso that it shall be void on payment of so much money, though intended only as a collateral security, amounts to a present lease. *Richards v. Sely*, 2 Mod. 80.
7. A permission by the plaintiff to the defendant to kill sheep in his passage, is not a lease which passes any property in the soil, but a promise for an easement. *Fathers v. Calcut*, W. Kely. 179. *Sed vide* 11 Mod. 42.

III. WHEN IT IS GOOD BY PAROL.

1. At common law, a lease might have been for any number of years by parol. 1 Saund. 276.
2. It may be so at this day by writing without a deed. 1 Saund. 236 a.
3. A lease for three years, to commence in future, by parol, is void by the statute of frauds. *Anon.* 12 Mod. 610.

4. But leases by parol for less than three years from the making, to commence at a future day, are not within the statute of frauds. *Riley v. Hicks*, 1 Stra. 651.

5. An office cannot be leased by parol. *West v. Sutton*, 2 Ld. Raym. 853.

6. A lease by baron and feme is not good without deed. *Thetford v. Thetford*, 1 Leon. 204.

IV. RELATIVE TO THE CERTAINTY REQUISITE IN A LEASE.

1. A lease is void for uncertainty in the commencement or end of the term. 2 And. 12, 13. 1 And. 258, 259. *Rowe v. Huntington*, Vaugh. 85.
2. A lease for so many years as J S shall name is good. *Stukeley v. Butler*, Hob. 174. Mo. 666. 1 And. 259.
3. But he must name them in the life of both parties. 3 Leon. 86.
4. Lease for years to such a person as J S shall name, is void. Mo. 666. 1 And. 259.
5. If a termor demises the land to another, to begin after his death, it is good; *aliter* if it be for so much of his term as should be behind at his death. *Foot v. Berkley*, Carter, 155.
6. Lease by termor for so many years as shall be to come at the death of J S is void. 2 And. 12.

V. RELATIVE TO MISRECITALS AND MISDESCRIPTIONS IN A LEASE.

1. Lessor in a lease recites a former lease, and that he was entitled to the reversion, and then grants the land to another for years, to be held after the expiration of the former lease; held, that the second lease was void, because he was then entitled to the land in possession. *Miller v. Maynewaring*, W. Jo. 355.
2. The parish of H extending into two counties of B and W, a lease of a close of the name of C, in the parish of H, in the county of B, though in fact the close is in W, is good; but where the name of the parish itself is mistaken, the lease is bad. 3 Dy. 292. pl. 72.
3. Lease to three at will; the lessor by deed, but without livery, reciting a surrender of the lease at will, grants to them and their heirs; this is void, for it is no confirmation, the estate at will being determined. 3 Dy. 269. pl. 20.
4. Lease of all my meadows in D, containing ten acres, when I have twenty in D; all pass. 1 Dy. 80. pl. 56.

[See also post, diff. X. p. 882.]

VI. RESPECTING THE DIFFERENT DESCRIPTION OF LEASES;—

(a) *Of leases for life.*

A lease for life ought to be made upon the land. 1 Ro. 373.

(b) *Of leases for years.*

In every lease for years there is a privity

of contract and a privity of estate. *Barnes v. Freeman*, Carter, 163.

(c) *Of leases by estoppel.*

1. A lease by estoppel is not a sufficient lease within a condition. *Wigley v. Blackwell*, Cro. Eliz. 780.

2. A lease which works partly [*877] in interest* cannot work at all by estoppel. *Foots v. Berkley*, Orl. Bridg. 544.

3. If the lessor has nothing in the lands at the time of the grant, the title begins by estoppel, and the estoppel runs with the lands. 2 Saund. 418 a.

4. But if one having nothing in the land leases for years, and afterwards purchases the land and dies, if it be by indenture, the heir will be estopped to avoid it. *Anon.* Dall. 26.

(d) *Of leases upon contingency.*

Lease to one for eighty years, if he so long live, and if he die, the lessor demises the land to a second person (being party to the deed) for so many of the eighty years as are unexpired at the death of the first lessee; the lease to the second is good if the first die within the term. 1 And. 259. Mo. 480.

(e) *Of leases under powers.*

1. If a man has power to make leases for one-and-twenty years, rendering the old rent, he cannot make a lease in reversion, or to commence after the expiration of another lease in being. *Countess of Sussex v. Worth*, Cro. Eliz. 5. *Wroth v. Countess of Sussex*, 3 Leon. 132. *Lepur v. Wroths*, 1 Leon. 35.

2. An authority to make leases for twenty-one years in *presenti* does not extend to making leases in reversion, (although to commence in *presenti*, but only in possession. *Duke of Buckingham v. Ad. Antrim*. 1 Sid. 101.

3. An indefinite power to lease for lives or years, so as upon every lease to be made in possession the old rent be reserved, and on every lease in reversion double the old rent be reserved, will justify the granting of leases in reversion. *Hamings v. Brabason*, Orl. Bridg. 8.

4. If husband and wife lease pursuant to 32 H. 8. c. 28., and then by act of parliament the land is settled to the husband for life, with power to make leases for three lives or twenty-one years, he may make leases in reversion during the first lease. 3 Dy. 357. pl. 43.

5. A power is granted to demise lands usually letten; lands which have been twice letten are within this proviso. *Dixon v. Harrison*, Vaugh. 38.

6. If it be to lease lands "which at any time before have been usually letten," that which was not in lease at the time of the proviso, nor twenty years before, is not within the proviso. *Tristram v. Roper*, Vaugh. 34, 35.

7. When the issue in tail was but one year old, his guardian leased lands (never before) let for twenty years; this was held not to be such letting for twenty-one years before, as would enable the issue in tail when of age to lease, under 32 H. 8. c. 28. 3 Dy. 271. pl. 28.

8. An authority given by parliament to make leases, rendering the true and ancient rent of the land demised, is not properly pursued by leasing the manor, comprehending services which had never before been leased. *Mountjoy's case*, Moore, 197.

9. Under an authority by parliament to make leases, yielding the true and ancient rent of the land so letten, a lease of many lands together, of which some had not been before demised, is void. Mo. 197.

10. A tenant for life having power to grant building leases for sixty-one years, reserving the best improved ground-rent, granted a lease for that term, which was not expressed to be a building lease, but which contained a covenant by the lessee to keep in repair the demised premises, (old houses,) or such other house as should be built during the term; held that this was not a building lease within the power. *Jones d. Couper v. Verney*, Willea, 169.

11. Under an authority to dispose of personages inappropriate to the use of incumbents, a lease for years cannot be made. *Cardinal Pool's case*, Moore, 42. pl. 129.

12. Where leases are made by tenants for life that have also a power to grant leases for years, they shall be esteemed to be made by virtue of the power, if they cannot have their full effect otherwise. *Thomlinson v. Dighton*, 10 Mod. 36.

13. Livery is not necessary to a lease made by virtue of a power. *Owen v. Saunders*, 1 Ld. Raym. 166.

14. If a manor and other hereditaments be settled, with a power to the tenant for life to make leases, "in possession, or in reversion, for one, two, [*878] or three* lives, for thirty years, or any other number of years, determinable at one, two, or three lives, so as such demise be out of the ancient demesne lands parcel of the premises, or any other lands used therewith for seven years previous to the settlement, so as the ancient rent be reserved," an absolute lease for thirty years of lands then in lease, for the term of two lives then in being, is a good execution of the power; but a lease of copyhold lands parcel of the manor, is not warranted by this power. *Loveday v. Winter*, 5 Mod. 245. *Winter v. Loveday*, Holt, 414, 415.

(f) *Of voidable leases.*

1. A lease to an infant is voidable at his election. Cro. Jac. 320.

2. A woman cannot avoid a lease made by her first husband and herself, if, upon her

marrying again before any day of payment, her second husband accepts the rent. 2 Dy. 159. pl. 36.

3. A voidable lease may be made good by acceptance of rent. Willes, 176.

4. A lease by tenant in tail *in presenti*, rendering rent, is not void by his death, but only voidable by the entry of the issue. *Symonds v. Cudmore*, 1 Show. 373. T. Raym. 132.

5. But if made to commence after his death, it is void. *Semb. Opey v. Thomasius*, T. Raym. 132, 133, 134.

6. Husband being seised in right of his wife, and entitled to be tenant by the curtesy, made a lease of the wife's lands, rendering rent; after his wife's death, the husband held the land, and died; it was held not to be necessary for the heir to enter to avoid the lease, for that the lease was absolutely determined; it being void, and not merely voidable. *Miller v. Maynewaring*, W. Jo. 354. Cro. Car. 398, 399.

7. A lease made by virtue of a power, but not in conformity to it, being granted by a tenant for life who has a bare naked power, without any legal interest, is void, and not capable of confirmation by the remainderman accepting rent. Willes, 176.

8. A lease by husband and wife by deed indented, if waived by the wife after the death of the husband, will be the demise of the husband alone; for her waiver avoids the lease *ab initio*. *Buller v. Baker*, 3 Co. 25 a.

VII. RESPECTING ENTRIES;—

(a) *By the lessor.*

1. Lessor makes a lease, and enters upon lessee for years, and levies a fine *sur consuance de droit come ceo*, &c., and five years pass; the lease is barred. *Barn v. Freeman*, Carter, 199.

2. A lease made before entry, after a recovery, is void. *West v. Sutton*, 2 Ld. Raym. 853.

(b) *By the lessee.*

1. If a lease for years be made to begin presently, and lessor continues in possession, a fine by lessor with non-claim will bar the lessee. *Hemming v. Brabason*, Orl. Bridg. 13.

2. Lease to B, to commence two years after; the two years being expired, B before entry may grant it, although the lessor continue in possession. *Wheeler v. Thorogood*, Cro. Eliz. 127.

3. Lessee for years enters and makes a lease at will, lessee at will enters, and dies; lessee for years has an actual possession to all purposes, without any other actual entry: the lessor might lease to a stranger without entry upon a tenant at sufferance. *Geary v. Bearcroft*, Orl. Bridg. 396.

4. The possession of lessee for years is sometimes called the actual possession of the

reversioner, though improperly. *Geary v. Bearcroft*, Orl. Bridg. 495.

5. Lessee enters before the term commences, and continues in possession afterwards; he is a disseisor for the whole time. *Hennings v. Brabason*, 1 Lev. 46. 1 Keb. 154. S. C.

(c) *By an intruder.*

Lease for years, to commence after the end of a former lease; which expiring, a stranger enters; the lessee may grant his term; otherwise, if once in possession. Cro. Eliz. 15.

[See also *ante*, tit. ENTRY, p. 576.]

VIII. RESPECTING LESSEES;—

(a) *In general.*

None can take by a lease but those who* are party to the deed. [*879] *Cole and Friendship's case*, 1 Loon. 287, 288.

(b) *Ecclesiastical persons.*

A lease to a spiritual person contrary to 21 H. S. c. 13. is not void. *Woodley v. James*, 3 Dy. 358. pl. 47.

IX. RESPECTING LESSORS:—IN RELATION TO LEASES BY PERSONS OF THE FOLLOWING DESCRIPTION:—

(a) *By an Attorney.*

A lease made by an attorney in his own name is void, and the covenants to pay the rent are void. *Frontin v. Small*, 2 Ld. Raym. 1419.

(b) *By the chancellor of the dutchy of Lancaster.*

Leases in reversion by the chancellor of the dutchy of Lancaster, without the usual proviso *si quis plus dare voluerit*, are void by the ordinances of that court; but where in such a lease it was said, *the king with the assent of the counsel of the dutchy, leased*, although false, it is good, for leases granted by the *counsel* are excepted by those ordinances. 2 Dy. 232. pl. 7.

(c) *By a corporation, or the members of it.*

1. Upon a lease by the queen to the aldermen of C, they have capacity to take, but not to grant to another. *Aldermen of Chesterfield's case*, Cro. Eliz. 35.

2. If one of two bailiffs of a corporation make a lease to the other, it is void. *Salter v. Grosvenor*, 8 Mod. 303.

(d) *By ecclesiastical persons;—*

1. What leases by them are good and binding.

1. By the 13 Eliz. c. 10., a dean and chapter may lease to A for twenty-one years; then to B the next year, for twenty-one years, to begin from the making, &c.; and so to C; and all the leases will stand together. *Lyn v. Wym*, Orl. Bridg. 125.

2. Leases made to the queen by colleges, deans and chapters, wardens of hospitals, or

any other having spiritual or ecclesiastical livings, against the provision of the act of 13 Eliz. c. 10., are restrained by the same act, as well as leases made to common persons. *Case of Ecclesiastical Persons*, 5 Co. 14 a.

3. A lease by a dean with the assent of his chapter, and the seal of the chapter affixed, is good, if the dean alone be parson in right of his deanery; *secus*, if the dean and chapter together be parsons imparsoned. 1 Dy. 40. pl. 1.

4. Lease by a bishop made by indenture, to commence immediately for twenty-one years, where there is an old lease in *esse*, is good, notwithstanding the statute of 1 Eliz. Mo. 107.

5. An abbot leases land for life, and afterwards leases the reversion thereof, *habendum* the land from Michaelmas next after the first lease ended for twenty-one years; this is a good lease of the land for so long; and the *habendum* and the premises will stand together; and therefore, though the tenant for life die before attornment, yet the grant is good, the *habendum* showing that it was intended as a lease of the land, and not as a grant of the reversion. *Thragmorton v. Tracy*, 2 Dy. 124. pl. 40.

6. Bishops may make concurrent leases, lease upon lease every year, for twenty years together, so there be none in being at once exceeding twenty-one years. *Berry v. White*, Orl. Bridg. 101.

7. An estate granted by copy is in judgment of law an estate at will; and therefore, lands granted by copy are lands accustomedly letten to farm within the statute 13 Eliz. c. 10. *Dean and Chapter of Worcester's case*, 6 Co. 37 a.

8. In a lease made under the provision of 13 Eliz. c. 10. it is sufficient if the accustomed rent be reserved yearly at one time. *Id.* *Ibid.*

9. If two manors have been usually let for 60l. a year, and the bishop grant a lease of one of them only, reserving thereon the same rent at which both the manors were let, yet this lease is good, for the 1 Eliz. c. 19. says, that the old accustomed rent or more shall be reserved. *Threadneedle v. Lynam*, 1 Mod. 203.

10. Under the statute 13 Eliz. c. 10., it is sufficient if the accustomed yearly rent or more be reserved; a heriot need not be reserved. *Dean and Chapter of Worcester's case*, 6 Co. 37 a.

11.* A demise of tithe with [*880] land is good within the 13 Eliz., but a demise of tithe barely is not good; the ancient rent must be reserved. *Holden v. Smallbrooke*, Vaugh. 203, 204. 2 Saund. 304.

12. All leases made by the bishop, though contrary to the 1 Eliz., bind himself. 1 And.

242, 243. *Bishop of Salisbury's case*, 10 Co. 58 b.

2. What are void or voidable.

1. At common law, bishops with the consent of the chapter, might, by their charter of feoffment, grants, or leases, bind their successors. *Bishop of Salisbury's case*, 10 Co. 58 b.

2. The statute 31 H. 8. c. 23. gives power to such persons only to lease, who had of themselves no power to make leases before that act. *Lyn v. Wyn*, Orl. Bridg. 124.

3. The statute 31 H. 8. c. 13. avoids leases of lands whereof any estate for life, &c. was then in being, made by religious persons within a year before; a copyhold was granted by copy for life, and then the religious house made a lease of it to another for eighty years; held that the lease was void, the copyhold estate being a lease for life within the statute. *Attorney-General v. Heyden*, 3 Co. 7 a.

4. A lease made by a spiritual corporation within one year before the dissolution by 31 H. 8. c. 13. was held void. 3 Dy. 280. pl. 13.

5. A bishop makes a lease for twenty-one years, and after some of those years were expired he made a second lease, to begin at the end of the other; held void. *Dean and Chapter of Westminster's case*, Carter, 15.

6. Lease by the dean and chapter of P. on a house in London, the house being then in lease to another for ten years; it is void both by 13 and 14 Eliz. *Hunt v. Singleton*, Cro. Eliz. 564.

7. Dean and chapter make a lease of houses in a city, and seventeen years are in being; then they grant a new lease of the same for forty years, to begin presently; it is not warranted by the statute of 14. Eliz., and not good. *Dean and Chapter of Westminster's case*, Carter, 12, 13.

8. Lease by a bishop for three lives, where there is a lease for years in *esse*, is void. Mo. 253.

9. Lease by dean and chapter for three lives, when the remainder of a term of years is in *esse*, is not void during the life of the dean, but voidable. Mo. 875.

10. On the grant of an advowson to a bishop and his successors after the death of the present incumbent, a lease by the bishop to commence when the advowson falls in, is void against his successor, if the incumbent survive him. 2 Dy. 244. pl. 60.

11. A lease made by a bishop (by deed indented) of a fair, parcel of the possessions of the bishopric, for three lives, reserving the old rent, and confirmed by the dean and chapter, does not bind his successor; so also if the lease had been for twenty-one years. *Paul v. Major*, 5 Co. 2d part, 3 a.

12. Lease by a bishop by indenture, reserving the ancient rent, (but which mentioned not any rent certain, nor let not all the manor together, which was usually de-

mised under one rent,) is a void reservation, and a void lease against the successor. *Owen v. Thomas App Rees*, Cro. Car. 95.

13. A lease of tithes, or any incorporeal thing, for three lives by a bishop, is void as against his successor, although as much rent be reserved as usually has been reserved and paid upon any former lease. *Mo. 778. Dean and Chapter of Windsor v. Gover*, 2 Saund. 303, 304.

14. When lands, parcel of a bishopric, are leased for years, and afterwards the bishop ousts the lessee, and makes a lease, confirmed by the dean and chapter, for three lives, rendering the ancient and accustomed rent, such lease is voidable by the successor. *Elmer v. Gale*, 5 Co. 2 a.

15. The grant with the ancient fee of an ancient and necessary office, is excepted out of the general restraint of 1 Eliz.; but where such office has been granted to one, a grant to two is not out of the general restraint. *Bishop of Salisbury's case*, 10 Co. 58 b.

16. After a grant of the next avoidance, if the parson make a lease, rendering rent, confirmed by the patron and ordinary, and afterwards the parson be deprived [*881] ed for marriage, the grantee* of the term presenting the incumbent shall avoid the lease. 2 Dy. 133. pl. 1.

17. Lease by a parson for twenty-one years after the statute of 13 Eliz. rendering the ancient rent; the patron and ordinary confirm it; the parson dies; the lease is void by death, as well as by non-residence or resignation. *Mott v. Hales*, Cro. Eliz. 123.

18. Lease made by parson, patron, and ordinary, being avoided by the next incumbent, discharges all his successors. Cro. Car. 84, 85.

3. When and how such leases may be made good by confirmation.

1. Lease for years or grant of a rent-charge by a parson, to commence after his death, confirmed by the patron and ordinary, shall bind the successor. 1 Dy. 69. pl. 30.

2. If a parson make a lease, which the bishop confirms as patron and ordinary, but not the chapter, and afterwards the bishop collate another, and then is translated, this lease cannot be avoided during the lives of the bishop and the incumbent who found the land charged. 3 Dy. 356. pl. 42.

3. The grant of any ancient office to one with the ancient fee by a bishop, shall not bind the successor, unless confirmed by the dean and chapter, for such grants remain at the common law. *Bishop of Salisbury's case*, 10 Co. 58 b.

4. If a lease be made by a dean and chapter, not warranted by 14 Eliz., reserving rent, and the dean dies, the succeeding dean and chapter may receive the rent, for it was only voidable. *Dean and Chapter of Westminster's case*, Carter, 16.

5. The bishop must confirm, as well as the dean and chapter, a grant of parcel of the prebend, or it shall not bind the successor. 1 Dy. 61. pl. 30.

6. If a bishop have two chapters, both must confirm his leases, or the successor may avoid them, but if one be dissolved, then the confirmation of the other suffices. 3 Dy. 289. pl. 26.

7. A prebendary makes a lease for seventy years, the bishop and chapter confirm the demise aforesaid *quoad* fifty-one years, it is certainly good for that time. 3 Dy. 338. pl. 43.

8. Lease for years of tithes by the provost of W., confirmed by the dean and chapter, but not by the patron and ordinary; the provostship by act of parliament is united, on the death of the provost, to the deanery; acceptance of rent by the dean is no confirmation of the lease, which is void by the provost's death. 2 Dy. 239. pl. 40.

[See also *ante*, tit. CONFIRMATION, p. 333.]

(e) *By husband and wife, or either of them.*

1. A, possessed of a lease of tithes in the right of his wife, as executrix to her former husband, grants *totum jus suum*; it is good. *Arnold v. Bidgood*, Cro. Jac. 318.

2. The wife is liable to such covenants as run with the land, if she agree to the lease after his death. 2 Saund. 180.

(f) *By joint-tenants.*

1. One of two joint-tenants for life leases for years and dies, the lease is still good. 1 Ro. 309. 401.

2. So, if one of two joint-tenants for life make a lease for years, if he and his companion so long live, the lease is good. 1 Ro. 309.

3. But in such case, if one dies, the lease is determined. 1 Ro. 310. 317.

(g) *By a lord of a manor.*

There needs no reservation of power to lease upon copyholds; the lord may grant them according to the custom. *Bosworth v. Forward*, Orl. Bridg. 177.

(h) *By tenant for life.*

Lessee for life, without impeachment of waste, may make a lease for years, excepting the trees. *Scheverel v. Dale*, Poph. 193. *Bacon v. Gyrlen*, Cro. Jac. 296.

(i) *By tenant for life and remainder-man.*

1. If A, tenant for life, and B, remainder-man in fee, by indenture, make a lease, by the delivery of the deed, it is the lease of A during his life, and the confirmation of B; and after the death of A it is the lease of B, and the confirmation of A; and, therefore, where the plaintiff in an ejectment declared on a joint demise by A and B, it was held* bad. *Trepars's case*, 6 [*882] Co. 14 b. 1 And. 46.

2. And after the death of tenant for life, the reversioner can declare alone for waste as upon his own lease. *Mo. 72.*

(j) *By tenant in tail.*

1. Tenant in tail makes a lease for twenty-one years, rendering the ancient rent, and afterwards releases it; still the lease is good against the issue. 2 Ro. 407.

2. If tenant in tail make a lease in *presenti*, and after convey over his estate by fine, the donee in this case cannot avoid this lease; otherwise it seems when the tenant in tail makes a lease to commence at a day to come; there the donee may avoid it. *Opey v. Thomasius*, T. Raym. 132, 133, 134.

3. Tenant in tail before the statute of uses made a feoffment to the use of himself and his heirs, and then made a lease reserving rent, and after the statute he died; held, that this lease could not be avoided by a grantee of the issue, who aliened without entering. 1 Dy. 51. pl. 17.

4. Tenant in tail may make a lease for twenty-one years, though the reversion be in the crown. *Berry v. White*, Orl. Bridg. 106.

5. Lease for forty years by husband, tenant for life, and his wife, who had the remainder in tail, is void against her issue. 3 Dy. 252. pl. 97.

6. Two coparceners in tail; the husband of one, being tenant by the curtesy, joins with the other in a lease, reserving rent jointly; it is not a good lease within the 32 H. 8. Lat. 45.

7. A lease by tenant in tail for twenty years, to commence at next Michaelmas, is not good. *Carter*, 15. *Contra*, 2 Dy. 246. pl. 69.

8. So, if a lease of tenant in tail be in being, and nine years expired, and he makes a lease to begin twenty years after the nine years expired. *Dean and Chapter of Westminster's case*, *Carter*, 15.

9. Tenant in tail of the gift of the king, leases for years, and dies; his heir accepts the rent, and is afterwards attainted; the king is in by *reverter*, and shall avoid the lease, notwithstanding this acceptance of rent. 2 Dy. 115. pl. 65.

(k) *By a termor.*

1. Held, that if lessee make an under-lease for the whole term, reserving rent to himself, it is an under-lease, not an assignment. *Peulieny v. Holmes*, 1 Stra. 405.

2. If termor for years grants for a less term, to commence after his death, it is good. *Salk*. 413. *Stoutvil v. Hicks*, Holt, 414.

3. JS makes a lease for life or years in being; after the first term expires, a stranger enters by tort, yet the lessee may grant over his term; but if he had entered, and afterwards been put out, he cannot grant his term till he re-enters. *Carter*, 196.

4. If lessee of a term, to begin after a former term, leases all the lands by indenture for twenty-one years, to begin presently, this is a good lease by estoppel between the parties. *Foot v. Berkley*, Orl. Bridg. 545.

5. Lessee for years cannot bind or charge the freehold. *Cro. Jac.* 142.

(l) *By one who has a wrongful estate.*

1. A lease by an intruder upon the queen's possession is not good. *Kenscy v. Richardson*, *Cro. Eliz.* 728.

2. A lease made by a person who has a tortious reversion shall be good, if before the commencement of the lease the tort be purged, and the lessor has a rightful estate. *Pulian v. Hardy*, *Skin*. 3.

3. A tortious fee-simple is sufficient to support a lease. *Potter v. Pinkney*, 10 Mod. 205.

4. Disseisor leases for life, rendering rent, then grants the reversion to the disseisee, who accepts the rent; this is a good confirmation. 1 Dy. 30. pl. 207.

(m) *By one who has no estate.*

A lease made by one who has no estate is good, if the lessor be entitled before the commencement. *Pulian v. Hardy*, *Skin*. 3.

X. RELATIVE TO THE TIME OF THE COMMENCEMENT OF A LEASE.

1. A lease for years may commence in *futuro*. 1 Leon. 171. Orl. Bridg. 4.

2. So also a lease at will. *Geary v. Bearcroft*, Orl. Bridg. 499.

3. A lease *per auter vie* cannot commence in *futuro*. 2 And. 29. [*883]

4. A lease for life cannot commence in *futuro* unless by way of remainder. *Curriton v. Gadbury*, 1 Leon. 275, 276.

5. If a lease is made for years, and no time fixed for it to begin, it begins presently, i. e. from the sealing and delivery. *Meshim v. Heckford*, J. Bridg. 21. 1 Vent. 137. S. P.

6. So, where there is an impossible date, as from the 40th of September. *Tailour v. Fitzgerald*, 1 Vent. 137. Orl. Bridg. 534.

7. If a lease be made to begin from the making of a lease, it takes effect the same day, whether it be dated or not. *Norris v. Hundred of Gawtry*, *Hob.* 140.

8. Where several lands (held part for life, and part for years,) are demised to A for years, *habendum* from the time of the death, surrender, forfeiture, or determination of the estate and term of the first lessees, and the estate in one of the parcels determines, the term granted to A shall begin immediately in the said parcel, although the other estates are in *esse*. *Cook v. Gerrard*, 1 Saund. 183, 184.

9. Lease for years to commence after an estate tail is good. 1 Sid. 102.

10. Where a man makes a lease for years, and afterwards makes another lease of the same land, to commence before the expiration of the first term, the second lease is void. 1 Dy. 26. pl. 167.

11. A lease to commence after the end of another, when there is no such other, shall commence presently. *Bassett v. Lewis*, 1 Lev. 77. 254. *Vaugh.* 73, &c.

12. So, if the former proves to be void *ab initio*, or becomes so afterwards. 2 Leon. 11.

13. If a lease is made to commence after the end of another lease, which is misrecited in a material part, as in the date, &c., so that there is no such lease in *esse*, it shall begin presently. *Carter*, 151. *Foote v. Berkley*, Orl. Bridg. 549, 541. 1 Vent. 83.

14. Otherwise if the variance is in an immaterial point. *Foote v. Berkley*, Orl. Bridg. 534.

15. A lease was made to A and B for sixty years, with a clause of re-entry immediately after the deaths of A and B, and of the longer liver of them within the term, after the death of A; within the term, another lease of the same lands was made to C *habendum et occupandum* when the former lease shall determine, after, or by the death, surrender, or forfeiture of the said B; held, the second lease shall commence either after the re-entry by force of the proviso, if any be, and if none, then after the determination and end of the first term by any of the other means. *Bp. of Bath's case*, 6 Co. 34 b.

16. If lands are given to two for their lives, remainder after their deaths to their executors or administrators for forty-one years, if they surrender or otherwise determine their estates for lives, the forty-one years begin presently. *Poole v. Haskey*, Orl. Bridg. 370.

17. And so it is if they had granted away their term for forty-one years, and after surrendered their estate for lives, the grantee might have entered presently. *Poole v. Haskey*, Orl. Bridg. 370.

18. Lease for years by indenture, to commence from Michaelmas, subsisting a former one; if the first lessee purchase the reversion, the second lessee may enter at Michaelmas. 2 Dy. 112. pl. 49.

19. A copyhold is granted to A, B, and C, for their lives, then another grant is made of the reversion for forty years after the death, surrender, or forfeiture of the estate of A, B, and C; C survives, and his wife holds in free-bench; the lease for forty years commences not till after the wife's death. *Chantrell v. Randall*, 1 Lev. 20. 35.

20. Lease to A for twenty-one years, to begin at Michaelmas, remainder to J S for twenty-one years more; there is a privity between them, and after Michaelmas it is an estate to A in possession, if he enter, remainder to J S. *Hemming v. Brabason*, Orl. Bridg. 5.

21. Two closes being in lease, one for forty years, and the other for twenty years, the lessor makes a new lease for forty years from and after the determination of the several demises aforesaid; this is a lease of one close, to commence at the end of twenty years, and of the other at the end of forty years.* *Wyndham v. Debney*, 5 Co. 7 a. Mo. 191.

22. Indentures of demise were [*884] engrossed, bearing date 26th May, 25 Eliz., of land in L, to have and to hold for three years from henceforth, and the said indentures were delivered at four

o'clock in the afternoon from the twentieth day of June in the same year; it was resolved, 1st, that "from henceforth" should be accounted from the day of the delivery of the indentures, and not by any computation of date; 2ndly, though the delivery was in the afternoon of the 20th June, the lease should end on the 19th, for the law rejects all fractions of a day; 3rdly, that in this case, as also where a lease is limited to take effect from the making thereof, the day of the delivery shall be taken inclusively; but if a lease be made to begin from the day of the making, or from the day of the date, the day itself of the date is included. *Clayton v. Presenham*, 5 Co. 1 a. *Barwick's case*, 5 Co. 93 b.

23. That every lease for years should have a certain beginning, is to be intended when it is to take effect in interest or possession. *Bp. of Bath's case*, 6 Co. 34 b.

24. But though a lease for years should not be totally uncertain, yet it may be good as a freehold under circumstances. *Petty v. Goddard*, Orl. Bridg. 39.

25. By indenture between J S of the one part, and A, B, C of the other part, J S demises lands to A for eighty years, if A should so long live, and not alien the premises; and if A die or alien within the term, then that his estate shall cease; and then the lessor granted the premises to B for so many years of the said term as should be then to come, if he should so long live, and not alien; and in like manner to C; and if C die or alien, then the lessor granted it to D, his executors and assigns, for so many years as should be then to come; held, that this was a good lease to A for so many years as he shall live of the eighty years; but the leases to B and C after were void, for the term ended by the death of A; *secus*, if the words of the second demise had been to have and to hold during the residue of the eighty years, and not during the residue of the term; that it was a good possibility in D to have the term for years; but B and C dying in the life of A, the possibility to D could not take effect, because the contingency was to D upon the ceaser of the estates of B and C, who never had any estates, on account of their dying in the life of A. *Chedington's case*, 1 Co. 153 a.

XI. RELATIVE TO THE DURATION OF A LEASE.

1. If a lease be made for years generally, it is a good lease for two years. *Bishop of Bath's case*, 6 Co. 34 b.

2. A lease "for the term of one year, and and so from year to year as long as both parties please," is a good lease for two years; for, after the first year, it is a lease from year to year until the lessor or lessee determine it. *Legg v. Stradwick*, 11 Mod. 205. 2 Salk. 413, 414. 3 Salk. 135. 222. S. C. 12 Mod. 610. *Bishop of Bath's case*, 6 Co. 34 b. Lutw. [75]. *Agard v. King*, Cro. Eliz. 775. *Combes v. Cole*, C. T. Hardw. 305.

3. A lease for three years, and those ended for other three years, and those ended for other three years more, during all the life of the lessor, is a lease for nine years only; *see* case, perhaps, had it been from three years to three years during the life, with livery. *Anon.* 1 Dy. 24. pl. 151.

4. A lease for three years, and at the end of those three years for other three years, and so from three years to three years, is a lease for twelve years. *Newberrie v. Rathbone*, 1 Ro. 287.

5. A lease for ten years by indenture, and that if the lessee pays so much at the end and term of every ten years, then he shall have a perpetual demise of the land from ten years to ten years continually following, and out of the memory of man, is a good lease for no more than ten years. *Plow.* 271, 272, 273, 274.

6. If a lease be made for twenty-one years, with a further covenant by the lessor, "that the lessee shall have the same for twenty-one years more after the expiration of the said term, and so from twenty-one years to twenty-one years, until ninety-nine years thence next ensuing shall be completed and ended," the first twenty-one years shall not be reckoned part of the ninety-nine years. *Manchester Coll. v. Trafford*, 2 Show. 31.

7.* Long leases are not to be [*865] favoured; by the ancient law, a lease for above forty years was held void; they are never without suspicion of fraud. *Freeman v. Barnes*, 1 Vent. 58.

8. A void limitation of the commencement of a lease for years is as no limitation. *Bishop of Bath's case*, 6 Co. 34 b.

9. Without livery, the words "I here demise unto you my house so long as I live, paying, &c." create but an estate at will. *Sharp's case*, 6 Co. 26 a.

XII. RELATIVE TO THE DETERMINATION OF A LEASE.

1. If husband and wife lease land at will, rendering rent, and the husband dies, it is no countermand of the will. *Henstead's case*, 5 Co. 10 a.

2. So also of joint-tenants. *Id.* *Ibid.*

3. A lease at will, rendering rent, is not determined by the marriage of the female lessor. *Id.* *Ibid.*

4. A lessee at will, paying quarterly, cannot determine his will after a quarter is begun, without paying that quarter's rent. *Leyston v. Field*, 3 Salk. 222. *Anon.* 12 Mod. 610. *Aleyn*, 4.

5. If lessee for life leases for years, and afterwards purchases the reversion, and dies within the term, the lease for years is determined, and the heir in reversion can oust him and avoid it. *Anon.* *Dall.* 26.

6. If a lease for years be made to three (naming them), so long as they live, and one of them die, the lease is determined. *Anon.* *Dall.* 2. 1 Dy. 67. pl. 18.

7. If a lease at will be made to three, rendering rent, and one dies, it is no determination of the lease. *Henstead's case*, 5 Co. 10 a.

8. A lease for years to husband and wife, if they or any issue of their body so long live, is not determinable till all are dead. *Mo.* 239. 1 *And.* 161.

9. If a lease be made to A during the life of several, upon the death of one of the *cestui que vies*, the estate is not determined; but A shall have the land during the life of the survivor of them. *Brudnel v. Skidmore*, 5 Co. 9 a. *Hughes v. Crouther*, 13 Co. 66.

10. But if a man lease land for one hundred years, if A and B shall so long live, if one die the lease is ended. *Brudnel v. Skidmore*, 5 Co. 9 a. 2 Vent. 74. 13 Co. 66. S. P.

11. So if a freehold lease be made during the time that C and D shall be justices of the peace, &c. on failure of one of them to continue justice, the estate shall determine. *Brudnel v. Skidmore*, 5 Co. 9 a.

12. Lessee for years makes a lease at will, and the will is determined; he is in of his old possession: *aliter*, if lessee for years makes a lease for years, and it is determined. *Geary v. Bearcroft*, *Cartar*, 66.

XIII. RELATIVE TO THE ASSIGNMENT OF A LEASE.

1. A lease for one hundred years, to commence ten years after the death of B, is good in interest, and assignable immediately. *Hemming v. Brabason*, *Orl. Bridg.* 4.

2. If a lease be made for years to begin at a day to come, and the lessor continue in possession beyond the time of the commencement of the lease, yet the lessee may grant the same over. *Orl. Bridg.* 11. S. C.

3. Assignment of lease for years, to commence after death of S, is void. 1 *And.* 122.

4. If a lease be made to begin at Michaelmas, and before the day a stranger enter, the lessor is disseised; yet the future interest of the lessee is neither divested nor turned to a right, and if the disseisin continue till after Michaelmas, that interest may be granted over. *Hemming v. Brabason*, *Orl. Bridg.* 4. 10.

5. An under-lease for the whole term amounts to an assignment. *Hicks v. Downing*, 1 *Ld. Raym.* 99. 1 Salk. 13. S. C. *Sed vide ante*, p. 862. div. (k). pl. 1.

[*See also ante*, tit. ASSIGNMENT, p. 98.]

XIV. RELATIVE TO THE CONSTRUCTION OF LEASES;—

(a) Generally.

1. By the rules of law, on the commencement of lease, the construction shall be strongest against the lessor, and most beneficially for the lessee. [*866] *Bishop of Bath's case*, 6 Co. 34 b.

2. Where a journey is reserved on a lease for years, to be performed yearly, the law directs for how many years it shall be per-

formed; namely, during the term, and no longer. *Lanyon v. Carne*, 2 Saund. 168.

(b) *In respect of the property leased.*

1. By the demise of the farm of H, the manor of H will pass. *Rowe v. Huntington*, Vaugh. 71.

2. By a lease of a manor to which an advowson is appendant, not saying *cum pertinentis*, the advowson does not pass. *Higgins v. Grant*, Cro. Eliz. 18.

3. A leases ten acres of his rectory for ten years, and afterwards makes a lease of the entire rectory to B; the ten acres pass as parcel without attornment, and after the ten years B shall have them. 3 Dy. 349. pl. 18.

4. Lease of a garden-plot; the lessee assigns, the assignee builds on it, and leaves a little garden-plot; the lessor makes another lease of the garden-plot to a third person; the building passes. *Burton v. Browne*, Cro. Jac. 648.

5. A prior and convent made a lease of the site and all the demesnes of a manor for life, rendering rent; the king after the dissolution made a lease of the manor for years *per nomen maneris*; the rent and the reversion of the demesnes pass. 3 Dy. 233. pl. 10.

6. Lease of an abbey, "and all lands, meadows, pasture, and the under-written, with the appurtenances, &c. viz. such a close and such a close;" the word viz. relates only to the underwritten, and all the other lands shall pass by the express words. 1 Dy. 77. pl. 38.

(c) *In respect of the estate or interest intended to be passed.*

1. In a lease for years, the word "term" is held to imply merely the space of time for which the interest is granted; and such a demise, with remainder over of the residue, should the lessee die within the term, will enure according to the expressed intention of the parties. *Doe dem. Plowden v. Cartwright*, Keny. 529.

2. If a man makes a lease for years, to commence after the surrender, forfeiture, determination, or end of a former lease, the lessee shall not have election; but whichever event shall first happen, on the happening of it, the second lease which before consisted in *interesse termini*, shall begin in possession. *Bp. of Bath's case*, 6 Co. 34 b. Cro. Jac. 71. S. C.

3. If a lease is made to A for the life of A, B, and C, he has but one entire estate for three lives. *Pinker v. Litcott*, Orl. Bridg. 376. *Fletcher v. Fisher*, Lutw. [584]. Mo. 398. *Boon v. Adwick*, Cro. Eliz. 491.

4. A lease for eighty years, and from the end thereof for twenty-one years more; the whole is one term of one hundred and one years. *Hemming v. Brabazon*, 1 Lev. 45.

5. The reservation of several rents does not make several terms. S. C. Orl. Bridg. 7.

6. The lessee granted the lands to W R,

his executors, &c., *habendum* to him and his executors' after the death of the grantee; adjudged that the whole term passed. *Germaine v. Orchard*, 3 Salk. 222.

7. When a lease for years shall be made good by reference, the reference ought to be to a thing which has express certainty at the time of the lease made, and not to a possible or casual certainty. *Bp. of Bath's case*, 6 Co. 34 b.

8. A house is leased "so that the lessee may make his profit of the house;" yet he may not pull it down, nor do waste in it. *Throckmorton v. Tracy*, Plow. 160.

8. If a man makes a lease of a wood, *ad faciendum maximum proficium meliori modo quo poterit*, the lessee cannot thereby cut the trees, nor do waste. *Anon.* 4 Leon. 9.

10. If a man having a warren leases the game, the soil does not pass. *Rice v. Wiseman*, 1 Ro. 259.

11. But by the lease of a park, the soil passes. 1 Ro. 259.

12. A lease for years made in one county will pass lands in that and in another county also; *secus* of a freehold, as there must be livery in both. 2 Dy. 246. pl. 71.

13. Lease to J S for life, *habendum* to him and A, B, and C, (his three sons) successive; the sons shall not take, either in possession or by way of remainder.* [*887] *Windemore v. Hubbard*, Cro. Eliz. 58.

14. Lease to two and the heirs of one for years, is only a lease for years. 1 And. 223.

15. Where A has a lease for the life of himself and two others, B and C, and grants the land for the life of himself, or for the life of B or C, this passes the whole estate and freehold for the life in question; and there is only a contingency or possibility that it may come back to the grantor. *Pinker v. Litcott*, Orl. Bridg. 376.

16. A lease made to A, B, and C, for their lives, *habendum* to A for life, the remainder to B for life, the remainder to C for life, they shall take according to the *habendum*. *Dowse's case*, Cro. Eliz. 25.

17. Where the king, after making a lease of lands for years, with the deadands, granting all deadands generally (not reciting the lease) to his almoner, and after the expiration of the lease made a new one like the former, the second lessee, and not the almoner, shall have the deadands. 1 Dy. 77. pl. 37.

18. A lease for twenty-one years to A, and after the expiration of thirty-one years, then to A for forty years, the latter term is a future interest. *Hemming v. Brabazon*, Orl. Bridg. 7.

(d) *In respect of the time of the commencement of the lease, and for payment of rent.*

1. A lease for years *habendum* from henceforth, includes the day of making; but *habendum* from the day of the date, excludes

the day of the date. *Cornish v. Cussey*, Aleyn. 76, 77. *Sed vide* Cro. Jac. 258, *contra*.

2. Lease *habendum a die confectionis* excludes the day of delivery. 1 And. 273.

3. Where a lease is to commence from a day to come, that day is excluded. *Macdonel v. Weldon*, 8 Mod. 54.

4. If a lease be made to one in November, rendering rent at Michaelmas and the Annunciation, still the first payment is to be at the Annunciation, being the first day of payment in time, though not the first in nomination. 2 Ro. 213.

(e) *In respect of covenants in the lease.*

1. Covenant by the lessor that the lessee shall have *hedgebote* by assignment of his bailiff, shall not restrain the tenant's legal right to take without assignment; *secus*, if the lessee had covenanted not to take without assignment. 1 Dy. 19. pl. 115.

2. Lessee may be restrained by condition not to alien; *secus*, if the lease be to him and his assigns. *Stukley v. Butler*, Hob. 170.

3. A covenant in a lease for years, that the lessee shall pay the rent, without naming his executors or administrators, is determined by his death. *Osborne v. Steward*, 3 Mod. 231.

4. A covenant in a lease to warrant the lands, extends only to lawful entries of strangers. 2 Saund. 178. n. (7).

(f) *In respect of provisos in the lease.*

1. Proviso, that the plaintiff may lease for one-and-twenty years, reserving the ancient rents so long as the lessee shall pay the rents; these are words of limitation, and the non-payment of the rent determines the term without a demand. *Tristram v. Roper*, Vaugh. 32.

2. If there be a proviso in a lease "to be void if the rent be behind and unpaid by a month after any of the days of payment," a demand must be made of the rent to determine the lease. *Steward v. Allen*, 2 Mod. 264.

3. Tenant in tail leases to A, B, and C, by indenture to them for their lives; "proviso, and it is covenanted, &c., that the second shall not occupy during the life of the first, and of the third during the life of the second;" they have a joint estate, and the proviso does not sever it. *Scovel v. Cabell*, Cro. Eliz. 89, 107.

4. Lease for years to two, proviso that the lease shall be void if the lessees die; one dies, his executors shall have his part in the term during the life of the other; had the lease been for their lives, the lessor should have had it. 1 Dy. 67. pl. 18. *Sed vide* 1 And. 162.

(g) *In respect of exceptions in the lease.*

1. Timber trees and great woods being excepted in a lease, do not include underwood or the herbage of the woods. 1 Dy. 79. pl. 48.

2* By a lease of a manor, &c. with all the profits of a wood, except forty trees to the lessor to take at his pleasure, the wood is not comprised within the lease, but the lessee shall only have the profits, as pannage, herbage, &c. *Anon.* 4 Leon. 8, 9.

3. By an exception of the woods and underwoods growing or being on the manor, the soil itself is excepted; but notwithstanding the exception, the wood remains parcel of the manor, and by lease of the manor shall pass; but if a lease for life had been made with such exception, it would have been otherwise. *Ive v. Sammes*, 5 Co. 11 a. Cro. Eliz. 522. 2 And. 51. S. C. 11 Co. 46 b.

4. Nor will they go as chattels to executors, but will descend to the heir, if no conveyance be made of the reversion. *Liford's case*, 11 Co. 46 b.

5. But this is only where the wood is such a distinct part of the property, that a *præcipe* would lie of it; for by an exception of trees growing upon pasture land, &c., the soil itself is not excepted, but sufficient nutriment out of the land is only reserved to sustain the vegetative life of the trees; and if the lessor fells them, or by the lessee's license grubs them up, the lessee shall have the soil. *Liford's case*, 11 Co. 46 b.

6. Lease by a prior and convent of a manor, with the appurtenances, and the rents of all tenements of the said manor, tithes of corn, perquisites of courts, and all other emoluments, the advowson of the church there, &c. excepted and reserved, the exception shall be taken to begin at the words *advowson of the church*, and the lessee shall have the perquisites of the courts. 1 Dy. 58. pl. 9.

7. If a man demises "a house and shops, except the shops," this is a void exception. 3 Dy. 264. pl. 40.

8. A demise of a messuage called U, with all houses, &c. excepting the house called New House, &c. this is a good exception. *Cudlip v. Rundle*, Holt, 410, 411.

XV. RELATIVE TO THE LESSOR'S OR LANDLORD'S RIGHTS.

1. Lessor cannot cut trees unless they are excepted in the demise. *Ashmead v. Ranger*, 1 Ld. Raym. 552.

2. But where a lease is made without an exception of the timber trees, the immediate owner of the inheritance, by the assent of the lessee, may cut them down. *Perry's case*, 13 Co. 60.

3. When the lessor excepts the trees, and afterwards has an intention of selling them, the law gives him power, as incident to the exception, to enter and show the trees to those who would buy them. *Liford's case*, 11 Co. 46 b.

4. The mere relation of landlord and tenant is enough to raise an implied assumpsit

to use the premises in a husbandlike manner. 1 Saund. 323 b. n. [k].

5. The tenant can in no case dispute the title of the person by whom he was let in possession; nor can his assignee; nor can the title of the assignee of lessor be disputed; nor can a copyholder dispute that of the lord who admitted him. 1 Saund. 325 a. n. [c].

6. The mere fact of paying the rent does not estop him. 1 Saund. 326.

7. The rule that the lessee shall not be by the law misconusant of seoffments made on the lands, is to be intended as to distresses, actions of debt, and actions of waste. *Mal-lory v. Payn*, 5 Co. 113 b. Cro. Eliz. 805. 832. S. C.

XVI. RELATIVE TO THE TENANT'S RIGHTS.

1. If a lessee for life covenants to repair the houses at his own costs, he can nevertheless cut trees to repair the groundsells of the houses, and the lessor cannot have waste against him. *Anon.* Dall. 28. pl. 3.

2. If there be no great timber upon the land leased, the lessor must find great timber for the repairs. Mo. 7.

3. The tenant of lands has a right to the thorns, &c. for fuel. 2 Saund. 259.

4. When a lease of land is made, the lessee has but a special interest in the trees, as to have the mast and fruit of the trees, and shadow for his cattle, &c.; but the inheritance of the trees is always in the lessor. *Liford's case*, 11 Co. 46 b.

5. But though the trees remain as parcel of the inheritance, the soil itself may still be in the tenant, but he must allow* [*889] sufficient nutriment for the growth of the trees; and the lessee shall have the pasture under the trees, and all the benefit of the trees, and the young of all birds that breed in them. Id. ibid.

6. If a lease is made with an exception of the trees, and a power is given to the lessor to enter and cut them down, and he assign this power to another person, if such power is not properly pursued, the lessee may maintain trespass, both against the lessor and his assignee. *Warren v. Arthur*, 2 Mod. 317.

7. If a lease of land be made for life or for years, in part of which there is a mine open, the lessee may dig in it; but if the mine be not open at the time of the lease made, the lessee cannot open it: if a man has mines hid within his land, and leases his land and all mines therein, the lessor may dig for them: if land be leased in which there is a hidden mine, and the lessee opens it, and then assigns over his estate, the assignee cannot dig in it: if a lessee assigns his term, with an exception of the profits of the mines, or the mines themselves, or of the timber, trees, &c., such exception is void. *Saunders v. Harwood*, 5 Co. 12 a.

XVII. REMEDY FOR THE LESSOR;—

(a) By lessor against lessee.

1. Case lies by lessor against lessee for years for burning the house. *Jermey v. Lowgar*, Cro. Eliz. 461.

2. Lessor seised in fee has no such action against a tenant at will, for he might have secured himself by covenant. *Pantam v. Isham*, 1 Salk. 19. 3 Lev. 359. S. C.

3. Case lies for not suffering the lessor to enter to view whether waste was committed or not. 2 Ro. 21. 311.

4. Lessee for years assigns over his term, and the lessor accepts of the assignee; the lessor notwithstanding may still maintain his action of covenant against the lessee for a condition broken by the assignee. *Bachelour v. Gage*, Cro. Car. 187. 580.

5. If lessee cuts down the trees excepted out of his lease, the lessor shall have trespass *vi et armis* against him. *Percy's case*, 13 Co. 60. Ley, 20. S. C.

6. If lessee holds over his term, trespass does not lie, without an actual entry. *Trevilian v. Andrews*, 5 Mod. 384.

7. Upon a lease to two and the survivor, without impeachment of waste during the life of the lessees, held, that after the death of one, the survivor could not be charged with waste. *Anon.* 1 And. 151.

8. No action lies upon covenants in law after the death of cestuy que vie. *Neltherton v. Jessop*, Holt, 413.

8. If the lessor and the lessee for life join in a lease for years, and after the death of the lessee for life the termor commit waste, the first lessor may declare as on his own demise. 2 Dy. 234. pl. 18.

10. Where the action is against the original lessee, the breach need not extend to assigns. *Guise v. Ellis*, 11 Mod. 313.

11. If a lease be made of meadow, pasture, and arable lands, in which two parcels are described as "lanes, meadows," and an action be brought against the lessee for ploughing up "lanes, meadows," contrary to covenant, the defendant may show that the lands thus described were arable and not meadow lands; for the words in the lease are descriptive of locality, and not of the quality of the lands. *Skeppith v. Green*, 11 Mod. 388.

12. If lessee for life becomes professed, the lessor may enter; but if the lessee be deraigned, he may re-enter. *Thornby v. Fleetwood*, 10 Mod. 413, 414.

(b) By lessor against a stranger.

The lessor of furniture or other goods cannot maintain trover for them pending the lease, unless the lessee be a married woman. 2 Saund. 47 b. Ib. n. [f].

XVIII. REMEDY FOR THE LESSEE;—

(a) By lessee against lessor.

1. Case lies against the lessor for permit-

ting a pump to decay, whereof plaintiff had but the common use. *Pemfret v. Ricraft*, 2 Keb. 505. pl. 76.

2. The lessor undertakes to his lessee, that he shall enjoy without the interruption of any person; if a stranger tortiously* enter, an action lies on this special assumpsit. 3 Dy. 328. pl. 8.

3. No action of trespass will lie for a lessee for years against the lessor, although he distrain without cause. *Anon.* 11 Mod. 209. n.

4. Lessee may bring covenant without having entered. 1 Saund. 322 a. n. (3).

(b) *By lessee against his under-lessee.*

1. Case lies by a lessee for years against his under-lessee, for damaging the premises, because he is liable to the first lessor. *Cudlip v. Rundale*, 4 Mod. 9. *Hicks v. Dowling*, 12 Mod. 100.

2. So, by lessee against his under-lessee, for taking timber affixed to the freehold. *West v. Trefusye*, W. Jo. 224.

(c) *By lessee against a stranger.*

1. The lessee for life of a house may maintain trover for its timbers. 2 Saund. 47 b.

2. An action lies by persons inhabiting a ground floor, against the tenant of the garret, for not keeping the roof in repair. *Anon.* 11 Mod. 7.

XIX. OF PLEADING A LEASE.

1. The consideration of it need not, and should not, be stated in pleading. 1 Saund. 233. n. [a].

2. A lease need not in a declaration be averred to have been in writing, though for more than three years; *secus*, in a plea. *Scob. 1 Saund.* 276 a.

3. A lease by tenants in common cannot be pleaded as a joint lease. *Challoner v. Davies*, 1 Ld. Raym. 404.

4. The place where a lease is made ought to be shown in pleading. *Throckmorton v. Tracy*, Plow. 149, 150.

5. In pleading a lease for life, it is mere surplusage to plead an entry of the lessee. *Liford's case*, 11 Co. 46 b.

LECTURER.

1. A lecturer ought to have the parson's leave to preach. *Turton v. Rignolds*, Holt, 527, 528.

2. The ordinary may license him, but cannot determine the right to the lectureship. *Bishop of St. Bartholomew's case*, 3 Salk. 87. 144.

3. For the right is triable at common law; but the ordinary is judge of his fitness. *Churchwardens of St. Bartholomew's case*, Holt, 418.

4. If the bishop refuse a fit person license, his remedy is by appeal. Holt, 528.

LEET.

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I. RESPECTING THE COURT LEET GENERALLY,
AND WHEN IT SHOULD BE HELD.

1. A leet may be appendant to a hundred, or be in or belonging to a hundred, *ratione hundredi*, and then all the inhabitants within the hundred are within the jurisdiction of the leet. *Davies v. Lowden*, Carter, 28. 177. Mo. 426.

2. If the king purchase part of the manor, the leet is appendant to the other part. 1 And. 27.

3. A leet may extend into one or more manors, or there may be several in one manor. *George v. Lawley*, Holt, 553, 554. Skin. 398. S. C.

4.* The sheriff's tourn is the [*891]
supreme leet of the county. 2
Ro. 74.

5. A presentment at a leet was quashed, where the court appeared to be held above a month after Michaelmas. *Dacon's case*, 1 Vent. 107.

6. But the leet may by prescription be held at different times than a month after Easter or Michaelmas. *Rex v. Gilbert*, 12 Mod. 4. *Rex v. Jennings*, 11 Mod. 228.

II. RELATIVE TO THE JURISDICTION OF THE
COURT.

1. A presentment in a court leet is the proper remedy when a man is disturbed in a common passage or way. *Pain v. Patrick*, 3 Mod. 294.

2. Excessive toll is inquirable in a leet. *Sanderson's case*, 4 Leon. 12.

3. A man may be amerced in a court leet for not scouring a ditch in a highway, notwithstanding the statute of 18 Eliz. c. 9., which gives the forfeitures for highways to the surveyors of the highways. *Stephens v. Hayns*, T. Raym. 250.

4. The duty of an ale-taster appointed by a court leet, is to make presentment at the leet on his finding the liquor not according to the assize. 1 Mod. 202.

5. The leet can make bye-laws for the regulation of trade and husbandry. *Bricklayers' case*, Palm. 396.

6. The sessions cannot discharge a constable and appoint another, except on the neglect of the leet. *Rex v. Lashmere*, 11 Mod. 380.

7. A court leet can amerce for none but public nuisances, and not for a particular trespass or damage to the lord or any other. *Rex v. Dickenson*, 1 Saund. 135. 135 c. n. (5.) 136. 12 Mod. 598.

8. A custom cannot authorize to the contrary. 1 Saund. 135 c. n. (5.)

9. A presentment at the leet for digging coney burrows, and breaking the soil in the waste, was quashed, because it was not *ad commune nocumentum*; for a leet cannot amerce for things to the damage of the lord. *Aye's case*, T. Raym. 160.

10. The erection of a pigeon-house is inquirable in a leet as a common nuisance; and none can erect it but the lord or the parson of the church. Mo. 238. 421. *Contra*, Cro. Jac. 491.

11. One was amerced in a leet because he left the gates open *ad nocumentum inhabitantium*, but held void. Mo. 356.

12. Pound breach is not inquirable there. 4 Leon. 12.

III. RELATIVE TO THE PROCEEDINGS OF THE COURT; AND HOW PRESENTMENTS THERE SHOULD BE.

1. All above the age of twelve ought to do suit and service at the leet, which is called suit real or legal. *Dacre v. Nixon*, 2 Ro. 56.

2. All the resiants ought to be presented at the leet. 2 Ro. 3.

3. An alien cannot be sworn in a leet. Palm. 14.

4. The lord of a leet may have a certain sum *pro certa leta* of all the resiants within the leet. *Bullen's case*, 6 Co. 77 b.

5. One who who was resiant was returned as a chief pledge by the chief pledges of the leet, but made default, and was amerced, but did not appear, nor was he sworn as a chief pledge; this does not make him a chief pledge. *Bullen's case*, 6 Co. 77 b. 1 Brownl. 189. Yelv. 186 S. C.

6. A leet is a court of record, and the steward is judge there, and therefore he may set a reasonable fine for any contempt before him; but courts which are not of record cannot fine or imprison. *Griesley's case*, 8 Co. 38 b.

7. The steward of a leet can impose a fine upon one who gives him the lie, or uses contemptuous words, or commits a misdemeanor in court before himself. Mo. 470. 8 Co. 41 a 41 b.

8. The steward may fine a man present refusing to take the oath of a constable. *Fletcher v. Ingram*, 1 Ld. Raym. 70.

9. A court leet can fine but not imprison. 1 Ro. 35. 74.

10. A court leet may amerce generally, and the sum be afterwards ascertained by the assessors. 11 Mod. 76. Andr. 49.

11. The jurors of the leet have connasance of those offences which are done out of court, and power to present* [*892] them, and to assess an amercement for them. 8 Co. 41 a. 41 b.

12. The fine imposed by the steward is good without any assentance; a fine is always imposed and assessed by the court, but an assessment is assessed by the county. *Griesley's case*, 8 Co. 39 a.

13. The court assesses fines, and they need not be assented, whether in cases of contempt and misdemeanors done in court, or upon writs of *capias pro fine*, &c. *Griesley's case*, 8 Co. 40 b. 41 a.

14. An unreasonable fine set in a court leet for a contempt in the court, is void. *Berrington v. Brooks*, T. Jones, 229.

15. The jury of a leet cannot present things done after the adjournment, but only such as happened before or during the sitting of the court. *Moore v. Wicker*, Andr. 48.

16. The jury cannot enter into shops to examine weights and measures, but can proceed only by way of summons. *Moore v. Wicker*, Andr. 48.

17. A prescription must be laid for choosing a constable in a particular method. 1 Ld. Raym. 94.

18. A custom in a leet that the inhabitants of D used to send a constable to the said leet, held good. *Pierson v. Riddley*, T. Raym. 204.

19. Where the jury of a leet are obstructed in entering into a shop to examine weights, an amercement, and not a fine, is proper. Andr. 49.

20. Presentments may be there for the king and lord of the manor. 1 Vent. 26.

21. In a presentation in a court-leet, it is not necessary to show how, nor *quo jure*, the court is held. *Rex v. Gilbert*, 1 Salk. 200. 12 Mod. 4 S. C.

22. In a presentment in a court-leet, it ought to appear on what day the court was held. 2 Saund. 291.

23. A presentment ought to allege the offence to be within the jurisdiction of the court, but it is good though it do not. *Semb. Wilton v. Hardington*, Hob. 129.

IV. REMOVAL OF THE PRESENTMENT.

1. The presentment may be removed by *certiorari* into K. B., and there traversed. 1 Saund. 135 c. n. (5.)

2. Where presentments in leets are removed by *certiorari*, the style of the court must be exactly shown. 11 Mod. 228.

V. REMEDY FOR A FINE OR AMERCEMENT IMPOSED BY THE COURT;—

(a) *By distress.*

1. Amercement in a court-leet is a duty

vested in the lord, for which he may distrain. *Matthews v. Cary*, 3 Mod. 138.

2. For an amercement for an offence out of court, and for fines imposed for offences done in the court, a distress is incident of common right, and the lord may sell the distress. *Griesley's case*, 8 Co. 41 a. 41 b.

3. The bailiff cannot distrain for a penalty forfeited without the warrant of the seneschal. Mo. 573. 607.

(b) *By action of debt.*

1. A fine or amercement imposed there is recoverable in debt in the king's bench. *Earl of Lincoln v. Fymer*, Cro. Eliz. 581. Mo. 426.

2. In debt for an amercement in a court-leet it must be shown that the party was summoned to the court at such a day and place. 11 Mod. 76.

VI. AVOWRIES AND JUSTIFICATIONS FOR AMERCEMENTS.

1. An avowry for a fine in a leet need not aver it by the record. *Gawen v. Garret*, 2 Ld. Raym. 1173.

2. In an avowry for an amercement in a leet, it is not sufficient to say *presentatum fuit* at the leet that the plaintiff did such an act, but he must aver the thing, and not rely upon the presentment. *Bambridges v. Bates*, T. Raym. 337.

3. An avowry for an amercement in a court-leet for not accepting the office of constable, must show that the party had special notice of his election. *Fletcher v. Ingram*, 5 Mod.

4. One who justifies a distress for an amercement in a leet, must in pleading allege the offence to be done within the jurisdiction. *Willon v. Hardington*, Hob. 129.

5. In trespass, the defendant pleads a special justification for an amercement [*893] upon a presentment by the jury for a nuisance at the court-leet of the archbishop of Canterbury; adjudged for the plaintiff, for the defendant ought to show the bounds and limits of the leet, and over what persons the leet has jurisdiction, as to say *de residentibus et inhabitantibus infra maner. de Lambeth, &c.* *George v. Lawley*, Skin. 392. Holt, 553, 554. S. C.

VII. RESPECTING THE FORFEITURE OF A COURT-LEET.

1. A court-leet may be seized for a misuser. 4 Mod. 56.

2. The lord is bound to find a pillory, stocks, and tumbrel, on pain of forfeiture. *Davies v. Louder*, Carter, 29. Mo. 573. 607.

LEGACY.

RESPECTING THE PAYMENT AND RECOVERY OF A LEGACY.

1. Executors are not compellable by the ecclesiastical court to pay legacies, except

legatees give caution to repay them upon contingent covenants broken. *Eeles v. Lambert*, Aleyn, 39. Cro. Eliz. 467.

2. Legacies must not be paid before debts. 1 Saund. 279 d. n. (8.)

3. Legatees shall refund against creditors; and if the ecclesiastical court give sentence for a legacy, a prohibition lies, unless they take security to refund. *Noell v. Robinson*, 2 Vent. 358. *Hodges v. Waddington*, 2 Vent. 360.

4. Where an executor delivers a legacy upon condition, the condition is void. *Dighton v. Tomlinson*, Com. 196.

5. The executor's consent is necessary to taking a legacy; *secus* as to a specific legacy. 1 Saund. 279 e. n. [1.] 2 Saund. 137 b. n. [a.] *Sed vide Eeles v. Lambert*, Aleyn, 39.

6. But his assent is not necessary to an entry into a real estate devised. 1 Saund. 279 e.

7. Legatees are to have their proportion where the assets fall short. *Noell v. Robinson*, 2 Vent. 358.

8. If a legacy be given, payable at twenty-one, with interest in the meantime, and the infant dies, his representative may sue for it immediately. *Harrison v. Buckle*, Stra. 238. 1 Leon. 278.

9. In case a husband dies before a legacy becomes payable to his wife, it is in the nature of a chose in action, which will survive to the wife. *Brotherow v. Hood*, Com. 725.

10. If a legacy be given to a married woman who dies before the time of payment, the husband is entitled to it; and he has an interest in it before the time for payment. *Anon.* 2 Ro. 134.

11. Suits for legacies charged upon personal estates were originally and properly cognizable in the ecclesiastical court. 3 Ridgw. 243.

12. A legacy out of land can be recovered only in Chancery, and not in the spiritual court. 1 Sid. 46. *Butler v. Butler*, 2 Sid. 21. 85. 3 Salk. 223.

13. A *donatio causa mortis* is not suable in the spiritual court. *Thomson v. Batty*, Stra. 777.

14. In general, no action at law can be maintained for a legacy; though the contrary has been sometimes held. 1 Saund. 279 e. n. [b.] 2 Saund. 137 b. (But see 2 Saund. 137 b. n. [a.]) *Anon.* 11 Mod. 91. *Rose v. Butler*, ib. 92. n. Salk. 415.

15. But the party ought to sue in Chancery, or in the spiritual court. *Nicholson v. Sherman*, 1 Sid. 45.

16. It was held that assumpsit lay upon an agreement by executors to pay a legacy, though not for a legacy. *Nicholson v. Sherman*, 1 Keb. 116. pl. 20.

17. Held, that if money be devised to be paid out of certain lands, the devisee can have an action of debt for it against the owner of

the lands. *Anon.* 6 Mod. 27. 2 Dy. 151. pl. 5. *Ewer v. Jones*, 2 Ld. Raym. 937.

18. Account will lie for a legacy to be paid out of the produce of land; but it cannot be sued for in the ecclesiastical courts. 2 Dy. 151. pl. 5.

19. If an executor give a bond to a legatee, the obligee can sue for the legacy in the court Christian, or at common law upon the bond. *Gardner's case*, 2 Ro. 160.

20. A feme covert may sue alone for a legacy in the spiritual court. *Daeth v. Baur*, 10 Mod. 64.

LETTER* OF ATTORNEY.

[*894] (*See post*, tit. WARRANT.)

LETTER MISSIVE.

A decree served on a peer needs no letter missive. *Mackenzie v. Powis*, Com. 675.

LETTERS PATENT.

(*See post*, tit. PATENT: and *ante*, tit. GRANT, div. (A.) Vol. I. p. 731. *et seq.*)

LEVARI FACIAS.

1. A writ of levari facias lay at common law on a judgment or recognizance, and must have been sued out within a year. 2 Saund. 68.

2. It lies for the penalty on a conviction for deer-stealing. *Reg. v. Ford*, 2 Ld. Raym. 768.

3. A levari facias for a fine may issue out of the crown-office. *Semb. Rex v. Cudmore*, Comb. 251.

4. A levari facias may be, and generally is, by custom, the process of a hundred court; but the common law process is *distingas*. *Wright v. Crump*, 7 Mod. 1. 44. *Simpson v. Mayhill*, Comb. 125. Carth. 54. *semb. cont.*

5. In all cases of levari facias the land is considered the debtor. *Skin.* 617. 2 Saund. 68.

6. Under it the sheriff might levy the corn and other profit growing on the land, and the rents, and the beasts levant and couchant. 2 Saund. 68.

7. The cattle of a stranger, levant and couchant thereon, are issues of the land, and as such may be sold under a levari facias. *Britton v. Cole*, Com. 52. Comb. 434. 469. *Holt*, 421. Carth. 441. *Skin.* 617.

LIBEL.

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I. WHAT CONSTITUTES A LIBEL; AND HEREIN OF THE REMEDY BY ACTION.

1. A libel is either in writing or without writing; a libel in writing is when an epigram, rhyme, or other writing is composed or published to the scandal or contumely of another; a libel without writing may be by pictures or signs. The case *De Libellis Famosis*, 5 Co. 125 b.

2. Writing makes the libel. *Rex v. Beare*, 1 Ld. Raym. 416.

3. It may be libellous to write and publish that which if only spoken would not be actionable. *Warren v. Ellison*, 1 Keb. 293. pl. 117.

4. Thus, to say one is a dishonest man, is not actionable; but to publish so, or put it up upon posts, is actionable. *King v. Smith*, *Skin.* 124.

5.* It is libellous to write that the Revolution was the destruction [*895] of the law of England. *Rex v. Drake*, 11 Mod. 78.

6. A letter respecting a lawyer, "he will give vexatious and ill counsel, and stir up a suit, and milk your purse, and fill his own large pockets," held actionable. *King v. Lake*, 2 Vent. 28.

7. C forged an order of Chancery in which were several defamatory expressions against the plaintiff, and at the end drew a pillory, and subscribed it "for Sir J. H. and his sworn witnesses by him suborned;" this was held to be but one complicated act, and that an action would lay. *Austin v. Culpeper*, *Skin.* 123.

8. A libel may be in ironical terms, of which the jury is to judge. *The Queen v. Darke*, *Holt*, 425.

9. Copying a libel is criminal, and writing

a copy without authority is writing a libel. *Rez v. Bear*, Salk. 417. 419.

10. But a copy of a libel lawfully made is not a libel. *Rez v. Bear*, 1 Ld. Raym. 417.

11. If a petition to parliament be referred to a committee of the house, an action will not lie for printing and publishing a number of copies for the use of the members, although the matter therein contained be false and scandalous. *Lake v. King*, 1 Mod. 58, 59.

12. But if a person print and publish a libellous answer to a petition to parliament, before such petition is referred to a committee, an action will lie. 1 Mod. 58, 59. *notis*. Skin. 124. 2 Keb. 361.

13. No allegations contained in articles of the peace exhibited to justices is actionable, it being a proceeding in the course of justice. *Cutler v. Dixon*, 4 Co. 14 b.

14. Nor any other proceeding in a regular course of justice. 1 Saund. 131 b. *Windham v. Clerc*, Cro. Eliz. 230. 247.

15. Nor matter in a report by the president of a military court of inquiry. 1 Saund. 131 a. n. [g].

16. Nor in a letter by an officer's creditor to the secretary at war; *secus*, where a person officiously reports to the constituted authorities. 1 Saund. 131 b. n. [g].

17. An action will not lie for slanderous expressions in an affidavit made in a cause in Chancery. *Dawling v. Wenman*, 2 Show. 446.

18. No action lies for matters contained in a bill in a court, having competent jurisdiction to examine into the matter, though the allegations be false; it being done in a course of justice; but for words concerning matters not examinable in the said courts, an action will lie, because it could not be done in a course of justice. *Buckley v. Word*, 4 Co. 14 b.

19. An action lies for a false charge, though made in a court of competent jurisdiction, if talked of elsewhere at large. *Buckley v. Word*, 4 Co. 14 b.

20. To print and circulate the proceedings of a court of justice with a defamatory intent, is libellous. *Waterfield v. Bishop of Chichester*, 2 Mod. 119. Cro. Eliz. 230.

II. RELATIVE TO THE CONSTRUCTION OF A LIBEL.

The words of the libel must be understood by the court in their plain and popular meaning, and not *sensu mitiori*. 1 Saund. 242 a. 242 a. n. [c].

III. RELATIVE TO THE PUBLICATION OF IT.

1. An action on the case lies not for having a libel, without delivering it or discoursing of it. 2 Keb. 502. pl. 66.

2. The publication may be either by verbally repeating the libel, or by singing, or by delivering the libel itself, or dispersing copies. The case *De Libellis Famosis*, 5 Co. 125 b.

3. Reading a libel is not a crime; but if

one repeat, and another writes, it is the writer who may be properly said to make the libel. *King v. Paine*, 5 Mod. 167.

4. He that writes a libel is the contriver; and having a written copy of a known libel is evidence of a publication. *Rez v. Bear*, Salk. 418.

5. If one find a libel against a private person, he may either burn it or deliver it to a magistrate; but if it be against a public person, he ought to deliver it to a magistrate. Case *De Libellis Famosis*, 5 Co. 125 b.

6. The having a libel in one's lodgings, and not delivering it to a magistrate, was only punishable in the Star-Chamber,* if the party maliciously published [*896] it. *Anon.* 1 Vent. 31.

IV. RELATIVE TO THE PROCEEDINGS IN THE ACTION FOR DAMAGES;—

(a) Declaration.

1. An action for a libel, stating, that the defendant dispersed a paper-writing, accusing the plaintiff with having said that "the war would not end, until the little gentleman (innuendo the Prince of Wales) was restored," is sufficiently certain. *Anon.* 11 Mod. 99.

2. The declaration must show a publication, but no particular words are necessary for that purpose. 1 Saund. 242. n. (1).

3. If the libel is in a foreign language, the plaintiff must aver that the hearers understood such language. 1 Saund. 242. n. (1).

4. It must be set out in the original tongue, and a translation must also be given. 1 Saund. 242 a. n. [a]. n. [b].

5. Judgment was arrested because the libel was not laid to be of and concerning the plaintiff. *Lowfield v. Bancroft*, 2 Stra. 934.

6. The libel itself must be stated, and not its purport. *Buckley v. Word*, 4 Co. 14 b. 1 Saund. 121. n. [a]. 242. n. [a].

7. "*Juxta tenorem sequentem*" imports the very words themselves. *Rez v. Berre*, 12 Mod. 218.

8. If any part of the libel which alters the sense be omitted, it is fatal. 1 Saund. 121. n. [a].

9. Malice must be shown, but the word "maliciously" is not exclusively proper; the omission is helped after verdict. 1 Saund. 242 a. Id. n. (2).

10. Special damage need not be laid if the writing is actionable in itself. 1 Saund. 243 c.

(b) Plea.

1. A plea of justification must confess the publication, and must not be general, but must specify particularly the facts on which it is founded, and must meet the facts in the libel in *totis*. 1 Saund. 244 a. 244 b. n. [m]. 244 c.

2. In an action on the case for printing and delivering a libel, defendant justified deliver-

ing it to parliament, he having a petition against the plaintiff. 1 Sid. 414.

3. It is no justification that such a one communicated the libel to defendant, unless in the libel he names his authority; and in such case, the plea must give the very words used, and not their substance, though he need only prove the material part. 1 Saund. 244 b. Ib. n. [n].

4. Defendant may plead not guilty to part, and justify the rest; or, by statute Anne, not guilty to the whole, and, in a further plea, justify part. 1 Saund. 244 c.

5. In case for exhibiting a bill in the Star-Chamber against the plaintiff, charging him with divers matters examinable in that court, and also that he was a maintainer of pirates and murderers, and that the defendant at B., in the county of S., speaking of the matters contained in the said bill, said in *audita quamplurim.* that the said bill and the matters therein contained were true, the defendant justified having spoken the words in court at Westminster, and traversed the speaking in S. at any time before or since; the plea was held bad, because the traverse did not go to the day on which the speaking was alleged. *Buckley v. Wood*, 4 C. 14 b.

(c) *Replication.*

To a plea of justification, *de injuria sua propria*, is proper. 1 Saund. 244 c.

(d) *Evidence.*

1. No evidence of special damage can be given in any case unless it be laid in the declaration. 1 Saund. 243 c, d.

2. As to what may be given in evidence under the general issue, see 1 Saund. 130, 131. 243.

V. RELATIVE TO THE REMEDY BY INDICTMENT;—

(a) *When it lies.*

1. A libel is made either against a private person, or a magistrate, or public person; and in either case, is punishable by indictment, although the party libelled be dead at the time of making the libel. The case *De Libellis Famosis*, 5 Co. 125 b.

2*. A libel against a private [*897] man is punishable by indictment, and that before justices of the peace at sessions. *Rex v. Sumner*, 1 Sid. 270. 1 Lev. 139.

3. No action on the case lies against one who sends a libel written in a letter sealed, and directed to the party libelled, without any other publication; but such offence is indictable. *Edwards v. Wooton*, 12 Co. 35.

4. An obscene book is punishable as a libel. *Rex v. Curl*, Stra. 788. *Rex v. Read*, 11 Mod. 142, overruled; see ib. (note).

5. Irony used with a libellous intent may become the subject of criminal prosecution. *Rex v. Brown*, 11 Mod. 86.

6. It is not material whether the libel be

true or false. The case *De Libellis Famosis*, 5 Co. 125 b.

(b) *Proceedings therein.*

1. In an indictment for libelling the trustees of a workhouse, all the trustees need not be named. *Rex v. Griffin*, 7 Mod. 197.

2. If a party write and compose a libel in one county, with intent to publish, and afterwards publish it in another, he may be indicted in either. 1 Saund. 132 b. n [k].

3. The whole libel need not be set forth in the indictment; but if any part qualifies the rest, it may be given in evidence. *Rex v. Bear*, Salk. 417.

4. An indictment for a libel need not set forth the tenour of it. *Reg. v. Darke, Holt*, 348.

5. *Juxta tenorem sequentem* is sufficient in an indictment for a libel; otherwise of the words *ad effectum sequentem*. 1 Ld. Raym. 415.

6. An indictment for a libel expressing only part of a title, as "the bishops," may, if from the nature of the libel the meaning be clear, be applied by an innuendo to "the bishops of England." *Baxter's case*, 3 Mod. 69.

7. If the plaintiff be indicted for perjury, and then he bring an action for words spoken of him, importing perjury, the indictment is to be tried before the action. *Anon.* 1 Sid. 69.

8. Indictment for composing, making, and writing a libel; the jury found the defendant guilty only of writing it, this amounts to making and composing it. *King v. Bear*, Carth. 407, 408.

9. A man may be found guilty of publishing, though acquitted of the printing. 1 Saund. 132 e. n, [l].

(c) *Punishment.*

1. A fine and corporal punishment may be imposed upon the offender after conviction. *Rex v. Dangerfield*, 3 Mod. 68.

2. Or he may be punished by fine and imprisonment. Case *De Libellis Famosis*, 5 Co. 125 b.

VI. RELATIVE TO THE REMEDY BY INFORMATION;—

(a) *When grantable.*

1. An information was granted in the reign of James the Second, for commending a book in which there were several seditious sentences, and the defendant was convicted. *King v. Eades*, 2 Show. 468.

2. An information granted against the defendant for a libel against the East India Company, although the words of imputation extended to one of its directors only, in the singular number, viz. "whereas an East India director, &c." *Rex v. Jenour*, 7 Mod. 400.

3. So, for sending a letter wherein were these words, "you are a scoundrel, and have

defrauded the king of his duty," &c. *Rex v. Pownall*, W. Kely. 58.

4. The court refused to give leave to file an information as for a libel, against a printer, who had published an advertisement concerning a married woman by order of her husband. *Rex v. Masters*, Say. 122.

5. So, where the libel was for matter contained in an affidavit exhibited in the court of Chancery. *Rex v. Lediard*, Say. 112.

6. Where the contents of a libel are true, the court will not grant an information. *Rex v. Bickerton*, Stra. 498.

7. The party ought to be either a contriver of the libel, or a procurer of the contriving it, or a malicious publisher of it knowing it to be a libel. *Lamb's case*, 9 Co. 59 b. Moore, 813. S. C.

[See also *ante*, tit. INFORMATION, p. 801., &c.]

(b)* *Proceedings therein*.

[*898] 1. Where the information and the libel differ but in one word, it is ill. *The Queen v. Drake*, 3 Salk. 224.

2. If, in an information for a libel, the libel is recited "according to the tenour following," a variance of "not" instead of "nor" is fatal. 11 Mod. 78. See also the same case, ib. 84. 95.

3. It is no objection to an information for a libel to say that the defendant did *inter alia* so and so, although the whole libel be recited. *Rex v. Johnson*, 2 Show. 488.

4. An information for a libel laid disjunctively, viz. "*scripsit seu scribi causavit*," is ill. *Rex v. Brereton*, 8 Mod. 330.

5. To an information for publishing a libel, the defendant cannot plead that he was speaker of the House of Commons, and that this publication was a part of their proceedings. *Sed qu. King v. Williams*, 2 Show. 471.

VII. RELATIVE TO THE REMEDY BY ATTACHMENT.

An attachment lies against the publisher of a libel until he produces the author. *Rex v. Wiatt*, 8 Mod. 123.

VIII. RELATIVE TO THE REMEDY BY PROCEEDINGS IN THE SPIRITUAL COURT.

1. The publisher of an obscene book may be punished in the spiritual court. *Rex v. Read*, 11 Mod. 142.

2. The spiritual court cannot entertain a libel not reflecting on a parson in his profession, and which does not impute any misconduct of spiritual cognizance. *Clerk v. Price*, 11 Mod. 140.

IX. OTHER CONSEQUENCES.

1. If a clergyman be convicted of a libel, and sentenced to the pillory, he may be degraded. *King v. Johnson*, 2 Show. 488.

2. A person may be apprehended on a warrant of a justice of the peace out of sessions, if charged on oath with having published a libel. 1 Saund. 132 b. n. [k].

3. One outlawed for a seditious libel may be bailed on his bringing a writ of error. *Rex v. Erbury*, 8 Mod. 177.

4. A libel against the mayor of a corporation is not a sufficient cause to disfranchise a man before conviction by course of law. *Rex v. Mayor of Gloucester*, Holt, 450. Fort. 275.

LIBERATE.

1. A liberate is a writ of allowance, and gives no jurisdiction. 5 Mod. 58.

2. The writ issues out of Chancery. 2 Saund. 70 b. *Young v. Johnson*, 1 Lutw. 429.

3. It is granted upon a petition to the king himself, but not to the barons of the Exchequer. 5 Mod. 48.

4. It is necessary for a conusee of statute-staple, or a recognisance in the nature of it, to get possession of the conusor's land. 2 Saund. 70 b.

5. A writ of liberate on a statute-merchant is unnecessary. *Ibid*.

6. A right is not assignable; and therefore, if the conusee of a statute sue an extent, and a liberate be returned, yet if he suffer the conusor to keep possession, he cannot assign the lands; for his possession under the liberate is, by his non-entry, turned to a right. *Hannam v. Woodford*, 4 Mod. 48.

7. There must be an actual entry, or recovery by ejectment. *Stephen v. Hankam*, 3 Lev. 312. 4 Mod. 48. *Anon*. 1 Vent. 41. Skin. 300.

8. An action of debt will lie on a liberate. 5. Mod. 62.

LIBERTY.

1. The word "liberty" properly signifies a right, privilege, or franchise; but improperly, the extent of a place. *Lever v. Hosier*, 2 Mod. 48.

2. Liberties in judgment of law are incorporeal, and of several sorts. *Rex v. Mayor of London*, 2 Mod. 48. 1 Show. 280.

3. An arrest by a sheriff within a liberty is good, and the offence is only to the lord. *Wolffreston's case*, Yelv. 51. 52. 2. Saund. 101 b.

4. The bailiff of a liberty to whom a writ* is sent is not protected in executing it. 2 Saund. 193 a.

[See also *ante*, tit. FRANCHISE, p. 723.]

LICENSE.

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I. WHAT LICENSES ARE GOOD IN RESPECT OF THE SUBJECT-MATTER.

1. The king cannot grant a license to the injury of his subjects. *Duell v. Saunders*, 2 Ro. 4.

2. No license can be made to do any thing that is *malum in se*, but it may be made to do what is *malum prohibitum*. Case of *Parsons*, 12 Co. 30.

3. The bishop ought not to license the master of a free grammar-school until he is satisfied of the goodness of his character and ability. *Rez v. Bishop of Lichfield*, 7 Mod. 218.

II. IN POINT OF FORM.

1. The tenants of a manor who have the sole pasture in the lord's soil may by deed license any other to feed there, but not without deed. *Hoskins v. Robins*, 2 Saund. 326, 327, 328. Poll. 23. S. C.

2. If a commoner may grant license to another to put his cattle into the common, such license ought to be by deed. *Hoskins v. Robins*, 2 Saund. 326, 327.

III. WHEN A LICENSE IS WELL PURSUED.

1. Licenses ought to be strictly performed. Mo. 119.

2. If A license B to enter his house to sell goods, B may take assistants, if necessary, for the purpose of selling the goods. *Denzel v. Grover*, Willes, 195.

3. Otherwise, where the license to enter is not for profit but pleasure. Willes, 195. note a.

4. By a license to a copyholder to lease for twenty-one years, a lease for three years is warranted. *Goodwin v. Longhurst*, Cro. Eliz. 535.

IV. HOW AND WHEN DETERMINED.

1. The king's grant or license to the vintners of London to sell wines is not determined by his death. *Thomas v. Lovell*, 1 Lev. 217.

2. If A license B to put trees planted in boxes in his garden, and A afterwards sell the garden with all his trees thereon, and the vendee suffers the trees to continue without molestation or objection, this is a renewal of the license granted by A. *Oliver v. Vernon*, 6 Mod. 171.

3. A condition not to alien without license, determined by license of the lessor as to

one of several lessees, is determined as to all. *Dumpor's case*. 4 Co. 119 b.

4. So, a condition not to alien without license, determined by license as to part of the land, is determined as to the residue. *Dumpor's case*, 4 Co. 120.

V. WHEN REVOCABLE OR COUNTERMANDABLE.

1. If one claims under a license which is not for pleasure, but for profit, the license is not revocable; so, where an authority is limited to a certain time, it is not revocable before the time expires. *Webb v. Paternoster*, 2 Ro. 143.

2. A license acted upon is not countermandable without putting the person licensed in the same situation as before. 1 Saund. 300 d. n. [h]. 2 Saund. 113. n. [a].

3.* If a license giving authority be executed, it is not then revocable; otherwise, if the license be still executory. 2 Ro. 152.

4. A license for pleasure or profit uncertain is countermandable. *Webb v. Paternoster*, Palm. 72.

5. A license to go out of the kingdom is revocable. Jenk. 220. 246.

VI. PRESUMPTION OF A LICENSE.

A license may be presumed from less than twenty years' enjoyment. 2 Saund. 175 c. n. [c].

VII. EFFECT OF A LICENSE.

1 A letter of license that the obligor shall not be sued amounts to a defeasance. 2 Saund. 47 s.

2 A letter of license with this proviso, "that if the creditor sue within a certain time his debt shall be forfeited," is pleadable in bar. *Ayliffe v. Scrimshire*, Carth. 64.

VIII. RESPECTING THE PLEA OF LICENSE.

1. A license must be pleaded, except in the case of a nuisance. 1 Saund. 300. d. n. [h].

2. If the law give a man a license for the doing a thing, and an action of trespass is brought, the license must be specially pleaded, for it cannot be given in evidence on the general issue. *Ewerard v. Stacey*, 6 Mod. 89.

3. If a master bring an action of covenant against his apprentice for leaving his service at such a time, and the apprentice left the service with his master's leave, this license must be pleaded by the way of justification; and the master, in such plea, cannot give in evidence a leaving of him at another time than that which is stated in the declaration. *Anon.* 6 Mod. 70.

4. If an engrosser justifies under two licenses, he ought to show particularly how much by one and how much by the other. Mo. 879.

5. If a defendant in trespass justify for right of common, and the plaintiff reply that the defendant's father gave license to make the fences and continue the inclosure,

it is ill; for it cannot be pleaded by the way of license, but it might have been good by way of release of common. *Miles v. Ellridge*, 1 Show. 350.

6. If A license B to enter his house to sell goods, and it be pleaded that B and also C and D (his servants) and by his command entered for that purpose, and necessarily continued there so long, it will be understood that it was necessary for them to enter. *Dennett v. Grover*, Willes, 195.

7. A license pleaded shall be supposed to have continuance. *Whateley v. Conquest*, Carter, 218.

8. Where a lessee pleads a license in writing in conformity with the terms of a covenant, he need not show the writing. *Walker v. Bellamie*, Cro. Jac. 103.

IX. REPLICATION TO IT.

1. An abuse of a license, when the license is given by law, should be replied. 1 Saund. 300 d.

2. A replication to a plea of license denying the license, should conclude to the country without a formal traverse. 1 Saund. 103 c.

LIEN.

1. Where deeds, &c. are delivered on a special trust, the party cannot detain them. *Lawson v. Dickenson*, 8 Mod. 306.

2. A man cannot detain title-deeds for drawing a writing. *Anon.* 1 Ld. Raym. 738.

3. Where writings are put into the hands of a person in the way of his profession, if he is under the control of the court, he may, upon motion, be obliged to redeliver all the writings, though some of them may belong to him. *Davy and Track's case*, Skin. 1.

4. An attorney was ordered to deliver up deeds, &c., though not intrusted with them in the way of business. *Strong v. How*, 8 Mod. 339.

5. A carrier may detain goods for the carriage of them against the right owner, though delivered to him by one who had no right to them. *Yorke v. Grenough*, Ld. Raym. 867.

6. An innkeeper may detain a [*901] horse (brought* by his guest) against the right owner. *Yorke v. Grenough*. 2 Ld. Raym. 237.

7. A factor has a lien upon goods consigned to him; and he may indemnify himself for money advanced to his principal, and charges incurred on his behalf, on the credit and in consequence of such consignment. *Kruger v. Wilcocks*, Keny. 32.

8. A party, who has a lien upon goods, may hold the goods by virtue thereof for a debt barred by the statute of limitations. 2 Saund. 67 a. n. [a].

9. If the person in whose possession the goods are has a lien on them, plaintiff may

prove a tender of the money before bringing an action of trover. 2 Saund. 47 f.

10. If he refuse to deliver them up on another ground, he cannot afterwards set up the lien as a defence to the action. 2 Saund. 47 f. n. [I].

11. An innkeeper who justifies the detaining a horse for his keep, need not show that he received him. *Yorke v. Grenough*, 2 Ld. Raym. 860.

12. That the avowant made no demand is no plea to an avowry of an innkeeper for detaining a horse. Id. ibid.

13. A personal lien survives, but a real one does not. *Harbert's case*, 3 Co. 11. b.

LIGHTS.

1. An action on the case lies for obstructing light and air, but not for obstructing a prospect. *Aldred's case*, 9 Co. 57 b. *Knowles v. Richardson*, 1 Mod. 55. Comb. 231. 480. *Nerrers v. Seaborne*, W. Jo. 326.

2. The owner of a house, although he be not in possession, may maintain this action. *Thomlinson v. Brown*, Say. 216.

3. It may be brought against the late assignee of lands adjoining. *Palmer v. Flesser*, 1 Keb. 553. pl. 65.

4. In such an action, it is sufficient to declare that the plaintiff was possessed of such a messuage for years, and had and ought to have such lights, without stating that the messuage and the lights were ancient. *Roswell v. Pryor*, 6 Mod. 116. But see 12 Mod. 215.

5. If it were necessary to show it was an ancient messuage, the want of it would be cured by verdict. Comb. 481. Id. 242. *Roswell v. Prior*, 12 Mod. 215.

LIMITATION OF ACTIONS.

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I. WHEN THE STATUTES OF LIMITATION OPER-
ATE AS A BAR.

1. By statute 3 & 4 Anne, actions on promissory notes must be commenced within six years. 2 Saund. 127 c.

2. The statute of limitation is a good plea to an action of debt brought on a bill of exchange. *Renew v. Acton*, Carth. 3, 226.

3.* The statute of limitations is [*902] a bar to a demand for attorneys' fees. *Oliver v. Thomas*, 1 Ld. Raym. 2. 3 Lev. 367. S. C.

4. To an *assumpsit* on a promise to pay so much out of the net proceeds of a certain parcel of goods to be imported, the defendant may plead that the cause of action did not arise within six years. *Martin v. Delboe*, 1 Mod. 71.

5. The statute extends to an action for rent against a tenant from year to year, who has ceased to occupy or pay rent, though there had been no notice to quit. 2 Saund. 67 a. n. [z].

6. The statute of 21 Jac. 1. c. 16. extends to an action of *indebitatus assumpsit*; for though trespass only is mentioned, yet all actions on the case are within the equity of the proviso. *Crosier v. Tomlinson*, 2 Mod. 71. *Farrington v. Lee*, 2 Mod. 312.

7. An action of trover is within the statute of limitations. W. Jo. 252.

8. The statute extends to merchants after their accounts are stated. *Martin v. Delboe*, 1 Sid. 465.

9. The statute is a bar, though defendant was beyond sea the whole time. *Swayne v. Stevens*, W. Jo. 252. Comb. 190. Salk 420. 1 Show. 99. Lutw. [413].

10. Or though he is privileged as a member of parliament. *Hall v. Wyborn*, 1 Show. 99.

11. The statute of limitations is a bar as well in equity as at law. *Skirne v. Meyrick*, Com. 710. W. Jo. 415, 416.

12. When once an account is stated, the statute begins to run. 2 Saund. 126. 127.

13. By the 4 Ann. c. 16. s. 17., "all suits and actions in the court of admiralty for seamen's wages, shall be commenced within six years next after the cause of action arises; but if the party be a minor or feme covert, insane, imprisoned, or beyond seas, it shall be within six years next after attaining age, being discover, of sane memory, released, or returning from sea;" but before this statute, it was considered that the 21 Jac. 1. c. 16. was not pleadable to a suit in the admiralty for mariner's wages. *Hyde q. t. v. Partridge*, 2 Ld. Raym. 1204. See 6 Mod. 26 u.

14. But, although the court of admiralty refuses to receive the plea of the statute of limitations to a suit for seamen's wages, yet, if the plea be badly pleaded, they shall not be prohibited from proceeding in the suit. *Ever v. Jones*, 6 Mod. 26.

15. In ejectment for mines, possession of the manor is no evidence to avoid the statute of limitations. *Rich dem. Cullen v. Johnson*, Stra. 1142.

II. WHEN THEY DO NOT OPERATE AS A BAR.

1. The statutes of limitation, as they bar rights, are to be strictly construed. 6 Mod. 26.

2. The statute of limitations is no bar to ejectment on a mortgage, where the interest has been paid. *Hatcher v. Finesax*, 1 Ld. Raym. 740.

3. The statute is not pleadable where a thing is to be done on request, and no request has been made. *Webb v. Martin*, 1 Lev. 48. *Collins v. Benning*, 12 Mod. 444.

4. It cannot be pleaded to an action on an executory promise. *Buckler v. Moor*, 1 Mod. 89.

5. The statute runs not against a tenant unless actually ousted or disseised; it only operates between tenants in common, &c., in case of an adverse possession. *Reading v. Royston*, Salk. 423, and note.

6. A *cessavit* is not within the statute. Mo. 44.

7. Debt upon an award is not within the statute. *Hodden v. Harridge*, 1 Sid. 415. 1 Lev. 273.

8. Nor debt for a copyhold fine. *Hodgson v. Harris*, 1 Lev. 273. 2 Saund. 67 a.

9. The statute of limitations is no bar to a matter merely of admiralty consuance. *Ever v. Jones*, 2 Ld. Raym. 935.

10. An action of debt against a sheriff for money levied under a *fiery facias*, is not without the statute of limitations. *Farrington v. Lee*, 1 Mod. 245, 246. 2 Show. 79. 2 Saund. 67 a.

11. The statute of limitations cannot be pleaded to an action of debt by an executor against a sheriff for money levied on a *fiery facias*, under an execution sued out by the testator. *Cockram v. Welby*, 2 Mod. 212.

12. The statute does not extend to actions* founded on a deed or [*903] specialty; a warrant of attorney is held not to be a specialty, so as to be out of the statute. 2 Saund. 67 a. Id. n. [z].

13. Debt for an escape is not within the statute of limitations, but an action on the case is. 1 Lev. 191. 1 Sid. 91. 2 Mod. 72. *notis*. 1 Saund. 38. Id. n. 2. 2 Saund. 67 a.

14. Actions for not setting out tithes were formerly not barred; but now, by statute 53 G. 3., the action must be brought within six years. *Jones v. Pope*, 1 Lev. 191. 1 Saund. 38. Id. n. [i.] 2 Saund. 67 a. and id. n. [y.]

15. The statute of limitations cannot be pleaded to an action of account between a

merchant and his factor. *Farrington v. Lee*, 2 Mod. 312.

16. Where accounts are current and unsettled between merchants, the statute of limitations is no bar. *Sandys v. Blodwell*, W. Jo. 401. 1 Lev. 287. *Cudmore v. Ellis*, 12 Mod. 579. *Skirme v. Meyrick*, Com. 710.

17. Otherwise, where their accounts are settled, or where the action is on a bill of exchange. *Webber v. Tyrrell*, 1 Lev. 287. *Chienly v. Bond*, 4 Mod. 105.

18. But if, before action brought, the balance upon an account be carried forward, and the account again becomes an account current, this is not within the 21 Jac. 1. c. 16. 1 Mod. 270. 2 Saund. 127.

19. The account (to be within the exception) must not only be current, but mutual. 2 Saund. 127 a.

20. The exception is not confined to merchants, and applies to case as well as account. 2 Saund. 127 a. 127 b. n. (6.)

21. The statute only relates to a separate and distinct act, and not to a continued one. *Aldridge v. Duke*, 3 Mod. 112.

22. The statute of limitations extends not to a trust. *Skirme v. Meyrick*, Com. 709.

23. The statute of limitations is not a good plea, when the estate in law is in trustees. *Carrick v. Errington*, 9 Mod. 33.

24. A suit in equity to recover a sum of money, being a *depositum* in trust for a feme covert, is not barred by the statute of limitations; but otherwise at law. *Lord Holles's case*, 2 Vent. 345.

25. The statute is not pleadable to an avowry for fealty. *Bennet v. King*, 3 Lev. 21.

26. Avowries for rent, created by deed or act of parliament, are not within the statute. 2 Saund. 65 a.

III. HOW THE OPERATION OF THE STATUTES MAY BE AVOIDED;—

(a) By commencing an action.

1. A *latitat* bearing teste within the time, though returnable after, prevents the operation of the statute of limitations. *Anon.* 1 Ld. Raym. 383. See Burr. 950.

2. A *latitat* prevents the statute of limitations without a bill of Middlesex. *Hollister v. Coulson*, Stra. 550. 736.

3. A *latitat* is the commencement of a suit upon a penal law. *Culliford v. Blanford*, 1 Show. 354.

4. A debt may be preserved from the statute of limitations by a *clausum fregit* returnable in the Common Pleas. *Kinsey v. Heyward*, 1 Ld. Raym. 434. *Contra, Moise v. Bructon*, 1 Ld. Raym. 553. *Brown v. Babbington*, 2 Ld. Raym. 880.

5. A plaintiff in an inferior court removed into K. B., is sufficient to enable the plaintiff to declare *de novo* in K. B. in an *indebitatus assumpsit* for the same cause of action. *Storcy*

v. Atkins, Stra. 719. *Barnard*. 2. 2 Ld. Raym. 1427. S. C. 1 Ld. Raym. 553.

6. A writ sued out and not returned will not avoid the statute. *Andrews v. Linton*, 2 Ld. Raym. 885.

7. There is no way of keeping alive a bill filed (to save the statute) against an attorney. 2 Saund. 63 d, e.

(b) By an acknowledgment.

1. An acknowledgment of a debt is not sufficient to avoid the statute of limitations, but it is sufficient evidence of a promise. *Ward v. Everet*, 1 Ld. Raym. 422. *Heylin v. Hastings*, 12 Mod. 224. Fort. 181, 5 Mod. 426. *Yes v. Fouraker*, 12 Mod. 224, *notis*.

2. If there be a mutual consent of any sort to any item, for which credit has been given within six years, this will bar the statute, independently of the exception. *Semb.* 2 Saund. 127 a.

3. The acknowledgment should be within six years. *Semb.* 5 Mod. 426.

(c)* By a new promise. [*904]

1. The statute does not destroy the debt, it only takes away the remedy. *Heylin v. Hastings*, Com. 56.

2. And therefore, where issue is taken on a plea of the statute, evidence of a promise by defendant within six years to pay the debt, takes the case out of the statute. 2 Saund. 63 i.

3. So a promise by an agent of defendant. 2 Saund. 63 i. n. [a.]

4. A conditional promise will avoid the statute of limitations. *Heylin v. Hastings*, Com. 54. 12 Mod. 223. S. C. 5 Mod. 426. 2 Saund. 63 i. n. 2. [2.] 64 a. n. [w.] *Contra, Sparking v. Smith*, 1 Ld. Raym. 741.

5. A promise to an executor or administrator without any new consideration is sufficient to take the case out of the statute. *Heylin v. Hastings*, Holt, 427. Fort. 180.

6. But in actions by executors, assignees, and the like, if the promises are laid as made to the testator, bankrupt, &c., proof of promise or acknowledgment made to the executor, &c., will not bar the statute. *Green v. Crane*, 2 Ld. Raym. 1101. Selk. 28. 6 Mod. 309. 11 Mod. 37. S. C. 2 Saund. 63 h, i. 63 k. n. [t.]

7. A new promise to pay an old debt, made after the commencement of the action, did not formerly avoid the statute of limitations; but now the acknowledgment of a debt after the action is commenced, will avoid the statute. *Dean v. Crane*, 6 Mod. 310. *Yea v. Fouraker*, 6 Mod. 310. n. 2 Show. *notis*. *Heylin v. Hastings*, Com. 56. *notis*.

8. In actions of tort, an acknowledgment, &c., will not take the case out of the statute. 2 Saund. 64 a.

(d) By the plaintiff being beyond sea.

1. The statute is no bar where the plain-

tiff is beyond sea. *Beven v. Clapham*, 1 Lev. 143. 2 Salk. 420. 3 Salk. 228. Stra. 836.

2. The plaintiff must be beyond sea at the time when his right accrues, and then his right is saved till his return. *Hall v. Wybank*, 3 Mod. 311.

3. Ireland is beyond the sea, within the statute of limitations. *Nightingale v. Adams*, Holt, 426. 2 Saund. 121. 1 Show. 91.

4. But not Scotland. 2 Saund. 121. n. [c.]

(e) *By fraud.*

No length of time will bar a fraud. *Cotterell v. Purchase*, C. T. Talb. 63.

(f) *By possession or actual entry.*

1. Actual entry must be made to prevent the statute. *Hayward v. Kinsey*, 12 Mod. 573. *Sed vide* 1 Saund. 319 *e. f.*

2. The entry of *cestui que trust* is sufficient to avoid the statute. *Gree v. Rolfe*, Com. 114. *notis.*

3. A, barred in his *formedon*, may take advantage of a right of entry. *Hunt v. Burn*, 2 Salk. 422.

4. The statute of limitations shall not be taken by construction to bar a man of his entry unless the possession be found. *Jones v. Morley*, 1 Ld. Raym. 289.

5. A person, who receives a moiety of the rents for twenty years, gains no title against the right owner who receives the other moiety. *Reading v. Rawsterne*, 2 Ld. Raym. 830. See also 2 Stra. 1142. *ante*, p. 902. pl. 15.

6. No advantage can be taken of the statute of limitations to bar an entry, although it appears in the special verdict, by computation of time, that an entry was not made within twenty years, if the special matter touching it is found. *Whalley v. Reede*, Lutw. [329.] 813. Id. [303. 306.]

(g) *In case of the plaintiff's death.*

1. When an action is brought within the time of the statute of limitations, and abates, a second action must be brought within a reasonable time. *Kinsey v. Heyward*, 1 Ld. Raym. 434.

2. A year is held to be a reasonable time for the executor or administrator to bring his action. Willes, 257. n. (a.)

3. Where an executrix sued upon a promissory note to her testator, and died before judgment, the six years from the cause of action having expired previously to her death, but subsequently to the commencement of the action, and her executor brought a new action within four years after the death of the executrix, on the statute of limitations being pleaded, the court held the plaintiff barred, and that he ought to have commenced his action within* a

[*905] year after death. *Wilcocks v. Hugins*, Stra. 907.

[See also *ante*, tit. JOURNEY'S ACCOUNTS, vol. ii. p. 831.]

(h) *When defendant is outlawed.*

When defendant is outlawed in one action, and the outlawry is reversed, a new action may be commenced, notwithstanding the statute. *Lambe v. Finch*, W. Jo. 312.

IV. HOW THE TIME OF LIMITATION IS TO BE RECKONED.

1. By statute 21 Jac. 1. c. 16. s. 1., a *formedon* must be brought within twenty years, but the count need not show a seisin within the time limited by the statute. *Whitton v. Compton*, 1 And. 16. 1 Saund. 319 *h.*

2. Where tenant in tail makes a discontinuance by making a lease for three lives, and the issue in tail is barred of his *formedon* by the statute, and afterwards the lease expires, he shall have twenty years to make his entry. *Hunt v. Bourne*, Lutw. [306].

3. Error to reverse a recovery is barred by twenty years, though the title of plaintiff in error accrued within that time. *Lloyd v. Vaughan*, 2 Stra. 1257.

4. Twenty years' possession is a good title in ejectment for the plaintiff as well as the defendant. *Stokes v. Berry*, Salk. 241.

5. In *assumpsit*, the statute runs from the breach of the contract, even where there is gross fraud. 2 Saund. 63 c. n. [e].

6. Where the promise is to perform any thing upon notice or request, though six years elapse from the promise, yet if the request was made within six years, the statute is no bar. *Pecke v. Ambler*, W. Jo. 329.

7. Seamen's wages arise from the time the service is performed, and not from the time the contract is made; and therefore though the contract be above six years ago, if any part of the service be within six years, it is out of the statute. *Ewer v. Jones*, 6 Mod. 26.

8. The statute of limitations runs notwithstanding a bankruptcy. *Gray v. Mender*, Stra. 556.

9. And therefore in a suit by assignees, the six years shall be accounted from the original cause of action. *Ashbooke v. Manby*, Comb. 70.

10. When the statute of limitations is pleaded to an action brought by an executor on a promise made to his testator, the six years are computed from the time when the cause of action arose, and not from the time of obtaining the probate of the will. *Hickman v. Walker*, Willes, 27.

11. By 4 & 5 Ann. c. 10., where the plaintiff is beyond sea, he is entitled to the action within six years after his return. *Hall v. Wybank*, 3 Mod. 311, 312.

12. When a disability is once removed, the statute begins to run, and no subsequent disability will stop it. 2 Saund. 121. n. [d].

13. If an intestate dies within six years, and administrator had time to bring the action within six years, and does not, the statute will incur. 12 Mod. 573.

14. An administrator *durante minore estate* brings an action, pending which the statute

of limitations incurs, and he dies, the next administrator is barred. *Elston v. Thorowgood*, 1 Ld. Raym. 283. Comb. 428. S. C.

15. Otherwise of an executor. *Semb*, S. C. Comb. 428.

16. If A dies intestate, and administration is at first committed to one, and a stranger receives money, and then administration is granted to another, the six years shall be accounted from the first administration. *Curry v. Stevey*, Comb. 311. Salk. 421. Carth. 335. Skin. 555. S. C.

17. So where the trustee for an infant neglects to sue within six years, the statute shall bind the infant. *Skyrme v. Meyrick*, Com. 711. *notis*.

18. In tort, the time is reckoned from the consequences of the act done. 2 Saund. c. a. [6].

19. In an action on the case for words actionable only by reason of a subsequent loss, the two years are to be accounted from the loss only, and not from the speaking; where the charge is *crimen falsis impositus*, the time is six years; and where it is [*906] found upon record, as by indictment, &c., there the statute of limitations does not extend. *Saunders v. Edwards*, 1 Sid. 95.

V. HOW THE STATUTES SHOULD BE TAKEN ADVANTAGE OF; WHETHER THEY SHOULD BE PLEADED, OR GIVEN IN EVIDENCE.

1. Advantage cannot be taken of the statute of limitations, unless it is specially pleaded. *Anon*. 1 Sid. 253. 1 Saund. 283. 283 a. 2 Saund. 63.

2. Even though the cause of action on the face of the declaration appears out of time. 2 Saund. 63 a. *Gould v. Johnson*, 2 Ld. Raym. 838. *Lee v. Rogers*, 1 Lev. 110.

3. But a distinction has been made between the pleas of *nil debet* and *non assumptis*, that under the former the statute may be given in evidence, but not under the latter. *Anon*. Holt, 283. *Draper v. Glassop*, 1 Ld. Raym. 153. 1 Salk. 278. *Sed vide* Bla. Rep. 702. Burr. 2630. Doug. 629.

4. In ejectment, the defendant need not plead the statute. 2 Saund. 63 b. n. [i].

5. And in a penal action, it is the duty of the plaintiff to show himself within time, and defendant need not plead the statute limiting it. 2 Saund. 63.

VI. IN RELATION TO THE FORM OF THE PLEA.

1. When the consideration is executed, *non assumptis infra sex annos* is a good plea. 1 Saund. 33 f. 2 Saund. 63 b.

2. To an action on an executory promise, the defendant cannot plead *non assumptis infra sex annos*; it should be, that the cause of action did not accrue within six years. *Buckler v. Moor*, 1 Mod. 89. *Gold v. Johnson*, 2 Salk. 412. 2 Ld. Raym. 838. S. C. 1 Saund. 33 c. 2 Saund. 63 b. c. 10 Mod. 104. 205, 206. 294.

3. If the statute of limitations extends to

suits in the admiralty court for seamen's wages, a plea that it appears by the libel that the cause of action did not accrue within six years is bad; the defendant should state immediately that the cause of action did not accrue within six years. *Ewer v. Jones*, Com. 137. 6 Mod. 26. S. C.

4. Not guilty within six years is ambiguous, because the consequences of the act are the cause of the action in tort. 2 Saund. 63 a. n. [L]

5. In an action of assault and battery, a plea of no assault within six years is bad, for the 21 Jac. 1. c. 16. limits it to four years, and the statute must be precisely, and not argumentatively, pleaded. *Blackmore v. Tiddery*, 11 Mod. 38. 1 Salk. 423. S. C. 2 Ld. Raym. 1099. *Sed vide* 2 Saund. 63 A. *contra*.

6. If pleaded to two things where not pleadable to one of them, the whole plea is ill. *Webb v. Martin*, 1 Lev. 48.

7. *Actio non accrevit infra*, &c. is in all cases, both of contract and tort, the safest and best plea. 1 Saund. 33 f. n. [w.] 2 Saund. 63 c. 63 c. n. [L]

8. The plea must conclude with a verification. 1 Saund. 283. 283 a.

VII. IN RELATION TO THE FORM OF THE REPLICATION.

1. To a plea of the statute, the plaintiff may reply a *latitat* or *capias* sued out within time. 2 Saund. 1 c, d. 63 a.

2. A *latitat* may be replied to a plea of the statute without showing a bill of Middlesex. *Crockett v. Jones*, 2 Ld. Raym. 144.

3. So a *capias* without an original is sufficient for this purpose, even though the *capias* be returnable on a common return-day, and not on a day certain, for such a writ is only voidable, not void. Willes, 257, 258. 2 Saund. 2 c, d. 63 a.

4. The replication must show a return of *non est inventus*, and continuances by *vice comes non misit breve*, to the time of declaring. 2 Saund. 63 d. 1 Ld. Raym. 701. *Churchwardens of Market Bosworth v. The Rector*, 1 Ld. Raym. 435. *Bedd v. Berkenhead*, Salk. 420. *Karver v. James*, Willes, 255.

5. A bill of Middlesex pleaded as returnable "on Monday next after three weeks of All Souls," is no bar to the statute of limitations. *Green v. Rivet*, 7 Mod. 12.

6. The continuance may be entered at any time, but it must be [*907] a continuance of the same writ; even an erroneous process will support the continuance. 2 Saund. 63 d.

7. When a writ is sued out, and the return indorsed upon it, it is not necessary that it should be delivered out of the sheriff's office at the same time. 2 Saund. 1 c. n. [g].

8. If a man be beyond sea at the time that the debt accrues, he may plead it by way of replication to the defendant's bar of the sta-

tute. *Ever v. Jones*, 6 Mod. 26. *Cheeveley v. Bond*, Holt, 427.

9. An action was brought in the 14th Car. 2., and the declaration was on a promise in 3 Car. 2.; defendant pleaded *non assumpsit infra sex annos ante* 14 Car. 2.; plaintiff replied *assumpsit infra sex annos ante* 14 Car. 2.; and held good. *Lee v. Rogers*, 1 Lev. 111.

10. Where the suit is commenced in an inferior court within time, and the defendant removes the suit into K. B., and the plaintiff declares *de novo*, he may reply the facts. 2 Saund. 63 c. *Story v. Atkins*, 2 Ld. Raym. 1430. Salk. 424.

11. In an *assumpsit* for money had and received, a *quantum meruit* for wares sold, and an *inimul compulassel*, if the defendant plead the statute of limitations, the plaintiff may reply that the action is grounded on the trade of merchants, and that the defendant was his factor, &c. *Farrington v. Lee*, 2 Mod. 312.

12. If defendant plead the statute of limitations to an action brought by an executor, or a promise made to the testator, the plaintiff cannot reply a subsequent promise to himself, because that would be a departure in pleading. *Hickman v. Walker*, Willes, 27.

13. In an action by an assignee of an insolvent debtor, if the promises are laid as made to the plaintiff, he cannot reply a promise made to the insolvent within six years. 2 Saund. 639.

14. If to an action for false imprisonment the statute is pleaded to part, the plaintiff may reply it was one continued duress. *Covenstry v. Apily*, 2 Salk. 420.

15. If an action be brought against an administrator, and the defendant plead *non assumpsit infra sex annos*, a replication that administration was granted *proul* in the declaration, &c. ought to conclude with a verification. *Curry v. Stephenson*, 4 Mod. 376.

16. If the defendant in an action on the case pleads *non culp.* within six years, and the plaintiff replies an original in trespass *quare clausum fregit*, prosecuted with intent, &c., he cannot conclude *ad patriam*, as is usual where defendant pleads *plene administravit*, and the plaintiff replies assets. *Cowper v. Towers*, Lutw. [37, 38]. 98.

LIMITATION OF ESTATES.

1. One may take an executory estate, or an estate in remainder, who is no party to the deed. *Geary v. Bearcroft*, Carter, 60.

2. If land be leased by the premises of an indenture to three, *habendum* to one for life, remainder to another for life, remainder to the third for life, they shall take in succession. 2 Dy. 169. pl. 43.

3. Feoffment to A for life, then to his wife B, till such child as he shall beget arrive at twenty-one years of age, and after-

wards during her widowhood; though A die without child, the widow is entitled to hold the lands. 3 Dy. 300. pl. 39.

4. Words of consideration in a will are construed as limitations, if by construing the words as a condition the remedy will be defeated. *Boraston's case*, 3 Co. 19 a.

5. Superadded words of limitation, varying the course of descent operate as words of purchase; as in case of a limitation to the use of a man for life, and after his decease to the use of his heirs, and the heirs female of their bodies. *Shelley's case*, 1 Co. 93 a.

6. A tenant in tail general has issue two sons, B and C; B has issue a daughter and dies, leaving his wife *enccinte*; A suffers a common recovery to himself for life, remainder to D for years, remainder to the heirs male of A's body, and to the heirs male of their bodies, and dies; afterwards B's wife is delivered of a son; he shall inherit now, though C took by descent until he was born. 3 Dy. 374. pl. 15.

[See also *ante*, tit. ESTATE, vol. i. p. 615, &c.].

LIVERY.* [*908]

I. WHAT LIVERY IS GOOD, p. 908.

II. WHAT IS NOT GOOD, p. 908.

III. WHEN NECESSARY, AND THE EFFECT OF IT, p. 909.

I. WHAT LIVERY IS GOOD.

1. If a man approaches as near as he can to the lands, this amounts to a livery. *Austin v. Osborn*, Com. 246.

2. If one of two women who are joint-tenants in fee make a feoffment to a man with livery within view, and marry the feoffee before he enters on the land, his entry after marriage is a good execution of the livery, for the livery being within view, an irrevocable interest passed to the feoffee, and the subsequent entry shall relate back so as to make the feoffment perfect. *Parsons v. Perna*, 1 Mod. 91. Poll. 46. 2 Keb. 872. 2 Lev. 34. 1 Vent. 186. S. C.

3. Livery made to one of two joint attornies in the name of both is not good; but livery to one of two joint lessees for years, in the name of both, is good, and supports a remainder for life. *Barwick's case*, 5 Co. 93 b.

4. To one authorized by one of three, feoffees is good. 2 And. 169.

5. The livery is good if the present lessee voluntarily recede from the premises, and then livery is made. 1 And. 130, 131.

6. Where lands leased lie in two counties, there must be livery in both. 2 Dy. 246. pl. 71.

7. *Cestuy que use* of three acres by several feoffments in one county makes a feoffment of all, and livery in one only, yet all passes under the 1 R. 3. c. 1. 3 Dy. 283. pl. 30.

8. If a deed be made to three persons, *habeendum* to two for their lives, with remainder to the third for his life, livery made to all three according to the form of the deed is good, although made as if they had all estates in possession. *Norris v. Trist*, 2 Mod. 78.

9. Livery is good after a traverse of office, and judgment given against the queen, before an *amoveas manum* executed, because the queen never had title, but the party. *Brown v. Terry*, Cro. Eliz. 523.

10. The matter of livery upon indorsements of writing is now always favourably expounded, unless when it appears that the authority is not pursued at all. *Norris v. Trist*, 2 Mod. 78.

11. The delivery of a charter of feoffment upon the land in the name of seisin of the land is at one and the same instant a delivery of the deed and a livery of seisin. *Thoroughgood's case*, 9 Co. 136 b.

II. WHAT IS NOT GOOD.

1. The king cannot make livery of seisin. *Duchy of Lancaster's case*, Plow. 213.

2. A corporation cannot make livery by the view, nor can an attorney. 2 Dy. 233. pl. 10.

3. If made by an attorney upon a lease for life a *die datus* the same day of the date, the lease and livery are void. Cro. Car. 94, 95. 388, 389.

4. If lessor make livery, the lessee being upon the land and not agreeing to it, the livery is void. Mo. 11.

5. Livery cannot be made to one in the name of him and of another who is absent, whereby an estate of freehold shall pass to him who is absent, without deed. *Barrick's case*, 5 Co. 93 c. Moore, 393. 8 C.

6. Lessee for years of a house and a close distant from the house, and other lands; afterwards, the lessor made a feoffment of the said house and all the lands mentioned in the lease, with livery of seisin in the close, the lessee being within the house, and not assenting; held that it was void for the whole; for when a house and land are demised together, the house is the principal, and the possession of the house is the possession of the whole; but if the lessee had made a lease for years of any part of the land, whereby the possession is severed, a feoffment and livery by the lessor of that part had been good, notwithstanding the lessee being in possession of the residue; *scilicet*, as to a lease at will. *Bettisworth's case*, 2 Co. 31 b.

[*309] 7. If land descend to two parcenars, whereof one is a nun professed, the other sister cannot enter into her half without livery, nor sue livery in her sister's name for the whole, without her performing of due ceremony. Hob. 74.

8. The wife of a termor continuing in the house avoids the livery made by the landlord to a feoffee; nor shall this, though made in the name of the whole, be good to pass an acre of land in view held under the same lease. 1 Dy. 18. pl. 107.

9. The lessor makes livery in a close where the lessee was not in person, nor had any servant or cattle there, but he was in the house and residue of the land; and adjudged a void livery for the whole. Mo. 250.

10. Livery of seisin by letter of attorney cannot be made by parcels, unless so limited. 1 Leon. 34.

11. Livery of lands in ward ought not to be sued by parcels. 3 Leon. 25.

12. The delivery of a deed as a charter of feoffment, upon the land, is not a livery. *Thoroughgood's case*, 9 Co. 136 b.

III. WHEN NECESSARY, AND THE EFFECT OF IT.

1. Livery of seisin is not necessary in case of a lease for years. *Throckmorton v. Tracy*, Plow. 159.

2. The reason of passing lands by livery was to give notice to the country who were owners of the land. *Bowyer v. Perryman*, 5 Co. 84 a.

3. He who claims by purchase is not compellable to sue livery, but he who claims by descent. 1 And. 42.

4. Where a rectory is granted *una cum decimis de D*, the tithe, which alone cannot pass without deed, doth pass by the livery of the rectory; and without livery the tithe will not pass, because it was intended to pass with the rectory by livery. *Holden v. Smallbrooke*, Vaugh. 197, 198.

5. If tenant for years, with remainder over in fee, enters before livery, the lease is good, but not the remainder. *Throckmorton v. Tracy*, Plow. 156.

6. If a man makes a lease for years to A and B, the remainder for life to C, he ought to make livery to A and B before their entry; by such livery C shall take a present estate for life by way of remainder. *Barrick's case*, 5 Co. 93 A.

7. If a feoffment be made to four, and livery only to one, nothing passes to the others, unless it be a feoffment by deed. 1 Dy. 14. pl. 71. 35. pl. 26.

8. By livery within the view, an interest passes without an actual entry. 3 Salk. 165.

9. Livery made in the house does not imply livery of seisin of the house; and clearly it is not livery of the land in view of the house. Mo. 458.

10. If a feoffment be made of two acres, and a letter of attorney be made to give livery, and the attorney enter only into an acre, and give livery *secundum formam charte*, both the acres pass. *Norris v. Trist*, 2 Mod. 78.

11. Feoffment by tenant for life, and before livery made by letter of attorney the

feoffor purchases the fee, and then livery is made; the fee passes. *Anon.* 3 Leon. 73.

12. But that will not pass other lands purchased by the feoffor in the same will, where the feoffment was of all his lands in D. *Anon.* 3 Leon. 73.

13. It must pass a present freehold, and cannot commence *in futuro*. *Stukeley v. Butler*, Hob. 171.

14. A special livery, or the tender of livery by the heir knighted within age, discharges all mesne rates. Hob. 94.

15. Though the suing of livery be neglected by a lunatick, it shall not prejudice him. *Bencher's case*, Hob. 137.

16. Livery of seisin made before enrolment shall vest the estate by livery, and prevent the operation of enrolment. 1 Leon. 6. 3 Leon. 125.

17. If a lease for life be made *habendum* from Michaelmas next, this is void, and livery by an attorney after Michaelmas will not help; *secus*, if the lessor himself make livery. Hob. 314.

18. If a man have two lessees by separate leases of land in one county, livery to a feoffee of all his lands in that county, made upon the lands of one of the lessees in the name of the whole, passes nothing of the other's land; *secus*, if he were tenant at will. 1 Dy. 18. pl. 106.

[*910] *LONDON.

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I. RESPECTING THE MAYOR AND ALDERMEN OF LONDON.

1. If a man be not fit to be mayor, he cannot be elected for the purpose of having the fine of him. *Case of Chamberlain of London*, 1 Ro. 109.

2. In London, the lord mayor is perpetual coroner. *Rez v. Garrard*, Cro. Jac. 531.

3. The lord mayor of London is conservator of the river Thames, and it is common to all fishermen. 1 Mod. 106. 2 Show. 47.

4. An alderman of London had his privilege allowed against a custom of electing constables according to their houses. *Butler v. Wigge*, 1 Saund. 63.

II. RESPECTING THE CHAMBERLAIN OF LONDON.

The chamberlain of London, though a sole corporation, is enabled by custom to take recognizances, obligations, &c. for orphanage money to him and his successors; and such recognizances go to his successors and not his executors. *Fulwood's case*, 4 Co. 64.

III. OF THE PARSON AND CHURCH-WARDENS.

In London, the parson and church-wardens are a corporation. *Warner's case*, Cro. Jac. 532.

IV. RELATIVE TO THE SHOPS IN LONDON.

1. The shops in London are market overt for goods usually sold in them. *Bp. of Worcester's case*, Mo. 360.

2. Citizens having shops in London pay prisage, unless they are inhabitants and freeholders there. *Rez v. Hanger*, 1 Ro. 140. 148.

V. POWER OF THE CITY OF LONDON.

1. The city of London has power over foreigners for matters of trade done within their liberties. *Hutchins v. Player*, Ori. Bridg. 304.

2. The court of aldermen in the city of London may impose a reasonable fine on a person for marrying a city orphan without their consent, although he be not a freeman, and he have no notice that she was a city orphan; and on^e refusal [*911] to pay the fine, the court may commit the offender. *Harwood's case*, 1 Mod. 77. 79.

3. The court of aldermen has power to impose a fine on a sheriff chosen by them and refusing to hold. *City of London v. Vanacre*, 5 Mod. 440.

4. The city of London cannot set a fine, &c. for non-performance of a bye-law. *Anon.* Comb. 10. 92.

5. If the city of London grossly abuse their power, a *quo warranto* or information of that nature may be brought against them. *Hutchins v. Player*, Ori. Bridg. 281.

6. The court of aldermen can fine and imprison. *Chamberlain's case*, Palm. 533.

7. No forfeiture can be imposed upon the goods of a subject. *City of London's case*, 8 Co. 125 a.

VI. OF THE MAYOR'S COURT.

1. Upon a recognizance taken before the mayor by custom, debt lies not but in their own courts. *Chamberlain v. Thorp*, 1 Leon. 130, 131.

2. The mayor and commonalty of London may limit penalties of bye-laws to themselves, but they cannot be sued for in the mayor's court. *Wood v. Mayor of London*, Balk. 397, 398.

3. If the mayor of London recover in the sheriff's court in an action on a bye-law, a bond given by the defendant to the mayor to prosecute a writ of error thereon in the court of hustings with effect, is a good bond; for although in the court of hustings the lord mayor is judge, yet it may be held before six aldermen without the mayor, and it shall be presumed that he was absent when the errors in his own cause were determined. *Mayor of London v. Markwick*, 11 Mod. 164.

4. A *procedendo* may be granted to the mayor's court in London, after the return of a *habeas corpus* (brought by a person committed for non-payment of a penalty under a bye-law of the city) has been filed in the superior court, although the usual practice is to award the *procedendo* without filing the writ. *Fasakerly v. Baldoc*, 6 Mod. 177.

5. The mayor's court at Guildhall has no jurisdiction to proceed on a penal law. *Rez v. Miller*, Cro. Jac. 558.

6. In the mayor's court of the city of London the use is, that none shall be a constant lawyer there but the common pleaders; but every man may in his own cause have his own counsel. *Hutchins v. Player*, Ori. Bridg. 301.

7. The courts at Westminster ought to take notice that there is in London a court of mayor and aldermen. *Hutchins v. Player*, Ori. Bridg. 279.

VII. OF THE SHERIFF OF LONDON, AND RETURNS BY HIM.

1. The sheriff of London is known in law to be two persons. *Lambe v. Wiseman*, Hob. 70.

2. On an escape out of either of the compters of the city of London, the action must be in the name of both the sheriffs. *Anon.* 6 Mod. 96.

3. If one of the sheriffs of London bring an action against the chamberlain, the fact may be surmised on the roll, and the pro-

cess of *venire facias* directed to the co-sheriff. *Rich v. Player*, 2 Show. 287.

4. If one be attainted of felony at Newgate for felony in Middlesex, the sheriff of London cannot detain him in execution upon process, unless it be directed to the sheriff of Middlesex. Mo. 178.

5. A return of a *venire* by one sheriff of London is bad, and not helped by the statute. *Lambe v. Wiseman*, Hob. 70.

6. Where an action is founded on a bye-law, it is usual on a *habeas corpus* to return the bye-law; as in an action for calling a woman "whore," &c., founded on the custom of the city. *Watson v. Clerke*, Comb. 139.

7. It is not usual to return the custom where suit is grounded on a custom. *Semb.* S. C. Comb. 139.

8. But on a return of a *habeas corpus*, grounded on a custom of London, the court first ordered the return to be filed, for the purpose of controverting the custom in an action for a false return. *Fasakerly v. Robinson*, 6 Mod. 177.

9. In attaint in London upon 23 H. 8. c. 3., the sheriff to the re-summons returned the party, and the petit jury served, but as to the grand jury returned the statute of 37 H. 8. c. 5., and that both juries were Londoners; the court ordered the statute to be struck out of the re- [*912] turn, and made the *distringas* returnable in London. 1 Dy. 81. pl. 65.

VIII. OF THE SHERIFF'S COURT.

1. The request made by the party levying the plaint in the sheriff's court to arrest the defendant, may be before as well as after the entry of the plaint. *Mackalley's case*. 9 Co. 65 b.

2. After the plaint is entered in the porter's book, and before it is entered in the court before the sheriff, the defendant may be arrested by the custom of London. *Mackalley's case*, 9 Co. 65 b.

3. One taken in execution in London upon process from the sheriff's court there, and removed by *habeas corpus* into the King's Bench, shall be committed there in execution for that debt, and having discharged all causes in the King's Bench, shall be remanded. *Cusack's case*, Cro. Car. 128.

IX. COURT OF CONSCIENCE.

The court of K. B. will not stay proceedings against a freeman upon the statute erecting the court of conscience, upon affidavit that the cause of action is under 40s., but it ought to appear upon the trial. *Blake v. Dodemead*, 2 Ld. Raym. 1504.

X. OF THE FREEMEN OF LONDON, AND HEREIN OF THEIR WIDOWS AND ORPHANS.

1. One may be a freeman of London three ways: 1st, by service; 2nd, by birth; 3d, by allowance of the court of mayor and aldermen. *City of London's case*, 8 Co. 126 b.

2. A freeman of London is not deprived of his right of voting for common-councilmen by not having paid the orphans' rate, if it is not demanded of him. *Warden v. Rous*, 7 Mod. 323.

3. Trading during apprenticeship forfeits the right of freedom in London. *Messon v. Finch*, 1 Ld. Raym. 383.

4. The city of London may fine a freeman for not taking up his livery, and recover it by action of debt. *Grafton's case*, 1 Mod. 10.

5. A freeman of London cannot devise over the orphanage part, but he may give to some of his children legacies inconsistent with it, and then they shall be put to make their election. *Hervey v. Desbouverie*, C. T. Talb. 130. 137.

6. An orphan of London (being under age), cannot devise away his orphanage part. *Id. ibid.*

7. The will of a citizen of London may be proved and inrolled in the hustings. *Rever v. Winington*, 2 Show. 158. 249.

8. A woman may bar herself, by an agreement before marriage with a freeman of London, of her right to the customary share of her husband's estate. *Bhndel v. Barber*, 10 Mod. 455.

9. But she is not cut off from her customary right by a jointure in land, unless the jointure be made in bar. 10 Mod. 457.

10. If the wife of a freeman of London be barred by agreement before marriage of her customary part, the freeman may dispose of a moiety of his personal estate by will, and the other moiety shall go to the children. *Bhndel v. Barber*, 10 Mod. 453. &c.

11. And so in like manner where the children have been all of them fully advanced, the wife will be entitled by the custom to a moiety of the personal estate, and the other moiety will be the testamentary part of the freeman. S. C. 10 Mod. 455.

12. If the certainty of a child's advancement out of the personal estate does not appear under the father's hand, it is cut off from claiming a share by the custom. 10 Mod. 456. 460.

13. If it appears under the father's hand what things were given a child, the advancement is sufficiently certain, though the value of them be not expressed. 10 Mod. 460.

14. And where it appears the child has not been advanced above such a sum, but somewhat less, the uncertainty of the advancement may be cured by the child's bringing the whole sum into hotchpot. 10 Mod. 461.

15. If the husband makes a voluntary grant of all his goods, it will not oust the wife of her customary part. *City v. City*, 2 Lev. 130.

16. If any one takes away or eoloigns an

orphan, the court may commit the eloigner to prison till he discover where the eloignee is. *Williamson v. Bolton*, T. Raym. 116.

17.* If a citizen take goods to a fair, and die, his executor is en- [*913] titled to the same privileges as himself. 1 Ro. 142.

[See also post, div. (f), infra.]

XI. RESPECTING THE FORFEITURE OF THE FRANCHISES OF THE CITY OF LONDON.

Neglecting to elect sheriffs of London forfeits the franchise. *City of London v. Vanecker*, 1 Ld. Raym. 499.

2. A citizen of London sued another citizen in the Common Pleas, and the mayor and aldermen wished him to compromise the matter, which he refused, whereupon they disfranchised him; all these that were parties to the disfranchisement were fined a hundred marks a piece, and the party was restored to his franchise. *Anon. Cro. Eliz.* 33.

XII. RESPECTING THE CUSTOMS OF LONDON;—

(a) Relative to apprentices.

1. A custom that every freeman may take an apprentice is good. *Windhurst v. Gibbs*, T. Raym. 4.

2. By custom, an infant may bind himself apprentice, and the master shall have the same remedies as if the apprentice had been of full age. *Horn v. Chandler*, 1 Mod. 271. T. Raym. 4.

3. So, a man may transfer over his apprentices to another, March 3. pl. 6.

4. By custom, an executor may place the testator's apprentice with another master, &c. *Rez v. Peck*, Salk. 66.

(b) Relative to the wife of a freeman.

A custom that if a man and his wife pass the wife's land in London, and she be examined, is good, and binds her. *Needler v. Bishop of Winchester*, Hob. 225.

(c) Relative to an innkeeper.

By the custom of London, an innkeeper may detain and sell a horse for keeping. *Gilbert v. Berkeley*, Holt, 366.

(d) Relative to churches.

By custom there, the parishioners repair both church and chancel. *Bail v. Cross*, Holt, 138.

(e) Relative to houses and lands.

1. By the custom of London, every citizen upon an ancient foundation may build his house as high as he pleases. *Anon. Com.* 273.

2. A custom for a tenant at will above 40s. to have half a year's warning, (and if under 40s. a quarter's warning,) is good, and pleadable in ejectment. *Taylor v. Seed*, Comb. 384.

3. Lands in London pass by parol bargain and sale, without indenture or inrolment, as before, 27 Hen. 8 c. 16., by a proviso in the statute. 2 Dy. 229. pl. 50.

(f) *Relative to devises.*

1. A custom that every citizen (a freeman of London) might devise in mortmain, was held good. *Windkarst v. Gibbs*, T. Raym. 4.

2. A foreigner, as well as a freeman, may by the custom devise his lands in London, but not in mortmain, without the king's license, nor with such leave, but to corporations within the city. 3 Dy. 255. pl. 3.

3. By the custom of London, a daughter loses her orphanage share of her father's personal estate if she marries without his consent, unless he be reconciled to her before his death. *Harvey v. Aston*, 749.

4. The custom of London that the third part of the effects of an intestate freeman shall go to his administrator, is good, although an administrator was constituted by 31 Edw. 3 c. 11., and so within time of legal memory. *Percivall v. Cripe*, 2 Show. 175, 176.

5. If a freeman of London die intestate, leaving a wife and one child, the custom is, that one part of his effects shall go to the wife, another to the child, and the third to the administrator. S. C. 2 Show. 176 *notis*.

6. The custom there concerning freemen's estates, extends only to children, not to grandchildren. The case of *Customs of London*, Salk. 426. *Fouke v. Hunt*, 2 Show. 467.

7. So, the custom of hotchpot there; and where it appears under the father's own hand how much a child has received, the court will judge if a full advancement or not, Salk. 426.

8. But now by 1 Jac. 2 c. 17. a. [*914] 8, the administrator's third part shall be distributed according to 22 & 23 Car. 2 c. 10. *Percivall v. Cripe*, 2 Show. 176. *notis*.

9. A custom that the executors of a freeman should be bound to the court of orphans there, as well as the spiritual court, held good: this custom extends to widows of freemen. *Luck's case*, Hob. 247.

10. The custom of London that the administrator of an intestate citizen shall be bound to pay a debt by simple contract, as if it were by bond, is good, and binds strangers. *Snelling v. Norton*, 5 Co. 62 b.

(g) *Relative to legal proceedings there.*

1. By the custom of London the lord mayor is chancellor, and may call causes before him out of the sheriff's courts, and rule them according to equity; this custom was held good upon a special return of it. *Barnes v. Barnes*, Skin. 67.

2. By the custom of London, a married woman may sue and be sued in the city courts as a feme sole trader without her husband; but *quere*, if the trade of a victualler be within this custom. *Moreton v. Packman*, 1 Mod. 26.

3. But a feme sole trader cannot be sued

in the superior courts without her husband. *Candell v. Shaw*, 1 Mod. 25. *notis*.

4. An action lies there by custom for calling a woman "whore." *Watson v. Clerke*, Holt, 429.

5. An action of waste is maintainable in London by custom. *Greene v. Cole*, 2 Saund. 254.

6. Debt upon contract lies against an executor by the custom of London; and upon error brought upon such action, the courts at Westminster will take notice of it. *Spink v. Tenant*, 1 Ro. 106.

7. By the custom of London, a debtor may be arrested before the money is due, to make him find sureties. *Anon.* 1 Vent. 29.

8. The custom of London, that after the plaintiff entered the defendant may be arrested without being first summoned, is good. *Mackalley's case*, 9 Co. 68 a. Cro. Jac. 279. Jenk. 231.

9. A custom to commit offenders for obstinately and contemptuously refusing to obey the order of the court of aldermen, is good. *City of London v. Coates*, 1 Vent. 115.

10. A custom to punish by information in the court of aldermen for assault and contemptuous words of an alderman in execution of his office, is good; *aliter*, if to disfranchise. *Reg. v. Rogers*, Salk. 425.

11. A custom to commit for calling an alderman upon the exchange fool or knave, is bad. *Dean's case*, Cro. Eliz. 689.

12. A custom to disfranchise and commit a freeman for speaking opprobrious words of an alderman, is bad. *Rez v. Melting*, 1 Vent. 327.

13. A custom that goods taken in London shall not be replevied by the king's writ, but only in London, is bad. 2 Dy. 246. pl. 67.

14. The privilege of the clerks of the court of King's Bench against a foreign attachment in London was disallowed. *Turbill's case*, 1 Saund. 68, 69. 38 H. 6. 29 b.

(h) *Relative to trade.*

1. The custom of London, that no person whatsoever, not being free of the city of London, shall by any colour, way, or means whatsoever, directly or indirectly, by himself or any other, keep any shop, or any other place whatsoever, inward or outward, for show, or putting to sale of any wares or merchandizes whatsoever, by way of retail, or use any trade, occupation, mystery, or handicraft, for hire, gain, or sale, within the city of London, is a good custom; and an ordinance made to enforce the custom upon pain of forfeiture, is good. *City of London's case*, 8 Co. 124 b. 125 a. 2 Brownl. 278. 284. S. C.

2. By the custom of London, the mayor may restrain any man from setting up his trade within the city in a place unsuit, and for his disobedience may imprison him. March, 15. pl. 34.

3. A custom that none but free porters

shall carry corn is good. *Fitzsacherly v. Wiltshire*, 11 Mod. 352.

4. The custom not to employ a foreigner in any manual occupation within the city is good. *Bosworth v. Budgin*, 7 Mod. 459.

[*915] XIII. RESPECTING THE BYE-LAWS OF THE CITY OF LONDON.

1. By a bye-law of London, if any citizen of London, being fitly qualified, shall be duly elected and chosen one of the sheriffs of the city of London and county of Middlesex, and shall refuse to take upon him the said office, (unless he shall be discharged by oath as to the insufficiency of his estate, not being worth £10,000 at the time of his election,) he shall forfeit the sum of £400 to the mayor, commonalty, and citizens, to be recovered by action of debt in any of the courts of record within the city of London. *Clark's case*, 11 Mod. 164. Holt, 430.

2. The bye-law of London, that a sheriff chosen after a fine paid shall have a portion of the fine, is good. *Rich v. Player*, 2 Show. 263.

3. A bye-law, that no drayman or brewer's servant shall be in any of the streets of London after certain hours, is good. *Bosworth v. Sterne*, C. T. Hardw. 405.

4. It is a good bye-law that no foreigner shall weigh goods imported, except at the ancient beam of that city. *Cudden v. Provost*, 6 Mod. 123.

5. A bye-law that every fellow of the company of vintners in London, who shall be elected into the place and office of one of the livery, shall pay £31 13s. 4d. is good, for it is to bind only the members of the corporation; and when a man agrees to be of a company, he thereby submits himself to the laws thereof, and it is convenient that the company should have such power, to keep up their reputation and the honour of the city. *Taverner's case*, T. Raym. 446, 447.

6. It is a good bye-law, that if any citizen, freeman, or stranger, within the said city, put any broad cloth to sale within the city before it be brought to Blackwell-hall, to be viewed and searched, so that it may appear to be saleable, and that hallage be paid for it, he shall forfeit for every cloth 6s. 8d., and that the chamberlain of the city for the time being shall have an action of debt for the forfeiture. *Chamberlain of London's case*, 5 Co. 62 b.

7. Their bye-law to restrain the number of carts is good. *Player v. Vere*, T. Raym. 324. 328. 1 Vent. 21. 196.

8. But a bye-law that no carman within the city shall go with his cart without a licence of the guardians of such an hospital, nor without paying a rent to such an hospital for the same, and if any do contrary, that then he shall forfeit such a penalty to the said guardians of such hospital, is void. S. C. T. Raym. 324. 328.

9. A bye-law of the city of London inflict-

ing a penalty on any person who shall employ a porter not a freeman of the porters' company, is void; but a bye-law that none but a freeman shall do portage work is good. *Cudden v. Estwick*, 6 Mod. 123.

10. Bye-laws made there, if unreasonable, are void. Holt, 130.

XIV. HOW FAR THE COURTS WILL TAKE NOTICE OF THE CUSTOMS AND BYE-LAWS OF LONDON.

1. The customs and liberties of London are confirmed by act of parliament. *Edgcomb v. Dee*, Vaugh. 93. W. Jo. 240, 241.

2. The customs of London cannot be judicially taken notice of, any more than any other particular customs; they must be certified by the recorder. 10 Mod. 440. 1 Mod. 202. *Coke v. Wingfield*, 8 Mod. 176. *Sed vide* 1 Leon. 284.

3. Therefore if a cause be removed out of the city courts by *habeas corpus*, the custom must be returned, or no *procedendo* can be granted. 10 Mod. 440.

4. But the customs of London that directly concern the interest of the corporation are not triable by their certificate, but by jury. *Day v. Savadge*, Hob. 85. 87.

5. The courts at Westminster will take notice of the customs of London upon error brought. *Spink v. Tenant*, 1 Ro. 106.

6. The court of King's Bench will not enter into the validity of a bye-law upon the return of a *habeas corpus*, except it be a bye-law of the city of London. *Cudden v. Provost*, 6 Mod. 123. *Ballard v. Bennett*, 6 Mod. 178. n.

XV. MISCELLANEOUS.

1. The gald delivery of Middlesex is held by prescription in the city of London. *Anon.* 6 Mod. 145. Palm. 45.

2.* Upon indictment at the sessions, error lies. 2 Leon. 107. [*916]

3. The very record is never removed from London. *Anon.* 12 Mod. 454.

4. In London, no exceptions are taken to bail, but there is an officer to take it, which, if insufficient, he must pay the debt, or the profits of his office will be sequestered. *Adams v. Cox*, 12 Mod. 249.

5. Debt lies in the Common Pleas upon a recognizance taken in London. *Hollingshead v. King*, 1 Leon. 284.

LUNATICK.

1. The bond, or surrender, or other deed of one *non compos* or a lunatic, is void. *Thompson v. Leach*, 12 Mod. 173. Salk. 437. S. C. Id. 675.

2. But a seoffment by him is only voidable, on account of the notoriety of it. *Thompson v. Leach*, 12 Mod. 173.

3. If the lunatic levy a fine to the king, and declare the uses of it by his deed, he is bound. *Needler v. Bishop of Winchester*, Hob. 224.

4. The steward of a lunatic may grant copyhold estates, notwithstanding the lunacy. *Blewitt's case*, Ley, 47, 48.

5. He is not prejudiced by laches in suing livery. *Burker's case*, Hob. 137.

6. A prohibition to the probate of a will (on suggestion of being *non compos*) to a remainder-man, is void. *Thompson v. Leach*, Salk. 576.

7. The estates and persons of idiots and lunatics by law are intrusted to the king. *Celt v. Bishop of Coventry*, Hob. 155.

8. The lord of a manor cannot grant the custody of a copyhold belonging to a lunatic, without a special custom. Hob. 216.

9. The king has not an interest in a lunatic as he has in an idiot. *Beverley's case*, 4 Co. 127.

10. Where the lord of a manor makes such a grant, no interest is gained, but the action must be brought in the lunatic's name. *Coke v. Darson*, Hob. 215.

11. If the trustee of a lunatic renew a lease for his own benefit, it is a breach of the trust. *Ex parte Phelps*, 9 Mod. 357.

12. An action must be brought in his name. *Fletcher v. Griffin*, Poph. 141.

13. He cannot gain a settlement. *Anon.* 12 Mod. 322, 323.

14. An idiot is maintainable by the parish where his father is settled, and not where born. *Thompson v. Leach*, Salk. 427. 1 Ld. Raym. 313. Com. 45. S. C.

MAGISTRATE.

No action lies against a magistrate for any act done by him as a judge. *Bushel's case*, 1 Mod. 119.

[See ante, tit. JUDGE, div. V. p. 833. and tit. JUSTICE OF THE PEACE, p. 858.]

MAINTENANCE.

1. If a man commence an action at the suit of another without his privity, it is maintenance. March, 47. pl. 76.

2. So it is to labour and expend money in the law suits of another. 3 Dy. 356. pl. 39.

3. But not to assist another in suits and quarrels which are not law-suits. 3 Dy. 356. pl. 40.

4. And though it is maintenance to expend costs in a suit, it is not so to engage to save harmless from costs to be awarded. Cro. Eliz.

5. It is maintenance in any other not concerned in the title to join with them. *Howard v. Bell*, Hob. 92.

6. A son may maintain a suit for his father, and *e contra*; and brother for brother. 1 And. 201, 202.

7. It is lawful for the master to maintain his apprentice. Mo. 814.

8. If a master expends more upon his ser-

vant's suits than his wages amount to, it is maintenance. Mo. 6.

9. If a servant without the command of his master retains an attorney to prosecute suits for his master, it is maintenance. 2 Ro. 77.

10. A contract for land, and sealing a lease to try the title, though nothing be done upon it, is maintenance; and though the year be expired it is still finable as a misdemeanor. Mo. 751.

11. Purchasing a copyhold by surrender is maintenance; so, purchasing after recovery by title executed, if there be any new suit pending; a solicitor is a maintainer within the 32 H. 8. *Moussé v. Weaver*, Mo. 655.

12. A term is within the purview of 32 H. 8. c. 9. 1 Dy. 74. pl. 19.

13. A lease for years by one out of possession made off the land, and for the purpose of trying the title, is within the statute. 3 Dy. 374. pl. 17.

14. In a declaration against the lessors upon that statute, it is necessary to aver it to be a pretended right or title, but not to aver the commencement or duration of the term; and a misrecital of the statute is fatal. 1 Dy. 74. pl. 19.

15. It is not necessary to recite the statute of maintenance in the count. *Partridge v. Strange*, Plow. 79.

16. It is not maintenance for the lessor to maintain the suit of the lessee. *Banister v. Eyres*, 2 Ro. 181. 1 And. 201.

17. It is not maintenance to solicit other's causes, unless it be done for maintenance, and money laid out for maintenance. *Worthington v. Garstone*, Hob. 67, 68.

18. It is not maintenance for all the tenants of a manor to join together in defence of a cause that concerns the title of all, though one only be sued. *Howard v. Bell*, Hob. 92.

19. No action at common law, or upon the statute of maintenance, lies for maintenance in the spiritual court. *Tisdale v. Bedington*, Noy, 68. Cro. El. 594.

20. A bond conditioned to commit maintenance is void. *Hackett v. Tilly*, 11 Mod. 93. 2 Ro. 201.

MALICIOUS PROSECUTION.

I. WHEN AN ACTION LIES FOR A MALICIOUS PROSECUTION, p. 917.

II. WHEN AN ACTION DOES NOT LIE, p. 918.

III. PROCEEDINGS IN THE ACTION;—

(a) *In what court it should be brought*, p. 919.

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(c) *Plea*, p. 920.

(d) *Evidence*, p. 920.

(e) *Error*, p. 921.

I. WHEN AN ACTION LIES FOR A MALICIOUS PROSECUTION.

1. An action on the case lies for malicious prosecutions of every description. *Hockin v. Matthew*, 1 Sid. 462.

2. Damages are of three kinds to maintain an action for a malicious prosecution. *Roberts v. Savill*, Holt, 8, 9.

3. Case lies for a malicious arrest, where there is no probable cause of action. *Norris v. Palmer*, 2 Mod. 52. 3 Lev. 210.

4. So, for arresting for such an excessive sum beyond what was due, that the defendant could not get bail. *Ward v. Evans*, Com. 191. Holt, 23. 1 Lev. 292. *Daw v. Swayne*, 1 Mod. 4. 6 Mod. 73. n.

5. It lies for vexatiously suing double execution, if the party knew the first execution was served. *Waterer v. Freeman*, Hob. 205, 206, 266.

6. An action lies for knowingly suing in a court which has no jurisdiction of the cause. *Ward v. Evans*, Com. 190. *Atwood v. Monger*, 6 Mod. 73. n. *Temple v. Killingworth*, 12 Mod. 4. Hob. 267. *Sed vide* 1 Show. 254, 255.

7. As, for suing in the admiralty, where the thing was done upon the land. *Flemming v. Yates*, 1 Ro. 203. 410.

8. But no action will lie against the officer. *Semb. Skin*. 131. *Coatlar, Sutton v. Benin*, 11 Mod. 50. 1 Show. 148. 214.

9. It lies also for suing in a proper court, but proceeding there vexatiously. *Ward v. Evans*, Com. 190.

10. For proceeding to judgment, and awarding of execution in an inferior court after an *habeas corpus* awarded. *Ipielt v. Williams*, 3 Leon. 99.

11. Although the matter be merely ecclesiastical, yet if the party grieved [*918] has sustained damage, either by any wrongful proceeding of the judge, or misfeasance or falsity of any minister, or by an unjust prosecution of the party, such party may recover his damages in an action on the case. 12 Co. 128.

12. It lies also for a malicious prosecution in the spiritual court. *Gray v. Degge*, T. Jones, 132. W. Jo. 312. 1 Lev. 292. 1 Sid. 463.

13. If a summoner return one certified upon his oath in a court Christian, where, in truth, he was not, and he is pronounced contumacious, and afterwards excommunicated, the party injured shall have an action on the case. 12 Co. 128.

14. So for outlawing a man in a county where he is not known. *Daw v. Swayne*, 1 Mod. 4.

15. So it lies for procuring the plaintiff to be indicted for conspiring to lay a bastard child to the defendant. *Pedro v. Barrett*, 1 Ld. Raym. 81.

16. If a false affidavit is made by which a party is arrested and molested for a con-

tempt, such party may recover damages in an action on the case. 12 Co. 128.

17. It lies against a justice for arresting a man for felony without accusation. *Windham v. Cleers*, 1 Leon. 187.

18. It lies for falsely and maliciously preferring a bill against another for treason. *Smith v. Cranshaw*, W. Jo. 93. 2 Ro. 259. *Contra*, 1 Ro. 109.

19. So for maliciously indicting the plaintiff at the assizes. *Savil v. Roberts*, 5 Mod. 394. 405.

20. For causing plaintiff to be arrested, and maliciously charging her with felony before a justice, &c. Holt, 22, 23.

21. Case in the nature of conspiracy lies against one person only, for causing the plaintiff to be falsely and maliciously indicted, *per quod* he was put to great expense, although the plaintiff was acquitted of the trespass laid to his charge. *Norris v. Palmer*, 2 Mod. 51. Cro. El. 871. 900.

22. If an indictment be preferred for a common trespass, and the defendant be acquitted, the prosecution shall be intended to have been malicious, and therefore an action on the case will lie against the prosecutor. *Anon.* 2 Mod. 306.

23. For though an indictment will not lie for a common trespass, yet in an action on the case for a malicious prosecution it makes no difference whether the matter be indictable or not. *Jones v. Gwynne*, 2 Mod. 306 *notis*.

24. Case lies for accusing a man of felony, if a bill be preferred, although he be not indicted; but no writ of conspiracy would lie in such case. *Anon.* 2 Ro. 188.

25. So, although the bill was not found; but the declaration must show that the prosecution is determined. *Gardiner v. Dudgeate*, 2 Show. 51. 1 Ld. Raym. 374. T. Jo. 20.

26. An action lies for the malicious prosecution of a bad indictment. *Chambers v. Robinson*, 2 Stra. 691. Yelv. 46. 2 Mod. 306 *notis*.

27. So, although the defendant be acquitted upon a defect in the indictment. 2 Show. 51 *notis*.

28. If the indictment contains a charge which either scandalizes the party, or endangers his personal security, or causes expense, the latter cause alone will support an action, though neither of the former two has been the consequence of the charge. *Seville v. Roberts*, 1 Ld. Raym. 374. 1 Salk. 13. 3 Salk. 16.

29. Any suit or action that is malicious, and without a cause, if attended with special damage, may be the ground of an action upon the case. *Ibid*.

30. Case lies for a malicious prosecution by information as well as by indictment. *Moore v. Shutter*, 2 Show. 295.

II. WHEN AN ACTION DOES NOT LIE.

1. An action for a malicious prosecution will not lie for bringing a civil action, although the plaintiff has no grounds for it, unless malice can be shown. *Savill v. Roberts*, 6 Mod. 73. n. *Waterhouse v. Bowde*, Cro. Jac. 133. Cro. El. 836.

2. It will not lie against a plaintiff for bringing an action where he had a probable cause. *Baugh v. Killingworth*, 4 Mod. 14. *Anon.* 6 Mod. 25.

3. An action for a malicious prosecution will not lie against one attorney for suing another in an inferior court, or for suing on the retainer of a client, although he knew there was no cause of action. 1 Mod. 209, 210.

4. A charge of conspiracy is not actionable unless there is special damage. *Saville v. Roberts*, 1 Ld. Raym. 374. 1 Salk. 13. 3 Salk. 16. 5 Mod. 394.

5. An action for a malicious prosecution will not lie, if there was a probable cause of prosecution; for to support such an action, there must be direct malice, and without any colour of cause. *Anon.* 6 Mod. 25. *Anon.* 6 Mod. 73.

6. An action will not lie for maliciously indicting another for a trespass. *Harwood v. Parrott*, 7 Mod. 104.

7. Nor for indicting one as being a disquietor of the neighbours. 3 Leon. 123.

8. So, if one brings an appeal of murder, returnable in C. B., though the bill contains matter of which the court has not cognizance. Lutw. [409].

9. Where there has been only an acquittal by a *nolle prosequi*, no action will lie for a malicious indictment. *Goddard v. Smith*, 1 Salk. 20.

10. Where the indictment is insufficient, if the matter is not scandalous, this action will not lie. *Jones v. Gwynne*, 10 Mod. 149.

11. One whose goods are stolen desires a justice to examine a man; no action lies, unless he charge him positively. 3 Leon. 100, 101.

12. If a declaration for a malicious prosecution charge three persons, one of whom is the justice of the peace, with a conspiracy illegally to arrest and imprison the plaintiff, the conspiracy may be collected by the jury from the circumstances of the case; but if it appear that the justice was persuaded by the others that it was not a bailable offence, and that from ignorance of the law, and not from malice of the heart, he committed the plaintiff, he ought to be found not guilty. *Muriel v. Tracy*, 6 Mod. 170.

13. An action will not lie for indicting a man for felony, unless it be done maliciously, and without probable cause. *Knight v. Gorman*, Cro. El. 70.

14. An action will not lie for falsely suing or indicting another, until the proceeding is

determined. *Rez v. Best*, 6 Mod. 138. *Ward v. Evans*, Com. 190.

15. Actions for malicious prosecutions are not encouraged. *Reynolds v. Reynolds*, cited, Say. 163.

III. PROCEEDINGS IN THE ACTION;—

(a) *In what court it should be brought.*

On an indictment and acquittal in B. R., no action lies in the Marshalsea for a malicious prosecution. *Rez v. Roberts*, 8 Mod. 307, 308.

(b) *How the declaration should be.*

1. A Declaration for causing a man to be held to special bail without cause, ought to show for what sum he was held to bail, and how the defendant caused him to be held to bail; a declaration stating generally that the declaration stating generally that the defendant, by colour of certain process, caused the plaintiff to be arrested and held to special bail without cause, is insufficient, even after verdict. *Robbins v. Robbins*, 1 Ld. Raym. 503. Salk. 15. 12 Mod. 273. 1 Salk. 15. S. C.

2. The arrest, and malice, and want of probable cause, must be stated and proved. 1 Saund. 230 a. n. [6].

3. An action on the case for a malicious prosecution must show that it was without probable cause; a declaration, stating that it was without just cause, is bad. *Box v. Taylor*, 2 Show. 154. 6 Mod. 170.

4. The plaintiff must state and prove that the first action is determined. 1 Saund. 228 d. n. [a]. *Fisher v. Bristow*, 2 Mod. 306 *notis*. Say. 162.

5. In case for maliciously citing a churchwarden to account in the spiritual court, knowing that he had accounted before, the declaration need not state the particulars of the cause. *Gray v. Dight*, 2 Show. 145. 1 Lev. 292.

6. In an action for the malicious prosecution of an indictment, the plaintiff must allege in his declaration that he was acquitted, and the prosecution at an end, before the action was brought. *Pantsune v. Marshall*, Say. 162. 1 Saund. 288 a. 288 d. n. (1).

7. The omission is cured by verdict, but not by judgment by default. *Wine v. Ware*, 1 Sid. 15. 1 Saund. 288 a.

8.* It must also be shown how the proceedings upon the indictment ended. *Lewis v. Farrel*, 1 Stra. 114. *Parker v. Langley*, 10 Mod. 145. 210. See also *Jones v. Gwynne*, 10 Mod. 219.

9. The declaration must agree with the indictment. *Anon.* 12 Mod. 555.

10. If the mode of prosecution be stated, it must be proved as alleged. 1 Saund. 229. n. [a.]

11. An action for a malicious prosecution, stating that the plaintiff thereof was lawfully discharged, is not maintained by showing a *nolle prosequi* entered on the indictment. *Goddard v. Smith*, 11 Mod. 56.

12. If a declaration for a malicious arrest

state the warrant to be "with intent to rob," and the charge in the warrant is, "with intent to rob, as he verily believes," the variance is immaterial. *Muriel v. Tracy*, 6 Mod. 169.

13. Case, in the nature of conspiracy; against A, because he procured the plaintiff to be indicted as a common barretor, and that he was thereof acquitted before B and C, justices of assize, held bad, because it was before them as justices of oyer and terminer. *Throgmorton's case*, Cro. Eliz. 564.

14. A declaration for a malicious prosecution, stating, that the plaintiff was arrested "by pretence of a certain warrant," is good. 6 Mod. 170.

15. In an action for a malicious indictment, if the indictment be recited "according to the substance following," a variance of "*valoris*" instead of "*valentia*" is immaterial. *Johnston v. Browning*, 6 Mod. 216.

16. If the indictment be not set out in the declaration, it is good after verdict. 1 Saund. 288, a. n. [f].

17. In an action for a malicious prosecution in charging the plaintiff with conspiring with others to defraud the defendant of the interest of an East India bond, the declaration stated that the bond bore interest "as therein is (not was) mentioned," and held good. *Jackson v. Sharpe*, Willes, 525.

(c) Plea.

To an action on the case for a malicious prosecution, a plea, that the action was brought to recover a debt on bond, without alleging that the money was due and unsatisfied, is bad. *Dixon v. Thompson*, 2 Show. 246.

(d) Evidence.

1. If the mode by which the first action or prosecution is determined be stated, it must be so proved. 1 Saund. 299. n. [a].

2. A declaration for maliciously indicting the plaintiff for barratry without cause, stating, that he was in due manner thereupon discharged, is not maintained by evidence that he was discharged by means of a *nolle prosequi* entered by the attorney-general; but if he had pleaded "not guilty," and the attorney-general had confessed the plea, that would have maintained the declaration. *Goddard v. Smith*, 6 Mod. 262.

3. To support this action, both malice and want of probable cause must appear. *Johnston v. Sutton*, 2 Mod. 306 *notis*. *Savill v. Roberts*, Carth. 417.

4. But malice may be inferred from the want of probable cause. *Johnston v. Sutton*, 6 Mod. 73. n. *Johnson v. Browning*, ib. 216. S. P.

5. If the malice, &c. can be proved as to some charges contained in the indictment, it is enough. 1 Saund. 230 a. n. [b].

6. In an action for a malicious prosecution for felony, the plaintiff ought to produce a copy of the indictment, and prove that it

was found by the grand jury upon the oath or procurement of the defendants; but the names being on the back of the bill, is of itself a sufficient evidence that they have sworn on the bill. *Johnston v. Browning*, 6 Mod. 216.

7. It may be proved that the defendant was a witness on the indictment, without producing a copy of the indictment. 6 Mod. 216.

8. But it is said that it is only where the prosecution was for a misdemeanor, that a copy of the indictment is not necessary; for that, where the malicious charge was for felony, a copy of the indictment must be produced. *Morrison v. Kelly*, 6 Mod. 217. n.

9. An allegation in a declaration for a malicious prosecution, that the plaintiff, "by a jury of the said county, &c., was duly and in a lawful manner acquitted," is proved by the production of * [921] the record, by which it appears, that "the jury found the plaintiff not guilty," and upon that, judgment was entered "that the plaintiff should go thereof acquitted." *Hunter v. French*, Willes, 517.

10. It is not necessary to prove the precise day of acquittal laid in the declaration. 2 Saund. 291 l. n. [a].

11. On an action for a malicious prosecution for felony, the defendant, to show a probable cause for the prosecution, must prove that a felony was committed. *Johnson v. Browning*, 6 Mod. 216.

12. Or show a fair and reasonable ground for suspecting the guilt of the plaintiff. 6 Mod. 217. n.

(e) Error.

In an action for a malicious prosecution against two defendants, one of them alone cannot bring a writ of error. *Turner v. Brewer*, 11 Mod. 321.

MANDAMUS.

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I. WHEN A MANDAMUS WILL OR WILL NOT BE GRANTED ;—

- (a) *On behalf of an outlaw.*

An outlaw cannot bring a mandamus ; he

must sue out a writ reciting the outlawry and its reversal. *Reg. v. Mayor and City of Bristol*, 1 Show. 988.

- (b) *For an abbot or prior.*

An ecclesiastical corporation always has a visitor, and therefore a mandamus was never moved for an abbot or prior. *Reg. v. Lee*, 1 Show. 252.

- (c) *Where the case is doubtful.*

1. A mandamus is sometimes granted where the court has doubted whether it lay or not, in order to be better considered upon the return. *Reg. v. Heathcote*, 10 Mod. 49. 53. 58. 62.

2. The court refused on a motion for a mandamus to determine a corporation question of consequence, but directed the suit to issue, that the question might be decided on the return. *Reg. v. Everett*, C. T. Hardw. 261.

- (d) *Where another remedy lies.*

1. A mandamus was denied to execute the judgment of an inferior court, because the plaintiff has another remedy. *Wilkins v. Mitchell*, 3 Salk. 229.

2. Held not to lie where an assize lay. *Anon.* 1 Comb. 347. 244.

- (e) *Where it would expose the party to an action.*

1. It is not grantable where a man would be liable to an action for obeying it. *Reg. v. Sir G. Heathcot*, Fort. 290.

2. It is said no instance can be produced where a mandamus has been granted under such circumstances. 10 Mod. 51. 61.

3. But a mandamus lies against an officer on stat. 11 G. 1. c. 18., notwithstanding a penalty be given thereby. *Reg. v. Everett*. C. T. Hardw. 261.

- (f) *To a constable.*

A mandamus will not lie to compel a constable to pay money levied by him under a distress and sale, and who, under an idea of its having been erroneous, had restored the money to the purchaser, and the goods to the owner. *Morley v. Slacker*, 6 Mod. 83.

- (g) *To a company.*

A mandamus to the company of gun-maker, to give a proof-mark to a freeman, was denied, because they were not a legal establishment. *Anon.* 2 Ld. Raym. 989.

- (h) *In relation to the Universities* :—

1. To admit or restore a fellow.

1. A mandamus will not lie to admit to the fellowship of a college that has a visitor, although it do not appear by the return that there was a visitor at the time of refusal, or that his authority extended to admit or refuse admission of fellows. *Reg. v. Alop*, 2 Show. 170. *Appleford's case*, 1 Mod. 82. 83. *Reg. v. New College, Oxford*, 2 Lev. 14. *Parkinson's case*, 3 Mod. 285. Holt, 143. Comb. 143. Carth. 92. 168. 1 Show. 74. *Philips v. Bury*, 4 Mod. 122. 10 Mod. 50. *Widrington's case*, T. Rym. 31. *Reg. v. St. John's College*, 4 Mod. 238. *Sed vide Reg. v. St. John's College, Oxford*, Comb. 238, 239.

2. The court of King's Bench will grant a mandamus to the master of a college to compel him to take the oaths of the fellows as prescribed by 1 Will. & Mary, c. 8. *Rez v. St. John's College, Cambridge*, 4 Mod. 233.

2.* To remove a fellow.

[*923] 1. It will not lie to turn a fellow out of a college. *Rez v. Gower*, 3 Salk. 230.

2. A mandamus was refused for removing the fellows of a college, on a suggestion that they had not taken the oaths to the king. *Rez v. St. John's College, Cambridge*, Comb. 279. Skin. 546. 549. S. C.

3. The parties complained of must be made parties to the writ. 4 Mod. 233.

3. To a visitor.

1. A mandamus lies not to a visitor to compel another to execute a sentence of the visitors; but, (if it lies at all), it must be to visit generally. *Rez v. Bp. of Ely, Andr.* 176.

2. It lies not to one as general visitor, if it be doubtful whether he be such or not; but this must be first determined in a solemn manner. *Rez v. Bp. of Ely, Andr.* 176 to 186.

3. It lies not to a general visitor to execute a sentence given by him as special visitor. *Rez v. Bp. of Ely, Andr.* 176.

4. A mandamus lies to a visitor to hear an appeal. 2 Show. 74 *notis*.

[See also *ante*, tit. COLLEGE, and *post*, tit. VISITOR.]

4. To the provost of a college.

A mandamus lies to the provost of a college, to compel him to affix the college seal to a presentation by the college. *Rez v. Bland*, 7 Mod. 355.

5. To the keeper of the common seal.

A mandamus lies to the keeper of the common seal of either of the universities, commanding them to put it to the appointment of high steward. *Rez v. Justices of Surrey*, 2 Show. 74 *notis*.

(i) To the court of delegates.

No mandamus lies to delegates to admit allegations. *Bp. of St David's v. Lucy*, 1 Ld. Raym. 544.

(j) To an inferior court.

1. A mandamus lies to the mayor and aldermen of London to make them enter up a judgment. *Amherst's case*, T. Raym. 214.

2. A mandamus may be granted to oblige an inferior court to pay obedience to a toll for the removal of a cause. *Burgh v. Bhunt*, 10 Mod. 350.

3. A mandamus lies to an inferior jurisdiction or officer, commanding him to execute the authorities given by act of parliament. *Rez v. Justices of Surrey*, 2 Show. 74. Comb. 202. 1 Vent. 188.

4. Where a new jurisdiction is created by act of parliament, B. R. may command the execution of it by mandamus. *Rez v. Glamorganshire*, 2 Mod. 403.

(k) To justices of the peace: miscellaneous.

1. A mandamus does not lie to justices at

sessions, commanding them to state a special case. *Peal's case*, 6 Mod. 229.

2. It was denied upon a supposed failure of duty in the justices of the peace to remove a man from a parish, after he had offered security to indemnify the parish; but if an affidavit had been made of the fact, it might have been granted. *Reg. v. Cory*, 3 Salk. 230.

(l) To an inn of court.

1. A mandamus will not lie to admit to a private society, as to the benchers of an inn of court. 1 Mod. 62, 83. 85.

2. A mandamus lies not for one who has studied the law seven years to call him to the bar, for there is no person to whom the writ can be directed. *Twinsend's case*, T. Raym. 69.

(m) To admit to a freedom.

1. A mandamus lies to a mayor to admit one to his freedom who has served an apprenticeship. *Rez v. Mayor of Lincoln*, 5 Mod. 402. 1 Lev. 91. 1 Sid. 107. *Rez v. Selbye*, 2 Show. 154. *Twinsend's case*, T. Raym. 69.

2. If, on such mandamus, it be returned, that he obliged himself by his indenture of apprenticeship not to contract matrimony during his apprenticeship, and that he within the first two years did marry, this is only a breach of covenant, but not any cause to bar him of his freedom. *Twinsend's case*, T. Raym. 92.

3. By the 12 Geo. 3. c. 21., where any person entitled to his freedom shall apply* to the mayor, &c. to be admitted, giving notice and specifying the nature of his claim, and the mayor, &c. shall not admit him within a month afterwards, a mandamus shall go, and if the person be admitted, the mayor, &c. shall pay costs. *Rez v. Selbye*, 2 Show. 154 *notis*.

4. Otherwise, before this act. *Semb.* 4 Mod. 235 *notis*.

5. A taverner, having been chosen into the livery of the company of vintners, had a mandamus directed to the master, wardens, and assistants of the said company, to admit him to be a liveryman according to the said election. *Taverner's case*, T. Raym. 446, 447.

6. A mandamus to the inquiry jury of Clithero, to present one to be a freeman, was refused. *Anon.* Comb. 239.

(n) To elect officers.

1. An application may be grounded on stat. 11 Geo. 1. c. 4., for a mandamus to proceed to an election of a mayor. *Rez v. The Corporation of Oxford*, C. T. Hardw. 178.

2. A mandamus for electing an officer may be awarded upon the 11 Geo. 1. c. 4., although there has been an election *de facto*. *Rez v. Newsham*, Say. 212.

3. A mandamus lies to a corporation to choose officers. 5 Mod. 275.

4. Granted to elect officers who are ne-

cessary constituent parts of the corporation, though not the head of it, where there were wrongful officers in possession. The case of *Corporation of Scarborough*, Stra. 1180.

5. A mandamus may be granted to go to an election, though there is a mayor *de facto*, if he have no colour of right. Case of *Borough of Bossing*, Stra. 1003.

6. Granted to go to an election, notwithstanding an election *de facto*, which there was good reason to think void. Case of *Aberystwith*, 2 Stra. 1157.

7. A mandamus may be granted to the court of aldermen, if, upon a false return of persons not chosen by the wardmote, they refuse to do justice to the parties injured after complaint made. *Reg. v. Heathcote*, 10 Mod. 59.

8. A second mandamus for electing an officer was refused. *Rez v. Corporation of Scarborough*, Say. 105.; but in another case, it appearing that there had been delay in proceeding on the first mandamus, a second was awarded. *Rez v. Corporation of Halesmere*, Say. 106.

9. A peremptory mandamus will lie on a reversal of a judgment for the defendant. *Fert v. Prosser*, Stra. 697.

10. A peremptory mandamus may be awarded in the first instance for electing an officer. *Rez v. Borough of Heyden*, Say. 208.

11. A mandamus lies to commissioners of the land-tax, commanding them to elect a clerk. *Rez v. The Surrey Justices*, 2 Show. 74 *notis*.

12. To call a vestry for the election of churchwardens, was refused. *Anon.* Stra. 686.

(o) *To admit and swear in, or restore, to an office* :—

1. When grantable.

1. A mandamus lies to swear one into the office of mayor. *Rez v. Stephens*, T. Raym. 431.

2. It lies (on 11 Geo. 1. c. 4.) to a steward, to hold a court-leet, and charge and swear a jury to present a particular person elected mayor, upon an affidavit of his election. *Rez v. Willis*, Andr. 279. 7 Mod 261. S. C.

3. A mandamus lies to restore a man to the place of alderman. *Bagg v. —*, 1 Ro. 173. Palm. 453.

4. So, to restore the sword-bearer of a corporation. *Roe's case*, Comb. 145.

5. To restore a man to be a burgess of a corporation. *Rez v. Wilton*, 5 Mod. 256.

6. A citizen of London was disfranchised for refusing to stand to the award of two of the aldermen in a cause of his in B. R., and a mandamus was granted to restore him. 3 Dy. 333. pl. 28.

7. A mandamus was granted to restore a common-councillor of Chester, &c. *Bret and Johnson's case*, Comb. 214.

8. So, to restore a clerk of the company of masons. *Stamp's case*, Comb. 348.

9. A mandamus lies to swear in a person to the office of judge of the sheriff's court in the city of London. *Thompson v. Goodfellow*, 2 Show. 173.

10.* Lies to admit or restore one to the stewardship of a court, [*925] leet or court-baron. *Stamp's case*. T. Raym. 12. 2 Lev. 18.

11. It lies for an attorney. *Hurst's case*, 1 Lev. 75. *Legh's case*, 3 Mod. 333.

12. A mandamus will lie to restore an attorney in an inferior court, for the office of attorney is necessary to the administration of justice, and is of a public concern. *White's case*, 6 Mod. 18.

13. So, to restore a schoolmaster. *Perkinson's case*, Comb. 144.

14. It lies for a sexton. *Rez v. Churchwarden of Kingsale*, 2 Lev. 18. T. Raym. 211.

15. So, to restore a clerk of the peace. *Rez v. Owen*, Comb. 317.

16. A mandamus lies to the ecclesiastical officer, to swear in a church-warden. *Rez v. Dr. Henchman*, C. T. Hardw. 130. 5 Mod. 325. March. 1. Comb. 417. 6 Mod. 89.

17. So, to swear a town-clerk into his office. Comb. 245. 418. 5 Mod. 318.

18. A mandamus was granted to the dean and chapter of Westminster to admit one to the office of bailiff. *Knipe v. Edwin*, 4 Mod. 281. *Rez v. Dean and Chapter of Westminster*, Comb. 244.

19. So, to restore the register of a bishop's court. *Anon.* Comb. 264.

20. It lies to swear in or restore a parish clerk. Comb. 105, 106. 144.

21. A mandamus was granted to swear a parish clerk, who had continued two or three years in quiet possession without being sworn, and whom the new parson would have put out without cause. March, 101. pl. 174.

22. It lies to admit a chaplain where there is no visitor. *Rez v. Bishop of Chester*, 2 Stra. 797.

23. It lies to admit a deputy into an office, where the office may be executed by deputy. *Rez v. Clapham*, 1 Vent. 111.

24. A principal may have a mandamus to admit a deputy. *Rez v. Ward*, Stra. 895. Barnard. 252. 294.

2. When not grantable.

1. All mandamuses are either to admit persons into their offices, if refused, or to restore them, when turned out; and therefore, in the case of an election, a mandamus will not be granted to the returning officer to make a new return. *Reg. v. Heathcote*, 10 Mod. 48. 54.

2. It will not lie to restore an alderman who is poor. *Rez v. Mayor of Andover*, 3 Salk. 229.

3. Nor to restore an alderman who has absented himself from the corporation. *Rez v. Mayor of Exeter*, Comb. 197.

4. A mandamus will not lie to restore a person to the place of clerk of a company in a corporation, although it be an office instituted by the charter, for it is of a private nature; and although the clerk has a freehold in such office, the person may have an assize, or action on the case. *Res v. White*, 6 Mod. 18. 3 Salk. 232. S. C.

5. Not for restoring a water-bailiff of the river Severn. *Anon.* Comb. 347.

6. A mandamus will not lie to "the gun-maker's company" to restore a member to the office of "approver of guns." *Vaughan v. Gunmaker's Company*, 6 Mod. 82.

7. It lies not for a town-clerk elected *durante bene placito*. 1 Lev. 162. 1 Vent. 77. 82. *Dighton's case*, T. Raym. 188.

8. It will not lie to swear in or restore a steward of a court baron. 3 Mod. 334. *Anon.* Comb. 127. *Anon.* 12 Mod. 666. [*Sed vide ante*, div. (c) 1. pl. 10. p. 924.]

9. A mandamus does not lie to restore a proctor at Doctors' Commons. *Res v. Oxenden*, 1 Show. 217. 263. Holt, 435. 3 Salk. 230 S. C. *Res v. Leigh*, 3 Mod. 332. 1 Show. 251. 3 Lev. 309. Carth. 169. S. C.

10. Nor to restore the clerk of a dean and chapter. *Anon.* Comb. 133.

11. No mandamus lies for a register, except he has ecclesiastical jurisdiction; for he has another remedy, Comb. 133. *Ballard v. Gerrard*, 12 Mod. 609.

12. Nor a deputy register, for it is only an office at will. *Res v. Hill*, 1 Show. 253.

13. It does not lie for a fellow of the college of physicians, nor a fellow of any college where a special visitor is appointed. *Widdrington's case*, 1 Lev. 23. 65. 2 Show. 178.

14.* A mandamus does not lie [*926] to an hospital to swear in a surgeon. *Anon.* 7 Mod. 118. Comb.

41. S. C.

15. Nor for any officer that is not a public officer. *Anon.* Comb. 41.

16. It lies not to swear in one who has had judgment on an information against him for an usurpation. *Res v. Heale*, 1 Stra. 625. 11 Mod. 390. S. C.

17. Where it appears that the right to exercise a private office is already the subject of a suit in equity between the parties, the court will not interfere by mandamus. *Res v. Wheeler*, C. T. Hardw. 99.

18. It lies not for an officer who is only suspended. *Res v. Approved men of Guilford*, 1 Lev. 162. 1 Keb. 868.

(p) *To compel admission to a copyhold.*

A surrenderee may compel the lord to admit by mandamus. *Brown v. Dyer*, 11 Mod. 73.

(q) *To instal into a prebend.*

A mandamus lies to instal a person into a prebend. *Res v. Bishop of Salisbury*, Andr. 20.

(r) *In the case of a dissenting minister.*

1. A mandamus will not lie to justices of

the peace, commanding them to suffer a dissenting minister quietly to preach in a particular meeting-house. *Peet's case*, 6 Mod. 229.

2. But a mandamus lies to justices of the peace to admit a dissenting minister to take the oath of allegiance, and subscribe the declaration according to the toleration act, in order to qualify him to preach. *Peet's case*, 6 Mod. 310.

(s) *To compel the grant of probate or administration?*—

1. When grantable.

1. A mandamus lies to prove a will where it is not disputed; or, if there is no will, to grant administration. *Gray v. Tench*, Comb. 454.

2. It was granted to admit an executor to prove a will, who was in poor circumstances. *Rex v. Raines*, Holt, 310.

3. A mandamus lies to the judge of the prerogative court to command him to prove a will, the will being not then controverted; but the suggestion for the mandamus was brought into court, and read, before the mandamus granted. *Dunkin v. Muen*, T. Raym. 235, 236.

4. So it lies to the spiritual court to declare a will proved *per testes*. *Anon.* Comb. 289.

5. A mandamus lies to the spiritual court to grant administration. *Anon.* 5 Mod. 374. *Offey v. Best*, 1 Lev. 187.

6. It lies to grant administration to the next of blood or next of kin, but not to a particular person. *Anon.* 11 Mod. 137. 2 Sid. 114. Comb. 450.

7. A mandamus lies to grant to the husband administration of his wife's effects, though she has made a will of property devised to her after marriage, with express power given by the testator so to do without her husband's interference. *Res v. Bettesworth*, 7 Mod. 313.

8. On the widow renouncing, the spiritual court refused to grant administration to the next of kin, till the widow had exhibited an inventory; but a mandamus was granted to compel them; for where the widow renounces, the next of kin is entitled *ex debite justitia*. *Res v. Dr. Bettesworth*, W. Kely. 156.

2. When not.

1. A mandamus does not lie to the spiritual court after administration granted. *Blackborough v. Davis*, Com. 96.

2. It does not lie to the spiritual court for not delivering up a will concerning land. *Sabine's case*, 1 Sid. 443.

3. Mandamus to grant administration does not lie, till the party has applied for it in the spiritual court. *Raine's case*, 1 Ld. Raym. 262.

4. It lies not for an administrator *durante minore etate*, either to a particular person or generally. *Smith's case*, Stra. 892. Fitzg. 153. Barnard. 370. 425. *Anon.* Andr. 24.

5. A mandamus will not lie to grant ad-

ministration where a will is in question. *Steward v. Eady*, 7 Mod. 143. *Gray v. Finch*, Comb. 454.

6. Nor to the spiritual court to grant administration to the residuary legates on the executors renouncing. *Res v. Bettesworth*, W. Kely. 139.

7.* Nor to grant administration [*927] a particular person. *Anon.* 7 Mod. 140.

8. Nor for enforcing the spiritual court to grant administration according to their sentence. *Anon.* Comb. 158.

(t) *To license.*

The court will not award a mandamus to justices of the peace for licensing a public-house. *Res v. Justices of Nottingham*, Say. 217. *Gile's case*, 2 Stra. 881.

(u) *To appoint overseers.*

A mandamus was awarded to justices of the peace for appointing overseers of the poor. *Res v. Nicholas*, Say. 230.

(v) *To make, or sign, &c., a rate.*

1. A mandamus lies to parish officers, &c. to make poor's rates. Comb. 420. 422.

2. It will be awarded in the first instance to justices of the peace, to allow and sign a poor's rate. *Res v. Fisher*, Say. 160. *Breedon v. Gill*, 5 Mod. 275. Comb. 478.

3. A mandamus lies to the only resident justice of the quorum to sign a poor's rate. *Res v. The Mayor of Worcester*, C. T. Hardw. 128.

4. But it lies not to make an equal poor's rate, where a rate is in being, though unequal. *Res v. Churchwardens of Freshford*, Andr. 24.

5. But in such case, if an appeal be made, and the sessions refuse it, they may be compelled by mandamus to proceed thereon. S. C. Andr. 25.

6. Nor to insert particular persons in a poor's rate. *Res v. Churchwardens of Weobly*, 2 Stra. 1259.

7. Nor to make a rate to reimburse the expense of defending an indictment. *Anon.* Stra. 63.

8. Nor to compel new churchwardens to make a rate to reimburse the old ones. 8 Mod. 339. *Res v. Inhabitants of Littleport*, 3 Salk. 232. 6 Mod. 97.

9. But if an overseer advance his own money for the poor of the parish, he may, during his continuance in office, get a rate for the relief of the poor, and reimburse himself out of the monies arising from it; and a mandamus will lie to compel the justices to sign and allow such a rate. *Res v. Littleport Parish*, 6 Mod. 97.

(w) *To inquire of a forcible entry.*

1. A mandamus lies to compel justices of the peace to make inquiry of the fact of forcible entry. *Anon.* 6 Mod. 138.

2. A mandamus was granted jointly and severally to all the justices of a town to inquire of a forcible entry, on proof having

been made that they had all refused to take any inquisition on the subject. *Caly v. Hardy*, 6 Mod. 164. Holt, 407. S. C.

(x) *To abate a nuisance.*

A mandamus may be granted to abate a nuisance. 4 Mod. 237.

(y) *To assess damages.*

Where a jury trying traverses under statute 9 Anne, c. 30., omits to find damages, the court will not direct a writ of inquiry for the purpose of assessing them. *Kinaston v. Corporation of Shrewsbury*, C. T. Hardw. 298.

(z) *To deliver up public writings, &c.*

1. A mandamus lies to compel the delivery of records (which concern the public administration of justice) to a new officer. *Res v. Sheriff and Town-Clerk of Nottingham*, 1 Sid. 31.

2. But a mandamus to the old churchwardens, to deliver up the parish-books, &c. was denied. *Res v. Street*, 8 Mod. 98, 99.

3. A mandamus lies to restore the ensigns of mayoralty to a succeeding mayor, without saying *vel causum nobis significatis*. *Res v. Owen*, 5 Mod. 314.

II. RELATIVE TO THE MEANS OF OBTAINING THE WRIT.

1. On motion for a mandamus to restore one to an office, no affidavit that he once enjoyed it is necessary, as that fact may be stated in the return. *Res v. The Company of Cutlers*, C. T. Hardw. 189.

2. To obtain a rule to return a mandamus, there must be an affidavit of service. *Dacosta v. Russian Company*, 2 Stra. 783.

3. But though the case is not within the mandamus act, you may have such a rule, and are not driven to an *alias* and *pluries*. Id. *ibid*.

4.* A want of notice is cured by [*928] appearance. *Res v. Bailiffs of Ipswich*, Holt, 444.

5. On an application to the court for a mandamus to admit a person to a fellowship of All Souls, in right of his relationship to the founder, the statutes, or sworn copies of them, must be produced. *Res v. Archbishop of Canterbury*, 7 Mod. 220.

6. On a mandamus to proceed to the election of an alderman, the court will not give any directions respecting the time of election. *Res v. Mayor of Eversham*, 7 Mod. 166.

III. RELATIVE TO THE FORM OF THE WRIT.

1. No precise form is necessary in a mandamus. Say. 37.

2. A mandamus may be directed to members of a corporation by their names of office. *Res v. Mayor of Abingdon*, 1 Ld. Raym. 560.

3. It must be directed to a corporation by its proper name. *Res v. Taylor*, 3 Salk. 230.

4. A mandamus to one, to command another to do the act, is ill. *Reg. v. Mayor, &c. of Derby*, Salk. 436. *Vide* lb. 701.

5. A mandamus to admit an appeal from a conviction of corporation justices on the 22 Car. 2. c. 1., should be directed to the session of the town, and not to the session of the county. *Rex v. Mayor of Southmilton*, 2 Show. 312.

6. A mandamus to restore must be directed only to the body that had power to remove. *Pees v. Mayor of Leeds*, Stra. 640.

7. But where the power is in the mayor, aldermen, *et al' de communi concilio*, if the writ be directed to the mayor, aldermen, and common-council, it is well enough. S. C. Stra. 640.

8. The writ should not be tested before it is granted, but the *alias* and *pluries* may be returnable immediately. *Anon.* Salk. 434.

9. There should be fourteen days between the teste and return, if above forty miles from London, and eight days if under. *Anon.* Salk. 434. Id. note. Stra. 407.

10. An *alias* mandamus may be made returnable immediately, and for a contempt thereon, the court will grant an attachment, or they may make the first writ returnable *de die in diem*, or with a short return, as a week, and an *alias* in four days after, and a *pluries* with the like short return. *Rex v. Mayor of Thetford*, 6 Mod. 25.

11. A mandamus dated the 13th of June, commanding justices to appoint overseers, is good, although, by 43 Eliz. c. 2., they are to be appointed within a month after Easter, and Easter day in that year was on the 22nd of April. *Rex v. Sparrow*, 7 Mod. 393.

12. If a mandamus to the spiritual court to grant a probate state, that the testator had *bona notabilia* in divers dioceses, it need not state them to be in that province over which the court has jurisdiction, especially if the judge has once acted. *Rex v. Beltenworth*, Stra. 858.

13. The writ need not aver that it is the person's duty, to whom it is directed, to admit and swear him. *Rex v. Ward*, Stra. 895.

14. A mandamus setting out the year in figures, is good. 11 Mod. 255.

15. To admit a freeman should be *ad privilegium*, not *ad locum et officium*. *Rex v. Morris*, 1 Ld. Raym. 338.

16. A mandamus to swear one who was elected to be one of the eight men of Ashborne court, was refused for uncertainty; for it ought to be specially stated what the office is. *Anon.* 2 Mod. 316.

17. A mandamus to choose and swear a mayor, shall be taken *redendo singula singulis*. *Rex v. Tregony*, 8 Mod. 111.

18. It is not necessary to set out particularly in a mandamus for electing an officer of a corporation, the right of the corporation to have such officer. *Rex v. Corporation of Nottingham*, Say. 37.

19. To obtain a mandamus to admit, the party ought to suggest whatever is necessary to entitle him to be admitted; and if that be

not done, or if it be done, and the fact is false, that will be a good matter to return. *Peal's case*, 6 Mod. 310.

20. Where a mandamus suggests that A served his apprenticeship with B, "being a freeman of C, and having lived during his apprenticeship in C," this is a sufficient averment that B continued* [*929] a freeman during the apprenticeship. *Rex v. Whisker*, Andr. 1.

21. And if ill, the writ would be cured by the return, whereby the fact is admitted. Id. *ibid.*

IV. RELATIVE TO THE AMENDMENT OF THE WRIT.

A mandamus may be amended before a return made. *Rex v. Clitheroe*, 6 Mod. 133.

V. WHEN ONE WRIT IS SUFFICIENT, AND WHEN NOT.

1. Two persons, claiming in different rights, cannot be joined in the same mandamus. *Rex v. Mayor of Kingston-upon-Hull*, 11 Mod. 382. 1 Stra. 578. S. C.

2. A writ of mandamus to restore nine persons to be common-councilmen, is not good, for each ought to have a separate writ. *Rex v. City of Chester*, 5 Mod. 11. 3 Salk. 230. Holt. 438. 444. *Rex v. Andover*, Salk. 433. 436, 437. 12 Mod. 332. 8 Mod. 209.

3. Churchwardens may join. *Rex v. Twitty*, Holt, 442.

VI. WHEN THE WRIT MAY BE QUASHED OR SUPERSEDED.

1. Where it is suggested on the face of a writ of mandamus, directed to an inferior officer of a college, that such college is subject to the power of a visitor, the writ is *felo de se*, and will be quashed; for where there is a visitor, the court has no power; and it is the same, whether the king or a private individual be the visitor. *Dr. Walker's case*, C. T. Hardw. 212.

2. It will be quashed if there ought to have been several writs. *Rex v. Mayor, &c. of Chester*, Comb. 307, 308.

3. The court will not supersede a mandamus to compel probate, if it issued before the will was litigated. *Rex v. Beltenworth*, 7 Mod. 219.

4. If a mandamus be granted to the master of a college to admit a fellow, the court will not supersede the writ on an affidavit by the master that there is a visitor, but he must return that fact to the writ; and on such return, the writ will be superseded. *Rex v. Whaley*, 7 Mod. 308, 309. n.

5. A mandamus to elect directed to those who have, and those who had, no right, was superseded. *Rex v. Mayor of Warwick*, Stra. 55.

6. If not made out according to the rule, it will be superseded. *Rex v. Wildman*, 2 Stra. 860.

7. It will not be superseded on affidavits without a return. *Stra.* 1139.

8. On a mandamus returned, cause may be shown, though the writ does not conclude *vel causam nobis significet*. *Rez v. Owen*, Comb. 399.

VII. TO WHOM THE WRIT SHOULD BE DELIVERED.

1. On a mandamus being granted to a corporation to elect a town-clerk, the writ ought to be delivered to the mayor. *Rez v. Chapman*, 6 Mod. 152.

2. A mandamus must be delivered to him who is to make the return. *Rez v. Mayor of Exeter*, 12 Mod. 251.

VIII. RELATIVE TO RETURNS TO THE WRITS:—

(a) *What are good.*

1. The ex-bailiff of a town can make a return to a mandamus. *Rez v. Clitheroe*, 6 Mod. 133.

2. Where the mandamus is directed to the mayor, bailiffs, &c. the mayor alone may make the return, and the others cannot disavow it. *Rez v. Mayor of Abingdon*, Carth. 499. *Salk.* 431. *S. C.* 2 *Salk.* 701. *Skin.* 368.

3. But the mayor is punishable if he does it against the consent of the majority. *S. C.* *Salk.* 431, 432.

4. A return to a mandamus is good, though there be neither the hand of the mayor or seal of the corporation to it. *Rez v. Mayor of Exeter*, 12 Mod. 128. *Rez v. St. John's College*, *Skin.* 368.

5. "*Non fuit electus*" is a good return to a mandamus. *Rez v. Corporation of Cornwall*, 11 Mod. 174. *Rez v. Twitly*, 7 Mod. 83. *Rez v. Aldborough*, 10 Mod. 101.

5. "*Non debito modo electus et praefectus ad officium*," held good, though not positively stated "*non fuit electus*," where the writ alleges he was duly elected. *Rez v. Newton*, *Show.* 252. *Rez v. Lambert*, 12 Mod. 2, 3. *Rez v. Sheriff of York*, 2 *Show.* 154.

7.* It is a good return to a [*930] mandamus for electing an officer, that a person has been duly elected. *Rez v. Williams*, *Say.* 140.

8. *Non fuit amotus per nos*, was adjudged a good return. *Rez v. Mayor of Colchester*, cited, 1 *Sid.* 210.

9. To a mandamus to restore, it may be returned that the complainant has resigned. 1 *Sid.* 14. *Rez v. Mayor of Rippon*, *Salk.* 433. 1 *Ld. Raym.* 564.

10. A good reason for not restoring, must be a good reason of removal. *Rez v. Corporation of Buckingham*, 10 Mod. 174.

11. Several matters may be returned on the same writ, but they must be consistent. *Rez v. Mayor, &c. of Norwich*, 2 *Salk.* 436.

12. A return is good, if it pursues the suggestion of the court. *Rez v. Sir W. Penrice*, 2 *Stra.* 1235.

13. A custom to remove *ad libitum* is

good, but that must be returned positively *Rez v. Mayor of Coventry*, 2 *Salk.* 430.

14. To a mandamus to the chamberlain of London, to admit a joiner to the freedom of the Merchant Tailors' Company in London, he returned a bye-law, that whoever exercises the trade of a joiner, shall take his freedom in that company; and held well. *Rez v. Ludlam*, 8 Mod. 267, 268.

15. In a return to a mandamus of a custom in London to hold courts for the admission of freemen, the place of holding them is sufficiently stated, if it be averred to be held within the city, and the time when held need not be stated. *Rez v. Bosworth*, 2 *Stra.* 1112.

16. Where a conviction disables a man from holding an office, a return to a mandamus of the cause, without stating the conviction, is good. *Anon.* 2 *Show.* 183, 184.

17. Where the return was, that they were a corporation such a year, and long before, an exception taken because they did not entitle themselves by prescription, was overruled, and held to be matter of surplage. *Rez v. Corporation of Durham*, 10 Mod. 146, 147.

18. It is a good return to a mandamus to swear a person in a common-councilman, that he had not taken the oaths pursuant to 23 *Car.* 2. *Rez v. Love*, 12 Mod. 601.

19. A return to a mandamus to restore A to his place of alderman was, that he had removed out of the city, and, although summoned to attend, he did not; held good. *Rez v. Glide*, 12 Mod. 27, 28.

20. Want of summons is no objection to removal, if the party appeared and was heard. *Rez v. Mayor, &c. of Wilton*, *Salk.* 428, 435.

21. Where to a mandamus for restoring one to the place of coroner, a return that he was elected 29th August, "and was neither then nor since, nor is he yet admitted," is a good traverse of the admission. *Rez v. Mayor and Aldermen of King's Lynn*, *Andr.* 105.

22. To a mandamus to restore to the office of town-clerk, it is a good return that the mayor for the time being elects a new one. *Rez v. Campion*, 1 *Sid.* 14, 15.

23. A return that the officer was "at will," and that they have removed him, without showing why, is sufficient. *Rez v. Parish of Thame, in Oxford*, *Stra.* 115. *Rez v. Mayor of Cambridge*, 2 *Show.* 70.

24. Commissioners of sewers return to a mandamus to make a rate, that they could not do it *propter brevitatem temporis*, before the expiration of their commission; it is a good return. *Rez v. Commissioners of Sewers of Tendring*, 2 *Ld. Raym.* 1479.

25. To a mandamus for granting probate, it is a good return that a suit is pending touching the validity of the will. *Rez v. Bellensworth*, *Andr.* 365.

(b) *What are not good returns.*

1. The returns to a mandamus ought to be certain, and not by implication, because the party ousted has not liberty to reply to them. *Manaton's case*, T. Raym. 365. *Rez v. Mayor, &c. of Doncaster*, Say. 39. 175. *Glide's case*, 4 Mod. 34. *Rez v. Mayor of Abington*, 2 Salk. 432. 12 Mod. 401. Holt, 436. 441.

2. But certainty to a certain intent in general, is sufficient. Salk. 432 *notis*.

3. The return ought to be direct, not argumentative. *Rez v. Stephens*, T. Jones, 178. T. Raym. 431. *Rez v. Mayor of Hereford*, 6 Mod. 309.

4.* Nothing is to be intended in [*931] a return to a mandamus. *Rez v. Evans*, 1 Show. 282.

5. A return that contains matters repugnant and contradictory is bad. *Rez v. Mayor of Pomfret*, 10 Mod. 107.

6. But several causes of removal may be returned, if consistent. S. C. 10 Mod. 108.

7. If the causes returned are consistent, but some only are good, and others bad, the bad may be quashed, and the good tried. *Rez v. Mayor of Warwick*, Salk. 436.

8. It is not a good return to a mandamus for restoring a person to an office, that he was not eligible. *Rez v. Mayor of Doncaster*, Say. 40.

9. *Non fuit debito modo admissus*, or *electus*, is not a good return to a mandamus; but *non fuit admissus* generally is. *Hereford's case*, 1 Sid. 209. 5 Mod. 11. 10 Mod. 101, 102.

10. Unless the writ suggests a *debito modo*. *Reg. v. Twitty and Marriot*, Salk. 433, 434.

11. Where, to a mandamus for admitting a freeman, the return admits the title, and says, that there are five court days for such admission, and that the party had notice and did not appear, this is not sufficient, without showing those to be the only days. *Rez v. Whiskin*, Andr. 1.

12. To a mandamus to swear a churchwarden, *non fuit electus* is not a good return. *Rez v. Harwood*, 8 Mod. 380. Ib. 395. S. P. *Rez v. White*, Stra. 894. *Contra*, Stra. 895.

13. So, it cannot be returned, that they were not duly elected, or not fit persons; but if there is matter of doubt, a special return may be made. *Rez v. Gray*, 6 Mod. 89. *Rez v. Rice*, 5 Mod. 325.

14. An inhibition of the bishop is not a good return to a mandamus to swear a churchwarden. *Rez v. Simpson*, 1 Stra. 609.

15. Where an inhibition is returned, in such a case, it must appear from the return that the town is within the diocese of the bishop who inhibits. S. C. Stra. 609.

16. A mandamus to swear two churchwardens; a return, that they were not duly elected, without saying *nec aliquis*, &c., is ill. *Reg. v. Guise*, 2 Ld. Raym. 1008. 3 Salk. 162.

17. Where the return to a mandamus to restore to academical degrees alleges a suspension or degradation of the party, and does not state that he was summoned to attend the proceedings, or made any defence thereto, it is bad. *Rez v. University of Cambridge*, 1 Stra. 557. 2 Ld. Raym. 1348. S. C.

18. A return to a mandamus to elect a town-clerk, that the candidates had an equal number of votes, is bad. *Rez v. Chapman*, 6 Mod. 152.

19. To a mandamus to admit a town-clerk, a return that he is not qualified is insufficient. *Rez v. Slatford*, 5 Mod. 318. Comb. 419, 420. S. C.

20. To a mandamus to restore H to the office of town-clerk, a return that he was an officer *annuatim eligibilis*, is ill; because the office of town-clerk, being in the eye of the law an office for life, the contrary ought to have been shown upon the return, and though he was *annuatim eligibilis*, yet the same person would continue town-clerk till another was chosen, which did not appear to have been done. *Reg. v. Corporation of Durham*, 10 Mod. 146, 147.

21. In a return to a mandamus to elect, if the corporation return a different constitution, they must deny the constitution recited in the writ. *Rez v. Corporation of Malden, in Essex*, 1 Ld. Raym. 481. Salk. 431. S. C.

22. In a return to a mandamus that the party had not taken the sacrament within a year before his election, there ought to be an averment that he was not elected since. *Rez v. Mayor of Abington*, 1 Ld. Raym. 559.

23. A return to a mandamus to restore a capital burgess, "that he wrote a libel to one of the aldermen, and thereupon consented to be turned out," is bad, for a common-council cannot try a libel, and a resignation by parol must be certain. *Rez v. Lane*, 11 Mod. 370. 2 Ld. Raym. 1304. S. C.

24. It is not a good return to a mandamus for restoring a person to an office, that he was moved for neglecting the duty of his office, it being necessary to show in such case the particular instances* of [*932] neglect. *Rez v. Mayor of Doncaster*, Say. 39.

25. To restore a deputy secretary of the marches of Wales, a return *quod tempore brevis deliberat*, he was not deputy, is ill. *Rez v. President and Council of the Marches*, 1 Lev. 306.

26. A mandamus was granted to restore the recorder of Barnstaple, directed to the mayor of the corporation, who returned *quod non constat nobis* that he was ever elected; the return was adjudged insufficient, and restitution awarded. *Anon.* T. Raym. 153.

27. A variance between the writ and return in the name of the corporation makes it ill. *Reg. v. Bailiffs of Ipswich*, Salk. 434.

28. To admit an executor to the probate of a will, the return was that she was executrix

damante minors estate of W R, who was now of full age; held bad. *Res v. Reines*, 3 Salk. 162, 233.

(c) *Inspection of charters; when allowed.*

A rule to inspect the charter in order to make a return, will not be granted; but in an action for a false return, it will. *Anon.* Salk. 430. See also *ib.* note (b), and cases there cited.

(d) *Traverse of the return.*

1. By statute 9 Anne, the prosecutor may plead or traverse the facts in the return of a mandamus; and the other party may take issue or demur. *Res v. Trinity Chapel*, 8 Mod. 28, 29.

2. Where, on trying a traverse in a return, no damages are given, this cannot be supplied by writ of inquiry. *Kynaston v. Corporation of Shrewsbury*, Stra. 1052.

3. No exception can be taken to the return, where the court had no power to grant the writ. *Res v. New College, Oxford*, 2 Lev. 14, 15.

(e) *Judgment on the return.*

1. Judgment upon the return is not entered, except the plaintiff has judgment to be restored. *Enfield v. Hills*, 2 Lev. 239.

2. No restitution on a mandamus ill directed. *Holt's case*, T. Jones, 52.

3. After restitution on a peremptory mandamus, the party may be removed for the former cause. *Res v. Corporation of Ipswich*, 2 Ld. Raym. 1283.

(f) *Consequence of the return being insufficient.*

1. Upon an insufficient return the plaintiff will be restored. *Basset v. Mayor of Barnstable*, 1 Sid. 286.

2. If the officer makes an ill return, he shall be amerced; if he makes a second bad one, an attachment shall go. *Anon.* 12 Mod. 410.

3. An attachment may go for not making a return to an alias mandamus, though the clause *vel causam nobis significetis* be omitted; for they may except to the writ after the return; and till the return, the court has nothing before them. *Skin.* 669.

4. What is not answered upon the return, must be looked upon as admitted to be true. *Reg. v. Buckingham*, 10 Mod. 174.

5. A peremptory mandamus granted, because the return contained inconsistent or repugnant matters; though the several matters would have been each a good return by themselves. *Reg. v. Mayor, &c., of Norwich*, 2 Ld. Raym. 1244. *Holt*, 444.

6. An officer at will shall have a peremptory mandamus, if an insufficient cause of removal is returned. *Reg. v. Bailiffs of Ipswich*, 2 Ld. Raym. 1240.

7. If a crime for which a person is removed is not well set forth in the return, a peremptory mandamus shall go. *Res v. Shaw*, 12 Mod. 112.

8. Upon an ill return to a mandamus, the

court ordered a peremptory mandamus for want of summons. *Dr. Bentley's case*, Fort. 205.

9. On a mandamus to swear a churchwarden, if the surrogate makes an ill return, &c., a peremptory mandamus issues. *Res v. Simpson*, 8 Mod. 325.

10. Where an officer at will is removed, and the corporation does not rely on its power, but returns a misdemeanor, and that is insufficient, a peremptory mandamus shall go. *Res v. Mayor, &c., of Oxon.*, 2 Salk. 428, 435.

11. On a mandamus to restore a clerk of the peace, an order of removal is uncertainly returned; he shall have a peremptory writ, while the order is in [*933] force. *Reg. v. Barnes*, 2 Ld. Raym. 1267.

12. In extraordinary cases, when the court is satisfied of the disorder of the place, they may require a return to the alias mandamus. *Res v. Owen*, *Skin.* 669.

(g) *Consequence of a false return; and remedy for the parties by action, &c.*

1. If a return be false, an action lies against the body politic for a false return, and against a particular person for procuring it. 12 Mod. 126. *Carth.* 226. *Res v. Chapham*, *Holt*, 443. *Res v. Mayor of Rippon*, 1 Ld. Raym. 564.

2. If a person be irregularly chosen, and afterwards is regularly entered in the books, or elected to a superior dignity, his election cannot be controverted. *Lord v. Francis*, 12 Mod. 408.

3. After the return is falsified, a peremptory mandamus is a matter of right. *Buckley v. Palmer*, Salk. 430. *Holt*, 440. S. C.

4. The court will grant a peremptory mandamus after judgment for the plaintiff in an action for a false return, although a bill of exceptions was tendered at the trial. *Wright v. Sharp*, 11 Mod. 175.

5. A peremptory mandamus will not be granted in K. B., upon a judgment for a false return in C. P. or any other court. *Green v. Pope*, 1 Ld. Raym. 128. Salk. 428. *Skin.* 670. S. C.

6. No peremptory mandamus pending error on an action for a false return. *Ruding v. Newel*, 2 Stra. 983.

7. In an action for a false return, it is not material whether the writ ought to have been granted. *Green v. Pope*, 1 Ld. Raym. 128.

8. Case lies not for a false return till the return be determined. *Enfield v. Hall*, 2 Lev. 238.

9. An action for a false return of a mandamus ought to be in B. R. *Green v. Pope*, *Comb.* 400.

10. The action is local, but may be laid either where the return was, or where it is of record. *Lord v. Francis*, 12 Mod. 408.

11. Two cannot bring one action for a

false return to a mandamus, *Buller v. Rees*, 12 Mod. 349.

12. But where a number of persons join in prosecuting a mandamus to register the certificate of a dissenter's meeting-house, they may join in action for a false return. *Green v. Pope*, 1 Ld. Raym. 127. See also 2 Saund. 116 a, b.

13. In case for a false return to a mandamus, it need not be alleged that they ought to obey it; for, by making a return, that is admitted. Case of *Mayor of Norwich*, 12 Mod. 322.

14. A return ought to be by the mayor with the consent of the major part of the corporation; and if he does it, not having such consent, an information will lie against him for a false return. *Rez v. Borough of Abingdon*, 12 Mod. 308.

15. When no one in particular is interested to bring an action for a false return to a mandamus, and the affidavits are contradictory, the court will direct an information to try the facts between the parties. *Rez v. Overseers of the poor of the town of Spottland*, C. T. Hardw. 184.

16. If the court suspect a return to be false, they can make a corporation swear the return. *Manaton's case*, T. Raym. 365, 366.

(h) *Amendment of the return.*

1. When the return was "*nunquam fuit electus et perfectus*," leave was given to amend the return by striking out "*perfectus*." *Reg. v. Aldborough*, 10 Mod. 102.

2. The return was "*non fuit electus et perfectus in locum et officium unius communis concilii ac un' alderman' civit' Cestr'*;" it was moved to add "*vel aliquem eorum*," because they averred several offices; and it was granted. *Rez v. Mayor of Chichester*, 1 Show. 273.

(i) *Consequence of not returning.*

1. If a mandamus be directed to a corporation, and the officer who presides in the corporate assembly should adjourn it, in order to prevent the making such a return as he dislikes, he would be punishable for a contempt. *Reg. v. Heathcote*, 10 Mod. 56.

2. If the first writ be not returned, a peremptory rule shall go, and next an attachment, &c. *Mayor of Coventry's case*, Salk. 429.

[*934] IX.* *EFFECT OF A MANDAMUS.*

1. A mandamus confers no right, but the title to the office remains as before. *Sir J. Sharp v. City of London*, Gilb. Rep. 259.

2. After a peremptory mandamus to swear an officer, no examination shall be permitted whether he was lawfully elected. *Rez v. Turner*, T. Jones, 215.

3. A mandamus is only to give a legal, not an actual possession. *Rez v. Dean and Chapter of Dublin*, Stra. 538.

X. *HOW IT SHOULD BE OBEYED, AND CONSEQUENCE OF NOT OBEYING IT.*

1. A ministerial officer must obey the writ at all events. *Rez v. Simpson*, cited, 2 Stra. 895.

2. On a mandamus to a corporation, the particular defaulters are to be attached. *Anon. Comb.* 327. 213.

3. Where a writ is directed to two, there must be an attachment against both, though one is ready to obey. *Rez v. Bailiffs of Bridgenorth*, Stra. 808.

XI. *ERROR.*

1. On a mandamus (by an archdeacon to be restored to his seat in the choir, &c.) a writ of error will not lie. *Rez v. Trinity Chapel*, 8 Mod. 27. Stra. 536.

2. Error lies not on allowing the return of a mandamus. *Rez v. Hearle*, Stra. 628.

XII. *COSTS.*

Costs were granted in a mandamus where the defendant was in contempt. *Rez v. —*, T. Jones, 178.

MANOR.

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I. *RELATIVE TO THE CREATION OF A MANOR.*

A man by his own act cannot at this day create a manor. *Finch's case*, 6 Co. 64 a.

II. *RELATIVE TO THE DESTRUCTION OF A MANOR.*

4. A manor cannot be without services; and by severance of services, the manor is extinct and destroyed for ever. *Somerville's case*, 1 And. 105. 257. *Finch's case*, 6 Co. 64 a.

2. There is a difference where the severance is by act of law, and where by act of the party. *Finch's case*, 6 Co. 64 a.

3. It ceases by sequestration. *Rez v. Staverton*, Yelv. 190, 191.

III. *WHAT IS COMPREHENDED WITHIN A MANOR.*

1. A manor consists of demesnes and services. *Winter v. Loveday*, Holt, 415.

2. Within one manor there may be another manor demisable by copy, and within that manor there may be customary tenants. *Eeri of Bedford, v. —*, Cro. Jac. 327.

3. A manor may contain several smaller manors in which courts are held for the ease of the tenants, but in law they shall be all taken as one manor. *Green v. Proude*, 1 Mod. 118.

4. Copyholds are parcels of the demesnes of the manor. *Loveday v. Winter*, 5 Mod. 944. 378.

5. No land is parcel of a manor but the demesnes of the manor. *Wood v. Atkinson*, Lutw. [472.] 1161.

6.* Common of pasture with-
[*935] out land may be parcel of a manor, though demised and demisable by copy of court roll. *Musgrave v. Cave*, Willcs. 323.

7. An advowson appendant to a manor, being once disunited from the manor, can never afterwards become appendant. 2 Mod. 2.

8. Lands once severed from a manor can never become part of the manor again, except by reputation. 6 Mod. 151.

IV. RELATIVE TO THE GRANT OF A MANOR.

1. Things merely incorporeal, may be granted by copy of court roll. Willcs. 324.

2. A manor may pass by the name of a knight's fee. *Throckmorton v. Tracy*, Plow. 154.

3. Lands formerly parcel of a manor, though severed, shall pass by a grant of the manor, if they were reputed to be parcel thereof at the time of the grant. *Lee v. Brown*, 2 Mod. 69.

4. A law-day or warren in a manor, does not pass by a feoffment of the manor, without "cum pertinentiis." *Anon.* 1 Dy. 30. pl. 209.

5. The lord *pro tempore* may well grant copyholds. Jenk. 243.

6. If leases of a manor attorn to the grantee of the reversion, the manor passes. *Bracebridge's case*, 1 Leon. 265. 1 And. 113. S. C. 2 Leon. 221, 222.

7. The manor passes by livery in the demesne lands. 2 And. 203.

8. A manor by reputation will pass in a grant by the name of manor, though it is not so in truth. *Theiford v. Theiford*, Sav. 113. 4th res. Cro. El. 524.

9. A manor in reputation will not pass in a fine or common recovery. *Maller v. Maller*, Cro. Eliz. 524.

10. A manor cannot be granted, excepting the courts, nor can the lessee of a manor surrender the courts, for they are incidents inseparable. *Brown v. Goldsmith*, Hob. 108.

11. But the king may grant a manor, and except the courts, and perquisites of courts, though a subject cannot. 3 Dy. 288. pl. 54.

12. By a lease of a manor, except all casualties and profits of courts, the court is not

excepted. *Wheeler v. Tweegood*, 1 Leon. 118, 119.

13. Where a gift in tail, or lease for life, is made of parcel of a manor, during those estates, the land is not parcel of the manor. *Bracebridge v. Clowse*, Plow. 422.

14. J.S. seized of a manor which extended into the towns of A, B, C, and D, and in each of which he had demesnes and services, bargained and sold to N, *totum illud manerium suum de A in A*; N has a divided manor in A, and may keep courts there. *Morris v. Smith*, Cro. Eliz. 38, 39.

15. The bargain and sale by the lord by deed indented and enrolled, does not divest the estate of those in remainder. *Podger's case*, 9 Co. 104 a.

16. A grant of any part of the demesne in fee, though but for an instant, severs it from the manor, so that it can never be part of it again. *Lemon v. Blackwell*, Skin. 192.

V. INCIDENTS;—

(a) Services.

1. The service of a tenant may be changed from one service to another. *Bracebridge's case*, 1 Leon. 266.

2. The services are extinct by alienation of a tenant to the king. *Broker v. Smith*, 1 And. 159, 160.

3. If a manor be held by the service or tenure of repairing a bridge, and part of it be afterwards severed from the manor, yet the charge or service shall run with it, and every one of the alienees, of ever so small a parcel of the demesnes and services, is answerable to the public for the whole charge of the bridge. *Rex v. Buccleugh*, 6 Mod. 151.

4. If a manor be holden by knight service, and the lord alien part of the demesnes, the alienee shall hold by knight service. 6 Mod. 151.

(b) Court.

The grantee of a moiety of twenty copyhold tenements has afterwards the grant of a moiety of the manor; he with the grantor may hold a court, and join in the grant of the copyholds. *Lemon v. Blackwell*, Skin. 191.

(c) Lease and rent.

1. A general power to make leases shall not be intended of copyhold estates,* for that were to destroy [*936] the manor. *Winter v. Loveday*, Holt, 415.

2. Lease for life of a manor, except twenty acres of it; these twenty acres are not parcel of the reversion, but are severed from the manor for the time; but if a lease is made of twenty acres, parcel of a manor, the reversion of them is parcel of the manor. *Fulmeston v. Steward*, Plow. 103, 104. 422, 423.

3. Lease of a manor, except an acre; this acre is no part of the manor as to the lessor, but, as to him that has right to demand the manor by elder title, it remains parcel, and

therefore he shall make no forprise in his writ. *Fulmerston v. Steward*, Plow. 104.

4. Lease of a manor for life, except the services of J S, who holds of the manor; neither the services nor any part of the estate therein are parcel of the reversion during the lease. *Id. ibid.*

5. If the tenants pay their rents to a disseisor, they are discharged. *Bracebridge's case*, 1 Leon. 265.

(d) *Customs.*

1. A custom for the tenants of a manor to have a sole and separate pasture, in exclusion of the lord, is good. *Hopkins v. Robinson*, 1 Mod. 74, 75.

2. The custom of a manor was for the lord or his overseer, or his deputy, to make leases; the lord by will empowered two to make leases according to the custom; they hold a court in their own names, and grant a reversion; the wife of the lord, it being assigned for her dower, may avoid this grant. 3 Dy. 251. pl. 89.

3. A custom cannot extend beyond the manor. *Chafin v. Bebbworth*, 3 Lev. 190.

(e) *Fine and heriot.*

1. The steward of a manor may enter on a copyhold forfeited for the non-payment of the fine assessed upon admittance, without making a precept for seizure, or having a written authority from the lord, provided he has made a personal demand on the tenant, and he has expressly refused to pay the fine. *Trotter v. Blake*, 2 Mod. 229.

2. A heriot cannot be seized by lord, but he may distrain for it. 1 And. 298, 299.

3. If on a survey being taken of a manor a copyholder be decreed to pay a year's value to the lord as a fine on every admittance, leaving it uncertain whether it shall be computed according to the improved value, or according to the rent at the time the decree was made, the lord cannot enter as for a forfeiture on the non-payment of a fine assessed according to the improved value. *Trotter v. Blake*, 2 Mod. 230.

(f) *Toll.*

Toll traverse may be appurtenant to a manor, and the appurtenancy is not destroyed by the manor coming into the hands of the crown. *James v. Johnston*, 1 Mod. 231.

(g) *Execution.*

Where an *elegit* issues against one who has two manors, the sheriff may deliver one manor in the name of a moiety of the whole. 2 Saund. 68 g.

VI. *POWER OF THE LORD.*

1. The lord of a manor may license another to use the common, but the person licensed must so use it as not to disturb or injure other commoners. *Smith v. Fernald*, 2 Mod. 7.

2. The lord of a manor cannot let out to pasture so much of a common as not to leave sufficient for the other commoners. *Smith v. Fernald*, 2 Mod. 7.

3. He may maintain trover against a stran-

ger for an estray, before the expiration of the year and day. 2 Saund. 47 b, c.

4. None but the lord of a manor can erect a dove-cote. *Boulston's case*, 5 Co. 104 b. Mo. 420. Cro. El. 547. S. C.

VII. *LIABILITY OF THE LORD OR HIS ALIENEE.*

1. A man is not bound to repair a bridge on account of his being lord of the manor. *Rex v. Bucknal*, 7 Mod. 55.

2. But if the lord of a manor be bound by reason of tenure to repair a bridge, all the alienees of the demesnes of the manor are separately liable to the whole charge. *Rex v. Backnal*,* 7 Mod. [*937] 98, 99. 2 Saund. 158 f.

3. Tenants of a manor may, by prescription, be exempted from repairing the church. *Anon.* 7 Mod. 122.

4. If the lord of a waste of two hundred acres enfeof another of fifty acres, the feoffee must enclose them, or keep his cattle from straying into the residue, and so must the lord of the residue, 3 Dy. 372. pl. 10.

5. If the lord of a manor grant a rent-charge upon the manor, and alien part of the demesnes, the alienee shall hold it subject to the charge. 6 Mod. 151. 3 Dy. 270. pl. 23.

6. But the lord of a manor may, on alienation, discharge the land from repairs. 6 Mod. 151.

7. An action will not lie against a lord of a manor for not admitting one to a copyhold. *Groenvelt v. Bursell*, Carth. 492.

VIII. *PLEADING.*

1. In pleading his title, the steward of a manor need only show that he kept the courts; he need not show any ingrossing of the rolls. 2 Dy. 156. pl. 26.

2. But it seems he should show a tender of his services to each succeeding lord, since it is insuable that such a successor did not exonerate him. 2 Dy. 156. pl. 26.

MANSLAUGHTER.

(See *post*, tit. MURDER.)

MARCHES, COURT OF

(See *post*, tit. WALES.)

MARINERS.

(See *post*, tit. SHIP.)

MARKET.

1. A market erected without a patent or prescription is illegal. *Yard v. Ford*, 2 Saund. 174.

2. If a man have a fair or market, or a ferry, and another erect a fair or market, or establish a ferry to his prejudice, an action will lie, although not held or worked on the same days. *Yard v. Ford*, 1 Mod. 69.

3. If the disturbing market be on another day, it shall not be intended a nuisance, but

it shall go to a jury to inquire whether it is so or not. 2 Saund. 174.

4. The clause in the king's grant that it shall not be to the nuisance of any other fair or market, is only put for an example; and if omitted, would be implied by law. 2 Saund. 174.

5. Uninterrupted enjoyment for twenty years is no bar, but evidence from which the jury are to be directed to presume a grant. 2 Saund. 174, 175. 175. a. b.

6. The party prejudiced may use the king's name in the suit. 2 Saund. 175.

7. If it be found that the grant is to his prejudice, it is sufficient, though it be found that the user is not so. 2 Saund. 72 p.

8. Where a market is granted to the damage of another, the patent may be repealed in a *scire facias*, notwithstanding a writ of *ad quod dampnum* had been executed, for the return of the writ was not conclusive. *Sir O. Butler's case*, 2 Vent. 344.

9. The grantee may remove it to any place within the precinct of his grant. 2 Saund. 114 c. n. [c].

10. Inhabitants of one market town may buy and sell goods in another market town, notwithstanding the statute of Ph. & M. *Davies v. Leving*, 2 Lev. 89.

11. London has a market every day in the week, Sunday only excepted. *City of London's case*, 8 Co. 126 a. 5 Co. 83 b. S. P.

12. Billingsgate market has been time out of mind. *Ree v. —*, 1 Show. 292.

13. In an action for disturbance of a market, (or taking the toll), it need not be stated that plaintiff is seised in fee of, the place where the market is held; nor that he is seised of an ancient market as of fee and right, but may declare on possession merely. 2 Saund. 113 b. 171 c.

14. A toll is not of common [*938] right incident* to a market. *Anon.*

7 Mod. 12. *Holloway v. Smith*, Stra. 1171.

15. Stallage is due to the owner of the soil where a market is held, *Mayor of Northampton v. Ward*, Stra. 1239.

16. The owner of the market must seek his remedy from the seller for the toll by such sale. 2 Saund. 114 c. n [c].

17. He cannot prescribe to take toll for goods sold by sample; nor for any goods not brought into the market. 2 Saund. 114 c. n [c].

18. Erecting a stall in a market is not of common right; trespass is the proper remedy for so doing. *Mayor, &c., of Northampton, v. Ward*, 2 Stra. 1238.

MARKET OVERT.

It is market overt in every shop in London; but it shall be intended that no one buys any goods there but those which belong to the particular trade; thus a scrivener can-

not sell plate in his shop, so as to alter the property, though he sells it openly. *Anon.* 1 And. 344. pl. 319. Poph. 84. Mo. 360. Case of *Market Overt*, 5 Co. 83 b. S. C.

2. There can be no market overt for pawning. *Hartop v. Hoare*, 2 Stra. 1187.

3. A sale in market overt does not alter property where there is any fraud, of which the purchaser was cognizant. *Harvey v. Facy*, 2 And. 115. 33 H. 6. fo. 5.

4. If a sale be not in the shop, but in the warehouse or other place in the house, the property is not changed. Case of *Market Overt*, 5 Co. 83 b.

5. A bailee of goods selling them in market overt transfers the property in them. 2 Saund. 47. b.

6. If a stolen horse be sold by J S by the name of J D, and so entered, it alters not the property. *Gibbe's case*, 1 Leon. 158.

7. Stolen goods sold in market overt may be restored to the owner, or recovered in trover by the owner after conviction, under statute 21 H. 8. 2 Saund. 47 c. J. Kely. 35. 48.

MARRIAGE.

I. WHAT PERSONS ARE CAPABLE OF ENTERING INTO A VALID CONTRACT OF MARRIAGE;—

- (a) *With respect to the party's age*, p. 939.
- (b) *In respect of relationship*, p. 939.
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[*939] XIII.* RESPECTING FORCIBLE MARRIAGES, p. 943.

I. WHAT PERSONS ARE CAPABLE OF ENTERING INTO A VALID CONTRACT OF MARRIAGE;—

(a) *With respect to the party's age.*

1. A contract under seven years of age is null. *Jenk. Cent. 95. 2 And. 208.*

2. But a marriage under age is made valid, *ab initio*, by consent of the male at fourteen years of age, and of [the female at twelve. *Jenk. Cent. 95. Lord Byndon's case, 2 And. 208.*

3. The marriage of the heir by her father *infra annos nobiles* is no complete marriage; and if she marry again after the death of her husband it is not bigamy. *Gorge's case, 6 Co. 22 a. Mo. 737. 2 And. 207. S. C.*

4. A lad of twelve years of age is married and put to bed to an adult female, and dies before years of consent; it is a good marriage *quoad dower*, and shall be so certified by the bishop. *3 Dy. 369. pl. 48.*

5. A marriage is absolutely void by the act of 26 G. 2. c. 33. s. 11, if a minor marries without consent. *Rex v. Inhab. of Preston. Burr. Sett. Ca. No. 154.*

(b) *In respect of relationship.*

1. All marriages are lawful which are not prohibited as being within the Levitical degrees, or otherwise by God's law. *Harrison v. Burwell, Vaugh. 219. 240. 242. 305.*

2. Marriage with a cousin-german is lawful. *Harrison v. Burwell, Vaugh. 218, 219.*

3. A man married his grandfather's brother's wife, by the mother's side, and held lawful. *Harrison v. Burwell, Vaugh. 206, 207.*

4. Marriage with the first wife's sister is unlawful. *Collet's case, T. Jones, 213. Harrison v. Burwell, Vaugh. 305. 2 Vent. 17.*

5. So it is to marry a brother's wife. *Harrison v. Burwell, 2 Vent. 17.*

6. Marriage with a brother's daughter held unlawful, and a prohibition denied to the ecclesiastical court. *Murgatroyd v. Watkinson. T. Jones, 191.*

7. A man may not marry his wife's sister's daughter, she being within the Levitical degrees. *1. Mod. 25. T. Jo. 118. Vaugh. 247. 321. 2 Show. 71. Ellerton v. Gastrell, Com. 318. Sed vide 5 Mod. 448.*

8. Or his own sister's daughter. *Clement v. Beard, 5 Mod. 448.*

9. Marriage in the ascending and descending line is prohibited without limit; not so between collaterals. *Harrison v. Burwell, 2 Vent. 18.*

(c) *In the case of a city orphan.*

A city orphan cannot marry without the consent of the court. *Harwood's case, 1 Mod. 77.*

(d) *In the case of a bastard.*

The marrying of a bastard, who, if legiti-

mate, would have been within the Levitical degrees, is illegal. *Harris v. Jeffell, 1 Mod. 25. notis. Haines v. Jeffereys, Com. 2. 5 Mod. 168. 1 Ld. Raym. 63.*

(e) *In respect of persons labouring under particular disabilities.*

Though the statute 32 H. 8. c. 58, allows all persons to marry that are without the Levitical degrees, yet persons pre-contracted, or under a perpetual impotence, are prohibited to marry. *Harrison v. Burwell, 2 Vent. 15.*

II. RELATIVE TO THE FORM OF THE CONTRACT.

1. Previously to the 26 G. 2. c. 33., words of contract *de presenti* repeated by a man and woman at the altar, after a parson, made a valid marriage, though no ring was used. *Weld v. Chamberlaine, 2 Show. 300.*

2. A contract of marriage *per verba de presenti*, or *per verba de futuro*, if afterwards executed, was held to be an actual marriage. *Wigmore's case, Salk, 437, 438. Holt, 457.*

3. A marriage contract *per verba de futuro* held to be releasable. *Jerson v. Collins, Holt, 457. 6 Mod. 155. 2 Salk. 437. S. C.*

4. By 26 G. 2. c. 33. s. 13., the ecclesiastical court cannot compel a celebration of marriage by reason of any contract of matrimony *per verba de presenti** or [*940] *per verba de futuro. 6 Mod. 156. n.*

III. RELATIVE TO THE SOLEMNIZATION.

1. The parson of a donative cannot marry persons without a license. *Maddox v. Peterborough, 1 Mod. 22.*

2. By 26 G. 2. c. 23. s. 8., it is felony in a clergyman to celebrate matrimony without publication of banns, or license first obtained. *1 Mod. 22.*

IV. RELATIVE TO THE FORM OF PLEADING A MARRIAGE.

In personal actions, the matter must be laid upon the fact of marriage, *vis.* that at such time and place the parties were married; but in real actions, and in appeals, it must be laid upon the right of marriage; *vis.* in *legitimo matrimonio copulati. Machell v. Garrat, 3 Salk. 64.*

V. RESPECTING THE TRIAL AND PROOF OF MARRIAGES.

1. A marriage *de facto* is triable in the temporal courts, but *de jure* in the spiritual court only. *Boyle v. Boyle, 3 Mod. 165.*

2. The judges of the temporal courts have, by several acts of parliament, full cognizance of marriages within or without the Levitical degrees. *Harrison v. Burwell, Vaugh. 207. 209, 210.*

3. They have full cognizance of what marriages are incestuous, and what not, according to the law of the kingdom, and may prohibit the spiritual courts from questioning them. *Id. ibid. Vaugh. 305.*

The ecclesiastical courts have cognizance to punish persons marrying within the Levitical degrees. *Harrison v. Burwell, 2 Vent. 22.*

5. On the plea of *ne unques accouple*, the

bishop (to the writ for his certificate) must expressly return the lawfulness or unlawfulness of the marriage; specially returning espousals at certain ages is bad. 3 Dy. 305. pl. 60.

6. So, though he conclude *issint* lawfully married. 3 Dy. 313. pl. 92.

7. It is not incumbent on the persons married to prove that the banns were published; but an entry ought to be made pursuant to the directions of the act of 26 G. 2. c. 33. sect. 14, 15., or the minister neglecting it is subject to an information. *Rez v. Inhab. of St. Devereux*, Burr, Sett. Ca. No. 162.

VI. RELATIVE TO THE DISSOLUTION OF MARRIAGES.

1. Previously to the marriage-act, the spiritual court was not prohibited from proceeding to dissolve a marriage contracted *per verba de presenti*, or *per verba de futuro*; for in both cases, the matter was matrimonial, and within the jurisdiction of the court; nor was it necessary to show that a dissolution of the contract was the object of the suit. *Collius v. Jesset*, 6 Mod. 155.

2. The spiritual court may proceed to dissolve marriages within the Levitical degrees. *Wortley v. Watkinson*, 2 Show. 71. Holt, 457. 6 Mod. 156.

3. The spiritual court cannot dissolve a marriage *de facto* after the death of either of the parties. Holt, 457. S. C.

4. A voidable marriage continues a marriage till it is dissolved. *Bury's case*, 5 Co. 98. Mo. 225. 2 Dy. 179 a. 2 Leon. 169. Noy, 72. 1 And. 185. Jenk. 258. S. C.

VII. WHEN THEY CANNOT BE CONTROVERTED.

1. After the death of one of the parties, there ought not to be any suit in the spiritual court to make the marriage void. *Hinks v. Harris*, 4 Mod. 182.

2. Therefore, if a man marry his wife's sister, the ecclesiastical court cannot proceed to bastardize the issue after the death of either of the parties, on the ground of the marriage having been incestuous. *Hinks v. Harris*, 4 Mod. 182.

3. The party may be punished afterwards for incest, but the children shall not be made bastards. *Id. ibid.*

4. The validity of it is not to be controverted after a man and woman have been received as man and wife, upon a removal, without appealing. *Rez v. Inhab. of Woodchester*, Burr. Sett. Ca. No. 67. 1b. No. 86.

5. Nor after thirty years' cohabitation. *Rez v. Inhab. of Stockland*, Burr. Sett. Ca. No. 163.

VIII.* EFFECT OF MARRIAGE UPON [*941] THE RIGHTS, CONTRACTS, AND PROPERTY, OF THE RESPECTIVE PARTIES:—

(a) *What property and rights of the wife pass to the husband.*

1. If a feme sole makes a lease and marries, payment of rent to her afterwards is

void, although the lessee has not notice of the marriage. *Tracy v. Dutton*, Palm. 209.

2. The baron, by the marriage, has full power over the wife's term to alien it. *Young v. Radford*, Hob. 3.

3. If a woman has goods, and takes husband, the executor of the husband, after his death, is entitled to the goods; and if they are seized before marriage, the husband alone can have replevin. *Powes and Wife v. Marshall*, 1 Sid. 172.

4. A wife, tenant for life of a hop-ground, dies immediately before their gathering; the husband shall have them. Cro. Car. 515.

5. If a stranger put clothes upon a child or wife, the father or husband can retake the child or wife, and also the clothes. *Mereby v. Scot*, 1 Sid. 129.

6. Land is devised to a feme executrix, during the minority of A, to hold to her own use, without account, provided that she keep and educate the said A at school, &c.; this is such a term in the executrix as will be given to her husband upon inter-marriage. *Balder v. Blackhouse*, Hob. 285.

7. If a legacy be given to a feme covert, to be paid eighteen months after the devisors death, and the wife die within that time, it belongs to her husband; for it was vested in him before the eighteen months, and he might have released within the eighteen months. *Anon*, 2 Ro. 134. 1 Lev. 278.

8. The law upon marriage considers the debts owing by the wife as the debts of the husband. *Miles v. Williams*, 10 Mod. 163.

9. Debts due to the wife, *dum sola*, are forfeitable and assignable to the king by the husband. *Miles v. Williams*, Gilb. Rep. 322.

10. Her debts, while sole, are discharged by the bankruptcy of the husband, so that debts due to her while sole, though unrecovered are assignable by commissioners of bankruptcy against the husband, by stat. 4 & 5 Ann. S. C. Gilb. Rep. 318.

11. A debt due to the feme is not altered by bringing an action, if not recovered in the husband's lifetime. *Dupays v. Shepherd*, Holt 297.

12. Land is demised to a feme sole, *habend.* to her, her executors and assigns; she takes husband, and dies; the husband is assignee within the word "assigns," in the lease. *Osborne v. Sture*, Lutw. [570. 572.] 1361.

13. Her covenant for assignees is broken by taking a husband. *Hall v. Cresswell*, 1 Keb. 512. pl. 84.

14. Where the husband dies before he received her portion, it shall go to his executor. *Withers v. Kelsey*, 3 Salk. 65.

15. The advantage of the wife's work shall not survive to her, but go to the husband's executors. *Nelthorp v. Anderson*, Salk. 114.

(b) *What do not pass to the husband.*

1. If a debt, or other chose in action, is due to the wife while sole, and she marries, and dies before it is recovered, it shall not go

to the husband by virtue of the marriage, but he may have it as administrator to his wife. *Obrian v. Ram*, 3 Mod. 186. 1 Leon. 216.

2. Lessee for years assigns the term to the wife, the lessor, and a stranger; the lessor bargains and sells the land, the stranger dies, the husband dies; the wife shall have the term. *Mo*. 171.

3. Money earned by her, living separate, shall go towards her own maintenance. *War v. Huntly*, Salk. 118.

4. A term in trust for her does not go to the husband. *Jenk*. 245.

5. Where a term for years is settled in trust for her jointure, in pursuance of articles before marriage, or where she has a term and assigns it before marriage, the husband cannot charge it. *Anon*. 3. Salk. 368.

6. So neither a term in trust, nor the use of it, will go to the baron surviving, either by law or equity. *Wytham v. Waterhouse*, Cro. Eliz. 466.

7. He cannot sell a term which she has in *auter droit*. *Jenk*. 264.

8. A bond made to the wife *dum sola*, will remain or survive to the wife. *Miles v. Williams*. 10 Mod. 163, 165, 246.

9.* But if judgment be obtained [*942] during coverture, it will go to the husband's executors. *Miles v. Williams*, 10 Mod. 162.

10. If feme, whilst sole, makes a lease for years, and then takes husband and dies, her executors shall have the rent. *Moore*, 7.

11. If a woman possessed of a term of years marry an alien, such marriage is no gift in law to him of the term. *Theobalds v. Duffoy*, 9 Mod. 104.

12. If a man be seised in right of his wife, and the wife be attainted of felony, the lord shall enter and oust the husband, for he gains nothing but a bare perception of the profits till issue had. *Parsons v. Perns*, 1 Mod. 91.

13. Rent is granted to the husband and wife; the husband dies; the wife shall have debt for the arrearsages in the husband's lifetime. *Mo*. 887.

14. Husband and wife (administratrix) recover debt and damages; the wife dies; the husband cannot have a *sci. fa.* *Reamond v. Lory*, Cro. Car. 208, 227, 228, 464.

15. If the wife has a chattel real in *auter droit* only, as executrix or administratrix, the husband does not take them, though he survives. *Co. Lit.* 351 a. *Osborne's case*, Flow. 294. *Ib.* 192. *Vide* 3 Wils. 277.

(c) Miscellaneous.

1. An agreement before marriage is distinguished by the marriage. *Gibbons v. Davies*, Comb. 242.

2. But a bond to a third person for performance of such agreement is not. *Id. ibid.*

3. If a woman be warden of the Fleet, and one in prison there marry her, he is thereby

out of prison; and (in the eye of the law) at large; because a husband cannot be in custody to his wife. *Harrison v. Burwell*, 2 Vent. 19.

4. He is her assignee in law, and may forfeit or assign a term, and after her death is liable to arrearsages during coverture. *Ehne v. Minshaw*, 1 Keb. 20, pl. 57.

5. Debt in the *devastavit* against them, she being sued as executrix; if she survives, she will be liable for the damages recovered against them, but not for the costs. *Horsy v. Daniel*, 2 Lev. 161.

6. The marriage of a feme sole, party to a reference, determines the power of the arbitrators. 2 Saund. 133 d. n. [d].

7. Marriage revokes the feme's former will. 1 Saund. 278 g.

8. Marriage of the feme abates a writ of error. 2 Saund. 101 q.

9. The man, after the marriage, has, in law, the power over her, and not she over him. *Hill v. Good*, Vaugh. 306.

10. Marriage extinguishes all contracts for debts due in *futuro*, in *presenti*, or upon a contingency, and all bonds which may become due during the coverture; otherwise, where the debt cannot become due during the coverture. *Gage v. Acton*, *Jenk*. 166. *Cage v. Acton*, 12 Mod. 290. *Com*. 68.

11. But if she, being executrix, marry the debtor, that would be no release, for it would be a *devastavit*. *Cage v. Acton*, 12 Mod. 290.

12. Where a bond is given with a condition to pay money to a feme sole, if she marry and survive the intended husband, it is not discharged by the marriage. *Gage v. Acton*, *Carth.* 511. *Cage v. Acton*, 12 Mod. 294. 1 *Ld. Raym.* 515.

13. The husband before marriage promises to leave the wife 100*l.*; the marriage does not discharge the promise; and if a stranger makes such a promise, the husband cannot release it. *Tomson v. Clerke*, *Palm.* 99.

14. Her marriage with the obligor to her use is no release. *Jenk*. 221.

15. A warrant of attorney given by a feme sole is revoked by her marriage after. *Salk.* 399. *Prac. Ca. K. B.* 36. 7 *Mod.* 53. *cont.*

16. But the court will give leave to enter judgment against both. *Anon. Prac. Ca. K. B.* 38. 1 *Show.* 91.

17. If a feme covert be outlawed, she may be discharged on motion. *Griffith's case*, 12 *Mod.* 444.

18. Baron cannot give any thing to the feme by deed, but he can by will. *Germyn v. Arstete*, 2 *And.* 11.

19. If the husband release the suit of his wife (for defamation) in the spiritual court, it is a good release *quoad* the costs, but not *quoad* the defamation. *Anon. Cro. Car.* 222.

20. A husband has not power to confine his wife without cause. *Rex v. Lister*, 1 *Stra.* 478. *Lister's case*, [*943] 8 *Mod.* 22.

IX. IN RELATION TO MARRIAGE-SETTLEMENTS AND PORTIONS.

1. The fortune of a wife may be settled on the husband till he fails, and then to her separate use. *Lockley v. Savage*, Stra. 947.

2. Marriage articles are to be carried strictly into execution. *West v. Erisey*, Com. 412.

3. If a husband sue in Chancery for a marriage portion, the court will oblige him to make an equitable settlement. *Anon.* 2 Show. 282.

4. If a son gives a bond during the marriage treaty, without his father's privity, to refund part of the portion, the bond is void. *Turton v. Benson*, 10 Mod. 447.

X. RELATIVE TO CONTRACTS FOR PROCURING MARRIAGES.

Obligations and contracts, &c. for procuring marriages, are void. *Hall v. Potter*, 3 Lev. 411.

XI. RELATIVE TO CONDITIONS IN RESTRAINT OF MARRIAGE.

1. A bequest of money, to be raised out of land, to daughters, when and as soon as they should marry with consent of trustees, and if they should die before marriage with such consent, then the portions should not be raised; two of the daughters married without consent; held that they were not entitled to their portions. *Hervey v. Aston*, Willes, 83.

2. But if they survived their husbands, and married again with such consent, then they would be entitled. *Id. Ibid.*

3. Where there is a devise on condition of marrying with consent, and no devise over, it is evidence of the testator's intention, that the condition is only in *terrorem*. Willes, 83, 95, 96.

[See further *ante*, tit. DEVISE, div. IV. & V., Vol. I. p. 498, &c.]

XII. REMEDY FOR A BREACH OF PROMISE OF MARRIAGE.

1. An action of *assumpsit* lies for the man as well as for the woman, upon a breach of promise of marriage. *Harrison v. Cage*, Holt, 456. Carth. 467.

2. The consideration of the plaintiff's promise of marriage, is the defendant's promise. S. C. Holt, 456. *Haines v. Cage*, 5 Mod. 471.

3. A contract of marriage is not within the statute of frauds, though it was once held that it was; but an agreement in consideration of marriage, without writing, is void by the statute 29 Car. 2. of frauds. *Philpot v. Walley*, 3 Lev. 65. *Cook v. Baker*, 1 Stra. 34. 1 Ld. Raym. 386. Carth. 467.

4. In an action brought by a woman for breach of a promise of marriage, if an express promise be proved on the part of the man, and it appears that the woman countenanced it, and by her actions at the time behaved herself so as if she agreed to it, though no actual promise be proved, it shall

be sufficient evidence of a promise on her side. *Hutton v. Mansell*, 6 Mod. 172.

5. Bringing an action at common law on a promise of marriage, the remedy in the spiritual court is waived. *Collins v. Tessot*, Holt, 459.

6. An action for breach of promise of marriage does not survive to the executor. 1 Saund. 216 b. n. [a].

XIII. RESPECTING FORCIBLE MARRIAGES.

1. If a woman be violently taken away and married, although she assents thereto by force, it is a marriage within the statute of 3 Hen. 7. Cro. Car. 448.

2. A maid above twelve, and under sixteen, taken from parents or guardians, and married, forfeits her estate to the next in remainder during her life. *Hicke v. Gore*, 3 Mod. 84.

3. There must be proof of the stealing an heiress, either by flight or force, to bring the person within the statute of 4 & 5 Phil. and Mary, c. 8. *Calthrop v. Astell*, 3 Mod. 169.

4. There must be a continued dissent of the parent or guardian; for if he or she once agree, it is an assent within the statute, though he or she disagree afterwards. *Id. Ibid.*

5. To an indictment for a forcible marriage, it is no defence that the woman afterwards consented. *Rex v. Swanson*, 7 Mod. 102.

MARSHAL.* [*944]

1. The marshal of the King's Bench prison is, by intendment of law, always present in the court of King's Bench. *Anon.* 6 Mod. 16.

2. The office is not grantable for years. *Meade v. Sir J. Lenthall*, Cro. Car. 587.

3. The office of chamberlain of the King's Bench prison is inseparably incident to that of the marshal. *Snow v. Firebrass*, 2 Salk. 439.

4. The earl marshal of England was formerly marshal of B. R. S. C. Salk. 439.

5. All other marshalseas are originally derived from that of the earl marshal of England. S. C. Salk. 439. 602.

6. The marshal of the King's Bench prison may fetter a prisoner in custody for a fine. *Fuller's case*, 7 Mod. 52.

7. If the marshal of the King's Bench prison be turned out for non-attendance, and the new appointed marshal make a forcible entry into the prison and dispossess his predecessor, the court of King's Bench will not on motion restore the possession. *Sutton's case*, 6 Mod. 91.

8. A bond to the marshal to be a true prisoner, is good. *Anon.* 2 Salk. 438.

9. The tipstaff is the marshal's officer, and a commitment to him is to the marshal. *Anon.* 12 Mod. 634, 635.

10. If a steward of the prison be put in for life by one who has an estate for life in the office of marshal, and the marshal is for misdemeanor removed by act of parliament, such officer is not removable by a succeeding marshal on the surrender of the estate of the marshal for life, because he could do nothing to defeat his own grant, and a removal by act of parliament for his own offence his is own act. *Semb. Sutton's case*, 12 Mod. 557, 558.

11. But as the succeeding marshal is answerable for his prisoners, whether one can be imposed upon him was the doubt. *Id. ibid.*

12. The marshal of the Marshalsea is not privileged from execution. *Leviston v. Lentall*, 1 Sid. 68.

13. The marshal is bound to take notice of commitments by the court of King's Bench. *Souther's case*, 6 Mod. 133.

14. If a marshal suffer a prisoner to escape, and after he is out of office the party voluntarily surrender himself, he may be legally detained by the succeeding marshal. *Grant v. Souther*, 6 Mod. 183.

15. In B. R., on a bill of trespass laid in Middlesex, defendant need not be charged to be in custody of the marshal. *Newdigate v. Auncel*, 2 Dy. 118. pl. 78.

16. A remanet in custodia, charges only the marshal after an escape. *Anon.* 11 Mod. 4.

17. In an action against him for an escape, it must be averred that the commitment is of record. 1 Saund. 38 b. n. (4).

MARSHALSEA.

1. The Marshalsea court has jurisdiction only in three actions, trespass, contract, and covenant; and of no action which concerns the reality. *Michelborn's case*, 6 Co. 20 b.

2. It is sufficient in trespass within the verge, if one of the parties be of the king's house; in contract and covenant, both plaintiff and defendant ought to be of the household. *Michelborn's case*, 6 Co. 20 b. Cro. Eliz. 502. S. C.

3. The prison of the King's Bench is not any local prison confined to one place. *Rez v. Hobert*, and *Rez v. Stroud*, Cro. Car. 210. 466.

[See also ante, tit. COURT, Vol. I., p. 400.]

MASTER AND SERVANT.

I. RELATIVE TO THE LIABILITY OF THE MASTER IN RESPECT OF HIS SERVANT'S ACTS, p. 945.

II. RELATIVE TO THE LIABILITY OF THE SERVANT, p. 946.

III. RELATIVE TO THE REMEDY FOR THE MASTER;—

[*945] 1(a)* Against his servant, p. 947.

(b) Against other persons, p. 947.

IV. RELATIVE TO THE REMEDY FOR THE SERVANT, p. 947.

I. RELATIVE TO THE LIABILITY OF THE MASTER IN RESPECT OF HIS SERVANT'S ACTS.

1. The servant's acts bind not the master, unless he acts by his authority, or he consents. *Ward v. Evans*, 2 Salk. 442. Holt, 120. 460. 463. *Nickson v. Brohan*, 10 Mod. 110.

2. Otherwise, where the servant derives a credit from his master by being used to transact business for him. 10 Mod. 110.

3. A promissory note of a servant will charge his master, if the money came to the master's use, though he was not intrusted to give such note. *Bolton v. Hillersdon*, 1 Ld. Raym. 225.

4. A note given by a servant will bind the master, where the servant is allowed to deliver out notes. Holt. 642.

5. A servant used to transact affairs of that nature, is sent with a note drawn upon a goldsmith to receive money, and invest it in Exchequer bills; the servant gets B to give him money for this note, and brings the Exchequer bills to his master; two days after, the goldsmith fails; adjudged, the master should answer the money to B. *Nickson v. Brohan*, 10 Mod. 110, 111.

6. If the holder of a bill of exchange send his servant with it to the payee for payment, and the payee give the servant a draft for it on his banker, but the banker, instead of paying the servant money, gives him a note for the amount, which note is not paid, the act of the servant shall not bind his master, for he was sent to receive the money, and not the note; and therefore the master may recover the amount from the banker, as so much money had and received to his use. *Ward v. Evans*, 6 Mod. 36. 10 Mod. 110.

7. If a servant, authorized to manage the cash transactions of his master, take a banker's check, instead of cash, for a bill, and give a receipt, and keep the draft an unreasonable time, and the banker fail, the master is bound by this act of the servant. *Thorold v. Smith*, 11 Mod. 71.

8. If an injury arise from the neglect of a servant, an action lies against his master only. *Perkins v. Smith*, Say. 142.

9. If a servant usually employed to borrow money or pawn goods for the master, do it, debt will lie against the master. *Anon.* 12 Mod. 564.

10. Where the master has once paid for goods delivered to the servant on trust, the tradesman may trust him after. *Hazard v. Treadwell*, 1 Stray. 506.

11. If a master uses to send his servant to buy upon trust, and the servant afterwards, when he is sent with money, embezzles it, and continues to buy upon trust, the master is chargeable. 10 Mod. 111.

12. And though a servant be dismissed,

yet, if notice be not given, and he is trusted on account of the former credit he derived from his master, his master will be liable. *Nickson v. Brohan*, 10 Mod. 110.

13. If a servant used to draw bills of exchange is turned away, his drafts shall bind the master, unless notice, &c. — *v. Harrison*, Holt, 460.

14. If one send his servant with ready money to buy goods, and the servant buy on credit, the master is not chargeable; but if the servant usually buy for his master on tick, and the servant buy some things without the master's order, the master is chargeable. *Anon.* 1 Show. 95.

15. A man gives money to a servant to buy goods, and the servant buys upon credit, the master is chargeable if he takes to the goods, otherwise not. *Bolton v. Hillersden*, 1 Ld. Raym. 225. Holt, 460.

16. So, where a servant usually buys for his master on tick, the master is chargeable. *Aishdome v. Hundred of Snelholme*, Holt, 460.

17. The master liable for a fraud of the apprentice. *Grawmer v. Nixon*. 1 Stra. 653.

18. If the apprentice commit a conversion with the master's knowledge, trover will lie against the master. 2 Saund. 47 d.

19. Trover lies against the master [*946] for goods* delivered to the apprentice. *Mead v. Hammond*, Stra. 505.

20. The master is indictable for a nuisance done by his servant. *Turberville v. Stanope*, 1 Ld. Raym. 264.

21. He that employs a servant, undertakes for him. *Boson v. Sandford*, 2 Salk. 440.

22. A master is liable for the neglect of his servant, but not for his wilful acts. *Jones v. Hart*, 2 Salk. 441.

23. The owner of a cart is liable for damages done by his servants. *Anon.* 1 Ld. Raym. 739.

24. A master of a stage coach is liable for goods lost by his driver, if he takes a price for carriage; aliter, not. *Middleton v. Fowler*, 1 Salk. 282.

25. Goods are spoiled by default of the master of a ship employed by the owners; the owners are liable. The action should be brought against all the part-owners, who make but one master; but the defect can only be taken advantage of by plea in abatement. *Boson v. Sandford*, 2 Salk. 440.; and note.

26. If a servant has orders to sell a horse, and the servant sells him as a good one, no action lies against the master. Godb. 361. 2 Ro. 270. *Nickson v. Brohan*, 10 Mod. 110.

27. A merchant is answerable civiliter, though not criminaliter, for the deceit of his factor. *Horn v. Nichols*, Holt, 462.

28. If the master command his servant to do what is lawful, and he misbehave himself,

the master shall not answer for him. *Kington v. Booth*, Skin. 228.

29. The chancellor of the augmentations delivers a bond, which he had taken from the queen by virtue of his office, to his servant, to bail to the clerk, to whom the custody of it belonged; the servant conspires with the obligor, who cancels the bond; his master is chargeable to the queen for it, and so is the servant and obligor. 2 Dy. 161. pl. 45.

30. A receipt given by a servant is no discharge of a debt, without special authority. *Thorold v. Smith*, 11 Mod. 87, 88.

31. A refusal to deliver, by a servant of plaintiff, goods, without an order from his master, is not absolute enough to be evidence of a conversion in trover. 2 Saund. 46 f. n. [m].

32. In an action against the master for his servant's default, the servant having a release from his master, was admitted a witness for him. *Jarvis v. Hayes*, 2 Stra. 1083.

II. RELATIVE TO THE LIABILITY OF THE SERVANT.

1. A servant or deputy is not chargeable as such for neglect only, but recourse should be had to the principal. *Lane v. Colton*, 12 Mod. 488.

2. But if an injury arise from the misfeasance of a servant, an action lies against him. *Perkins v. Smith*, Say. 42. 12 Mod. 488.

3. If a servant by the command of his master do a tortious act, an action lies against both. *Perkins v. Smith*, Say. 41, 42.

4. Or it may be against the servant alone. *Sands v. Child*, 3 Lev. 352.

5. An action lies against a servant upon a bill of exchange drawn on him and accepted generally, though the order is to place it to the account of the master. *Thomas v. Bishop*, 2 Stra. 955.

6. The servant may be charged in trover, though the conversion was for the benefit of the master. 2 Saund. 47 g. n. [n].

7. If subscription money be paid to a servant of the South Sea Company, who pays it over, but does not make the proper entry, the subscriber has no remedy against the servant. *Cary v. Webster*, 1 Stra. 480.

8. If a servant makes a bill, acknowledging the purchase of goods for his master's use, and binds himself to pay, but does not seal the bill, debt will not lie against him, but case on the *assumpsit*. 2 Dy. 230. pl. 56.

9. Where a servant executes a lawful command of his master in an unlawful manner, he is answerable for the misdemeanor, and not the master. *Nasiah v. East India Company*, Com. 469.

10. Trover will not lie against a servant for an unlawful intermeddling with the goods of any person by the command of his master. *Mires v. Solebay*, 2 Mod. 242.

11. The servant may justify battery in

defence of his master, but not *et* [*947] *converso Leewerd v. Bardel*, 1 Salk. 407.

12. Where money is paid to a servant, and he misapplies it, the party has a remedy against the master or servant, at his election. *Attorney-General v. Perry*, Com. 486.

13. In a trespass against a servant for fishing in a several and free fishery, the defendant may plead property in his master, and that he did it by his command. *Wine v. Rider*, 2 Mod. 68.

III. RELATIVE TO THE REMEDY FOR THE MASTER ;—

(a) Against his servant.

1. A master can have an action on the case against the servant, for doing any thing to his damage which the law prohibits, or which is a breach of trust. *Hussey v. Pusey*, 1 Sid. 298.

2. If the servant of a common carrier accidentally lose goods intrusted to his master to carry, the master cannot maintain an action against him for the value, unless he can prove negligence, and has paid the money to the owner. *Savage v. Waltheu*, 11 Mod. 135. See *Nickson v. Brohan*, 10 Mod. 111.

3. An indictment against a servant for absenting himself from his master's service, must state how long the absence continued. *Rex v. Daniel*, 6 Mod. 182.

(b) Against other persons.

1. Trespass lies by a master for the battery of his servant, by which he lost his service. *Rosiere v. Sawkins*, Holt, 460.

2. For the battery of a servant, the master and servant may both bring actions for damages, and recovery in the one action cannot be pleaded in bar of the other. *Savil v. Kirby*, 10 Mod. 386.

3. But the master cannot have an action for beating his servant to death, for, by being converted into felony, the civil remedy is merged. *Higgins v. Butcher*, Yelv. 89, 90. 1 Brownl. 205. Noy, 18.

4. The master may have an action for inveigling away his servant. *Anon.* Comb. 111. lb. 354.

5. The servant is robbed of the master's money; either of them may maintain the action upon the statute of Winton. *Combes v. Hundred of Bradley*, Holt, 37, 38.

6. If the servant (an apprentice) earn any thing, the master may recover it in trover; it does not matter whether he be legally an apprentice. 2 Saund. 47 i.

7. Trover lies for the master for his servant's ticket for money by him earned, &c. *Anon.* Holt, 461.

8. If the servant purchases goods, the master may have trover for them. 2 Saund. 47 i.

9. Trover does not lie for taking away a negro servant. 2 Ld. Raym. 1274. *Chamberlain v. Harvey*, 1 Ld. Raym. 146.

10. An indictment for retaining a servant

without a testimonial from his last master was quashed. 1 Mod. 78.

IV. RELATIVE TO THE REMEDY FOR THE SERVANT.

1. If a servant be robbed of his master's money or goods, he or the master may sue the hundred. *Combs v. Hundred of Bradley*, Salk. 613, 614.

2. The servant cannot have an action against the master for refusing to give him a character. 1 Saund. 130. n. [c].

3. If the master honestly gives a bad character of a servant, who brings an action for it, the master may show the fact under the general issue. 1 Saund. 130.

MAYOR.

1. A mayor has not a casting voice in a corporation unless by special custom. *Anon.* 7 Mod. 12.

2. If a charter fix the election of a mayor on a day certain, without power to hold over, the poll cannot be adjourned. *Rex v. Pole*, 7 Mod. 194.

3. The person who represents the mayor on an election under 11 G. 1. c. 4. must be the person nearest to him in place and office. *Rex v. Morgan*, 7 Mod. 322.

4. Where a corporation is by charter to consist of a mayor, recorder, &c., the same person cannot be both mayor and deputy recorder. *Semb. Reg. v. Sutton*, 10 Mod. 76.

5.* If a charter authorize the mayor and aldermen to nominate [*948] four burgesses as candidates for the mayoralty, a bye-law that any burgess, though he be an alderman, may be put in nomination, is void, for it is contradictory to the charter, which confines the nomination of the burgesses only. *Rex v. Mayor of Weymouth*, 7 Mod. 373.

6. An attachment lies against a mayor for proceeding after a *certiorari* delivered. *Rex v. Mayor of Carlisle*, 7 Mod. 38.

7. An information will not lie against a mayor for neglecting to hold a session, unless such neglect was wilful and corrupt. *Rex v. Holford*, 7 Mod. 193.

[See ante, tit. CORPORATION, div. XVI. (b). Vol. I. p. 376.]

MAYOR'S COURT.

If a person assault an alderman of London while in the due execution of his office, the common serjeant of the city may file an information in the mayor's court against the offender. *Rex v. Rogers*, 7 Mod. 29.

MELIUS INQUIRENDUM.

1. The courts will grant a *melius inquirendum* on proof of corrupt practice in a coroner, on taking an inquisition *post mortem*. *Rex v. Stanlake*, 1 Mod. 82.

2. So to supply the omission of finding the

goods of a *felo de se* in the coroner's inquisition. 1 Saund. 271 a.

3. It is not granted but for a misdemeanor in the jury. *Rex v. Hetherall*, 3 Mod. 80.

4. It never helps a defective inquisition. *Rex v. Warden of the Fleet*, 3 Mod. 336.

5. A *melius inquirendum* is, upon default of the coroner, to be directed to the sheriff. 1 Mod. 82.

6. A *melius inquirendum* shall be avoided, on a surmise in court that the lands are of greater yearly value than is declared in the office; so on a surmise that they are held by other service, or that the party is seised of another estate than is found in the office; but if in these cases, on a writ of *melius inquirendum*, it be again found against the king, the king shall have a new writ of *melius inquirendum*. *Stoughter's case*, 8 Co. 168 a.

7. After office found against the king, the court ought not to award a *melius inquirendum*, unless on some matter of record, or some other pregnant matter to show the former to be mistaken. *Id. ibid.*

MERCHANT.

I. DEFINITION OF THE WORD, p. 948.

II. OF THE LAW-MERCHANT, p. 948.

III. RELATIVE TO RESTRAINTS OF TRADE, p. 948.

IV. LIABILITY OF A MERCHANT, p. 949.

V. IN RELATION TO THE DEATH OF A JOINT-MERCHANT, p. 949.

I. DEFINITION OF THE WORD.

The word "merchant" includes all sorts of traders, as well as merchant adventurers. *Mayor of London v. Wilks*, Salk. 445.; and *note*. 2 Brownl. 99.

II. OF THE LAW-MERCHANT.

The law-merchant is *jus gentium*, and part of the common law, and the court ought to take notice of it when pleaded. *Meggadow v. Holt*, 12 Mod. 15, 16.

III. RELATIVE TO RESTRAINTS OF TRADE.

1. The king cannot at his pleasure put any imposition upon any merchandize to be imported into this kingdom, or exported, unless it be for advancement of trade and traffic. 13 Co. 33.

2. Such impositions so laid cannot be deemed or granted to any subject. *Ibid.*

[*949] IV. * LIABILITY OF A MERCHANT.

A merchant shall answer civilly, though not criminally, for the deceit of his factor. *Horn v. Nicholas*, Holt, 462.

V. IN RELATION TO THE DEATH OF A JOINT-MERCHANT.

1. Among joint-merchants there is no survivorship. *Martin v. Crompe*, 1 Ld. Raym. 340.

2. But though the duty does not survive, the remedy does. *Martin v. Crump*, 2 Salk. 444.

3. Therefore the survivor and the execu-

tor cannot join in an action. *Martin v. Crump*, 2 Salk. 444. *Kemp v. Andrews*, 1 Show. 189. 3 Keb. 798. 2 Lutw. 1493. *Contra, Hall v. Huffman*, 2 Lev. 188. 1b. 228.

4. To an action of trover brought by the survivor of three partners, it cannot be pleaded in bar that the two deceased partners and the plaintiff were joint-merchants, and that there is not any right of survivorship; for, if the executors of such deceased partners ought to join, it is matter of abatement and not of bar. *Kemp v. Andrews*, 1 Show. 188.

5. The executor of a joint-merchant deceased can have account against the survivor by the law-merchant, for the survivor is only entitled to half the stock; but it is otherwise by the common law. *Chamberlain of London's case*, 3 Leon. 264. 2 Brownl. 99.

MERGER.

1. One bond, be it of record or not, cannot merge another bond. *Higgen's case*, 6 Co. 44 b.

2. If a man brings an action of debt on a bond, and is barred by judgment, so long as the judgment remains in force he shall not have a new action. *Id. ibid.*

[Respecting the merger of an estate, see *ante*, tit. ESTATE, div. XIII. Vol. I. p. 631.]

MESNE PROFITS.

1. The lessor of the plaintiff in ejectment cannot maintain an action for the mesne profits, without an actual entry; but the lessee may. *Newport's case*, Skin. 424.

2. When a remainder-man has made an actual entry to avoid a fine, a court of equity will decree the wrongful possessor to account to him for the rents and profits from the time when his title first accrued, even those that accrued before he made the entry. *Dormer v. Fortescue*, Willes, 343. n. (a.)

3. But in a court of law, the party can only recover the profits that accrued after such actual entry. *Compere v. Hicks*, ib.

4. If a suit for possession be properly cognizable in equity, there may be an account of rents and profits; but if the plaintiff has a legal title to the possession, he has no right to proceed by bill for an account of rents and profits. *Barnewall v. Barnewall*, 3 Ridgw. 66.

5. An after-born child is not entitled to mesne profits in case of entry by the uncle. *Thornby v. Fleetwood*, 10 Mod. 414.

6. In case of a divorce in the spiritual court *a vinculo matrimonii*, the husband is not answerable for the mesne profits of his wife's estate. 10 Mod. 411.

7. An action for mesne profits cannot be maintained against the executor of the person who held the possession. *Barnewall v. Barnewall*, 3 Ridgw. 24. 54. 71.

8. It is in form an action of trespass; if the declaration omit to state any time when the defendant entered, this is cured by statute 4 Anne. 1 Saund. 227 n. [h.] 277 a.

9. After recovery in ejectment, the lessor brought an action for the mesne profits, and the lessee released the action; but the release was set aside by the court. — *v. Close*, Skin. 247.

10. Where judgment is obtained against the casual ejector, the party in possession may controvert the title in an action for the mesne profits. *Jefferies v. Dyson*, 2 Stra. 960. 2 Burr. 665. But see *Barnes*, 59.

11. Mesne profits cannot be recovered for a time before the demise. 1 Saund. 319 c.

12.* Actions for mesne profits [*950] tend to create double expense; plaintiff should be ready at the trial of the ejectment to prove his damages. *Treherne v. Gressingham*, 2 Barnes, 59.

13. The nominal plaintiff may sue for an escape of defendant in execution for mesne profits. 1 Saund. 38. n. [h.]

MESSAGE.

In an action on the case, a garden may be said to be parcel of a message or house, and it shall pass by such words in a conveyance, although in a *præcipe quod reddat*, where land is demanded, it must be demanded by the name of a garden. *Smith v. Martin*, 2 Saund. 4. 1.

MILL.

1. A manor was held of the king in fee-farm, in which there was a custom that the tenants, &c. should grind their corn, &c. at the lord's mill; the defendant erected a mill out of the manor, near to the said mill, and to have this mill out of the manor demolished was the drift of the bill, but it was dismissed. *Hard*, 174, 175. *Vide* 184, 185.

2. In an action for not grinding at a mill, the plaintiff may declare on his possession merely of the mill, without setting out any title. 2 Saund. 113.

3. The custom to grind must be proved at the trial. 2 Saund. 113 a.

4. This action is substituted in the place of the writ *de secta ad molendinum*. 2 Saund. 114 b.

5. If a miller takes more than customary toll, it is extortion. *Rex v. Burdett*, 1 Ld. Raym. 149.

MINE.

1. The place where coals, copper, and ores of all kinds lie buried under ground, is, before they are worked, called a vein, and after they are worked a mine. *Astry v. Ballard*, 2 Mod. 193.

2. But a vein of ore not open, but close,

may be called a mine. *Case of Mines*, Plow. 337.

3. If a man be seised of lands in which there are mines open, and veins not open, and a lease be made of the lands, the mines only, and not the veins, pass, and therefore he cannot open new mines. *Astry v. Ballard*, 2 Mod. 193.

4. If a man lease his lands and all mines, lessee may dig for them when there are no open ones. 1 Saund. 323. 2 Saund. 259 b.

5. If there are open ones at the time of the lease, lessee cannot sink new pits. 2 Saund. 259 b.

6. If a man opens a mine in his own land, he may dig and follow the vein under another man's ground; but if the owner dig there also, he may stop his further progress. *Anon.* 2 Vent. 342.

7. In ejectment for mines, the possession of the manor is no evidence to prevent the statute of limitations. *Rich v. Johnson*, 2 Stra. 1142.

MISDEMEANOR.

1. It is a misdemeanor in an officer to take any thing from a prisoner in his custody. *Rex v. Johnson*, 11 Mod. 62.

2. A sheriff cannot admit a person to bail who is arrested for a misdemeanor. *Anon.* 6 Mod. 179.

3. But he can take a recognizance. 2 Saund. 59.

4. If a person surrender on proclamation to a secretary of state on a charge of misdemeanor, the secretary may bind him to appear in the King's Bench, but cannot oblige him to give sureties for his good behaviour. *Rex v. Tutchin*, 6 Mod. 164.

5. An indictment for a misdemeanor, setting forth an intention to commit treason, is good. *Rex v. Cooper*, 5 Mod. 207.

6. The defendant, on an information for a misdemeanor, is entitled on pleading to an imparlance until the next term. *Anon.* 11 Mod. 5.

7. If a person surrender to an information for a misdemeanor, he may, on^e renewing his recognizance, have [*951] time to plead; but if he is brought in on a *capias*, he must plead *instantly*. *Rex v. Tutchin*, 6 Mod. 165.

MISNOMER.

I. WHAT IS A SUFFICIENT AND PROPER STATEMENT OF A PARTY'S NAME; AND CONSEQUENCE OF A MIS-STATEMENT;—

(a) *Generally*, p. 951.

(b) *In a name of dignity*, p. 951.

(c) *In the name of a corporation*, p. 952.

(d) *In a lease*, p. 952.

(e) *In a bond*, p. 952.

(f) *In an act of parliament*, p. 952.

II. WHEN AND HOW THE DEFENDANT CAN TAKE ADVANTAGE OF A MISNOMER, p. 952.

III. HOW MISNOMER SHOULD BE PLEADED, p. 953.

IV. CONSEQUENCE OF NOT PLEADING IT, p. 953.

V. WHEN AN AMENDMENT WILL BE ALLOWED, p. 953.

I. WHAT IS A SUFFICIENT AND PROPER STATEMENT OF A PARTY'S NAME; AND CONSEQUENCE OF A MIS-STATEMENT;—

(a) Generally.

1. A man can have but one name of baptism, but he may have two surnames. *Displyn v. Sprat*, Cro. El. 57.

2. An indictment was quashed, because it gave the defendant two distinct Christian names. *Rex v. Newman*, 1 Ld. Raym. 562.

3. If a man marries with a woman precontracted, and has issue by her, this issue bears the surname of the father; but if after, the husband and wife be divorced for precontract, the issue loses its surname; yet this is a good ground for reputation subsequent; so, in many other cases, the name by repute is sufficient. *Finch's case*, 6 Co. 66 a. 66 b.

4. Vulgar reputation is allowed in writs amicable, which are had by agreement and consent of parties, but not in adversary suits. *Finch's case*, 6 Co. 66 b.

5. "A certain person called Captain S, gentleman," was held to be a good description of a person, in an indictment for forcible entry. *Earl of Salisbury v. Sir A. Ashley*, Palm, 195.

6. On *certiorari* to remove orders, the name of the parish in the writ and that in the order must be the same. *Reg. v. Inhabitants of Berking*, 2 Salk. 452.

7. If there be father and son of the same Christian names, a declaration against the son in *custodia mariscalii* is good, without distinguishing him by the addition of junior. *Lepiet v. Browne*, 6 Mod. 198.

8. In debt on bond, the defendant was sued by the name of "Joacob," instead of "Jacob," and held no misnomer. *Abots's case*, 1 Mod. 107.

9. "Samuel" and "Samul" shall be intended the same name. *Fenn v. Alston*, 11 Mod. 284.

10. "Seger" and "Segear" held to be *idem sonantia*, and no misnomer. *Brunger v. Seger*, 1 Ra. 425.

11. So, "Peirs" and "Peter." *Griffith v. Middleton*, Cro. Jac. 425.

12. So, "Sanders" and "Alexander;" and "Joan" and "Jane." S. C. Cro. Jac. 425.

13. "Franciscus" and "Francus." *Griffith v. Middleton*, Cro. Jac. 534.

14. But otherwise of "Edward" and "Edmund." *Watkins v. Oliver*, Cro. Jac. 558. 640.

15. So, "Saint-John" for "Sain-John," is bad. 2 R. 3. fo. 13. 1 And. 211.

16. So, "Elizabeth" and "Isabel" are dif-

ferent; "Margaret" and "Margary." 26. Ass. pl. 16. 1 And. 212.

17. "Ap' Bell" and "Ap' Pell," held not to be the same names, though they are *idem sonantia* in Welsh. *Lloyd v. Bethell*, 1 Ro. 200.

18. "Adderley," for "Adderby" is a material misnomer; but is amendable by the statute. Mo. 407.

(b) In a name of dignity.

1. Baronet is a dignity, and part of the name. *Lepars v. Sir J. Jermaine*, 3 Salk. 235.

2. Knight is likewise a dignity, and part of the name. *Ld. Ossula*. [*952] *ton's case*, 3 Salk. 336.

3. In records and legal proceedings, the whole name is to be set forth; therefore, if one that is knight and baronet be only styled knight, it is a misnomer. *Hutton v. Crowe*, 10 Mod. 283, 284. Salk. 50. *Jefferies v. Snow*, Carth. 14. Comb. 65. 1 Salk. 6. 2 Salk. 54, 55. 5 Mod. 310.

4. An earl of any other realm may implead or be impleaded by the name or title of knight and earl of such a place; and good because knight is not local, though earl is. March, 19. pl. 26.

5. A peer may be named esquire in the bail-piece, but not in the recognizance. 7 Mod. 38.

6. Indictment of a peer as a commoner, &c. is a misnomer. *Rex and Reg. v. Knollys*, Holt. 533.

7. Earl of, &c. is a sufficient description, though the Christian name is mistaken. *In-goldsby v. Martin*, Stra. 316.

8. A duke's eldest son is not to be styled by his father's second title in legal proceedings, though allowed him in common parlance. *Marquis of Carmarthen's case*, Salk. 451.

9. A declaration in debt on bond, that the defendant became bound by the name of John Villars, Viscount Perbeck, and Earl of Buckingham, is good; but the better way is, to recite the titles under an *alias dictus*. *Villars v. Cary*, 6 Mod. 303.

(c) In the name of a corporation.

1. A corporation may acquire a name by reputation. *Dutch West India Company v. Moes*, 1 Stra. 614.

2. A corporation may sue by their name of incorporation, though they have express power to sue by another. *College of Physicians v. Salmon*, 2 Salk. 451.

3. Any variation in the name of a corporation is fatal. *Turril v. Aynsworth*, 2 Stra. 787.

4. Judgment against a corporation by a wrong name is void. *Button v. Gardon*, 1 Ld. Raym. 119.

5. A variance between the writ and return of a *mandamus* in the name of the corporation is ill. *Reg. v. Bailiff of Ipswich*, Salk. 433, 434.

(d) *In a lease.*

1. Lease by the provost and royal college of the blessed *Mary* of Eton, &c., by the name of the provost and fellows of the royal college of Eton, &c., is void. 2 Dy. 150. pl. 85.

2. A lease made by an ecclesiastical person shall not be avoided for misnomer. 1 Mod. 115.

(e) *In a bond.*

A bond made by the name of "Erlin," but subscribed "Erlwin," is no material variance. *Cromwell v. Grunsden*. Salk. 462.

(f) *In an act of parliament.*

Misnomer of a corporation in an act of parliament, when the express intention appears shall not avoid the act. *University of Oxford's case*, 10 Co. 53 b.

II. WHEN AND HOW THE DEFENDANT CAN TAKE ADVANTAGE OF A MISNOMER.

1. If A make a bond in the name of B, and is sued by the name of B, he may plead the misnomer. *Linch v. Hooke*, 6 Mod. 226.

2. One bound himself by the name of John, whereas his Christian name was Robert; in debt on this bond, he pleaded *non est factum*, and the jury found the whole matter; a judgment in B. R. for the plaintiff was reversed in Cam. Scacc. Lutw. [370].

3. A wife after a bail-bond given may plead a misnomer. *Linch v. Hooke*, 6 Mod. 310.

4. The putting in bail is the act of the bail, and does not estop the defendant from pleading a misnomer. *Pullein v. Benson*, 1 Ld. Raym. 249.

5. An *exigent* is sued to outlaw a defendant in appeal, who sues out a *supersedeas* by the name in the writ; he cannot after that plead a misnomer to the original. 1 Dy. 88. pl. 107.

6. Misnomer cannot be pleaded to a writ of *excommunicato capiendo*. *Bonnefield's case*, 1 Mod. 70.

7. After defendant has appeared and pleaded no advantage can be taken of misnomer. 2 Ro. 50. 88.

8. Misnomer of the defendant may be pleaded after a full defence, but not after a general appearance and defence. *Britton v. Gradon*, 1 Ld. Raym. 118.

9. If two be joined in one writ, the one shall not plead the misnomer of [*953] the other.⁴ *Rawlinson v. Orielt*, Carth. 96. *Finch's case*, 6 Co. 64 b.

III. HOW MISNOMER SHOULD BE PLEADED.

1. Misnomer must be pleaded in person, and not by attorney. 2 Saund. 209 b.

2. A plea of misnomer by attorney may be refused, but it is no cause of demurrer. *Cremor v. Wicket*, 1 Ld. Raym. 509.

3. In an action against a corporation, misnomer of the defendant can be pleaded by attorney, after obtaining a special warrant by leave of the court. *Britton v. Gradon*, 1 Ld. Raym. 118. 509.

4. Great precision and certainty is requisite in this plea. 2 Saund. 209 a.

5. It is a bad plea in abatement, that the defendant's name of baptism is not so and so. *Evans v. King*, Willes, 558.

6. It is not sufficient to say he was baptised by another name, without showing that he was always known by it. 6 Mod. 116.

7. In a plea of another name of baptism, there is no need to traverse. *Walden v. Holman*, 2 Ld. Raym. 1016.

8. If a man sued by the name of Benjamin plead in abatement that he was baptised by the name of John, with a traverse that the said John was never known by the name of Benjamin, the plea is bad. S. C. 6 Mod. 115. 3 Salk. 238.

9. The plea must not state that "*the said B, &c.*," because it thereby admits that he is the person sued. *Tallant v. Germyn*, Carth. 207. 2 Saund. 209 a.

10. In debt on bond, the defendant was sued by the name of Peter; he pleaded, that he was baptised by the name of Paul, and not by that of Peter, and concluded to the country: a *respondens ouster* was awarded. *Shield v. Cliff*, 7 Mod. 104.

11. In a plea in abatement of the writ, *dominus* is too general; it ought to be, that the defendant is a baron of parliament, and ought to show the writ under seal testifying the same. *Countess of Rutland's case*, 6 Co. 53 b.

IV. CONSEQUENCE OF NOT PLEADING IT.

If the defendant omits to plead a misnomer, he may be taken in execution by the wrong Christian name. *Crawford v. Satchwell*, 2 Stra. 1218.

V. WHEN AN AMENDMENT WILL BE ALLOWED.

A misnomer in a bail-bond, and a *reddidit se*, variant from the first writ, cannot be amended. *Bernardiston's case*, 6 Mod. 309.

MISRECITAL.

1. Immaterial recitals hurt not. *Foot v. Berkley*, Carter, 149.

2. If the recital make no alteration in the commencement or end of the term, that is not a material misrecital. S. C. Carter, 157.

3. One having bought a message in D of J C, makes a feoffment by deed of his message, late of R C, in D; this mistake does not vitiate the conveyance. 3 Dy. 376. pl. 25.

4. Where there is a misrecital of the commencement of a former lease, *habendum* after the demise, it is good; but if it be after the term recited is expired, it is void. *Foot v. Berkley*, Carter, 149.

5. Where a lease is misrecited in the date, and the *habendum* is to be from the date which is recited, there the lease shall commence from the sealing. *Rowe v. Huntington*, Vaugh. 73.

6. If misrecital of a lease in *esse* be in a material point, this lease shall begin from the delivery. *Foot v. Berkley*, Carter, 149.

7. Misrecital of a general grant will pre-

judice; *scus*, in a grant of particulars once sufficiently ascertained. Hob. 171.

8. The queen, in a grant of an office, recited a surrender made to her of a former grant, as dated 33 H. 8., when it fact it was dated 32 H. 8.; this misrecital vitiates the grant, and is not aided by 4 & 5 P. & M. c. 1. 2 Dy. 194. pl. 35.

9. If a lease be made to begin for thirty years after the lease made to J S., and there is no such lease in *esse*, it begins presently. *Foot v. Berkley*, Carter, 156.

10. An indictment reciting the [*954] 1 El. c. 2. to be made at a parliament holden on the 23d of January, when it was adjourned to the 25th, it is a fatal variance; but an information in this case, reciting the parliament *tenet. apud West. anno prime regine nunc*, was holden good, though it referred to that indictment. 2 Dy. 203. pl. 72.

11. Misrecital of the date of an act of parliament in the writ, where it is rightly set out in the declaration, will not arrest the judgment. 1 Dy. 95. pl. 36.

MISTRIAL.

1. A mistrial is not helped by consent of the parties. Hob. 5.

2. It is not a mistrial where the day and place of the assizes is left out of the *distringas*, for the *jurata* is the warrant to try the cause. *Earl of Yermouth v. Darrel*, 3 Mod. 78.

3. A wrong venue in a proper county is aided, but not where the jury which tried the cause are of a wrong county. 5 Mod. 405.

4. If an indictment for a conspiracy against several charge the acts of some of the defendants in the parish of St. Giles's in Middlesex, and of the others in the parish of St. Margaret's, in the same county, and a venue be awarded to St. Giles's only, it will be a mistrial, for the jury ought to come from both parishes. *Rez v. Tracy*, 6 Mod. 179.

5. If a *venire facias de novo* be granted on an indictment after a mistrial, the defendant must enter into a new recognizance. *Rez v. Tracy*, 6 Mod. 179.

MODUS.

[See post, tit. TITHES.]

MONEY.

Money current by proclamation is lawful money of England. *Wade's case*, 5 Co. 114 a. (See also ante, tit. COIN, Vol. I. p. 297.)

[Respecting the payment of money into court, see post, tit. PRACTICE.]

Respecting the application of money paid, see post, tit. PAYMENT.

MONOPOLY.

1. A charter to the East India Company

for the sole trade to the East Indies is a monopoly. *Sands v. Childs*, 3 Lev. 351.

2. Monopolies are against the common law. *Edgeberry v. Stephens*, Holt, 475, 576.

3. And contrary to Magna Charta. *Partridge's case*, 10 Mod. 106. *Mitchel v. Reynolds*, 10 Mod. 133.

4. But where the king has a special interest, his grants shall not be adjudged monopolies. *Partridge's case*, 10 Mod. 107.

5. Monopolies are against the policy of the law. *East India Company v. Sandys*, Skin. 226.

6. By 21 Jac. 1. c. 3., all monopolies by letters patent, &c., or any thing tending to the same, are void. 1 Mod. 258 *notis*.

7. Monopolies for new inventions are warranted by 21 Jac. 1. *Edgeberry v. Stephens*, Holt, 476.

8. The statute of monopolies does not extend to letters patent granted to companies. *East India Company v. Sandys*, Skin. 234.

9. If exportation or importation of a commodity or exercise of a trade is prohibited generally by act of parliament, and no cause thereof expressed, a license may be granted to one or more persons, with a *non obstante*; for by such general restraint, the law intended to limit the over numerous importers and traders, and such general licenses shall not be accounted monopolies. *Thomas v. Sorrell*, Vaugh. 345.

10. A patent granted by the king to another for the making out all bills and informations, &c., to be preferred before the council at York, was declared by the judges to be a monopoly, and therefore void. *Mounson v. Lyster*, W. Jo. 231, 232.

11. To avoid a monopoly, the king's dispensation upon all prohibitory laws must generally be limited by law. [*955] *Thomas v. Sorrell*, Vaugh. 346.

12. The difference between monopoly and engrossing is, the one is by patent from the king, the other is by the act of the subject between party and party. *East India Company v. Sandys*, Skin. 169.

MONSTRANS DE DROIT,

AND

PETITION OF RIGHT.

1. Where claim or entry in the case of a subject is required, in the case of the king, these writs are the only remedy, except in some special cases. 2 And. 112, 113, 114.

2. Where one is attainted who has acknowledged a recognizance, conusee has a remedy by petition of right. 1 And. 281.

3. For the difference between a monstrans de droit and petition of right, see 1 And. 180, 181, 281.

4. The mortgagor of socage lands redeeming, may, by monstrans de droit, without petition, recover the lands which the king had taken into ward, with the heir of the

mortgagee, his tenant *in capite*. 2 Dy. 236. pl. 25.

5. All the estates must be truly set down, else all is void after judgment. 3 Leon. 242.

6. Upon reversal of outlawry, a man can enter without these remedies. 1 And. 188.

7. If the plaintiff therein fails in his own title, he cannot take advantage of another's, or want of title in the crown. *Rex v. Mason*, Salk. 447.

8. The record of the inquisition thereon is before the court with respect to the plaintiff only. S. C. Salk. 448.

9. Estate to the queen upon condition, which is performed, ought to be found by office, and then monstrans de droit, upon which an *amoveas manus*; but the award of an *amoveas manus* is sufficient without execution of the writ. Mo. 346.

10. Where upon a monstrans de droit, the judgment of the court is erroneous, if the remedy be proper, the court ought to give a new judgment. *The Banker's case*, Skin. 615, 616.

MONSTRANS DE FAIT.

[See post, tit. PLEADING.]

MORT D'ANCESTOR.

1. In a writ of mort d'ancestor, one object is, to enquire if the demandant be next heir to his father. Plow. 239.

2. In a mort d'ancestor, if the issue joined on one of the three points be found against the tenant, it seems the other should be inquired of; as, if he plead in abatement, or vouch, all three must; but if he plead in bar and fail, it is peremptory against him. 3 Dy. 310. pl. 82.

MORTGAGE.

I. RELATIVE TO THE FORM OF A MORTGAGE, p. 955.

II. OF THE RELATION BETWEEN A MORTGAGOR AND MORTGAGEE, p. 956.

III. RESPECTING THE EQUITY OF REDEMPTION AND FORECLOSURE, p. 956.

IV. WHERE THE MORTGAGOR ADVANCES A FURTHER SUM, p. 956.

V. OF THE PREFERENCE GIVEN TO A MORTGAGEE, p. 957.

VI. WHEN IT IS ASSETS, p. 957.

VII. IN CASE OF DEATH; BY WHOM TO BE PAID, p. 957.

VIII. RESPECTING THE REMEDIES FOR THE MORTGAGOR;—

(a) *Ejectment for the mortgaged premises*, p. 957.

(b) *Debt on the mortgage deed*, p. 957.

(c) *Covenant on the deed*, p. 958.

IX. HOW AFFECTED BY A FINE OR RECOVERY, p. 958.

I. RELATIVE TO THE FORM OF A MORTGAGE.

1. An absolute conveyance, with a sepa-

rate defeasance by way of mortgage,* should be discouraged as [*956] an inlet to fraud. *Collerell v. Purchase*, C. T. Talb. 63, 64.

2. A mortgage was made, with a proviso that future interest, if not paid, shall be taken as principal and bear interest; the proviso held void. *Lord Ossulston v. Lord Yarmouth*, Salk. 449.

3. Where a mortgagor covenants to make further assurance after a default, he is bound to make an absolute assurance, but not to release his equity, nor with warranty. *Alkin v. Urton*, Comb. 318.

II. OF THE RELATION BETWEEN A MORTGAGOR AND MORTGAGEE.

1. A mortgagor in possession is strictly a tenant at will to the mortgagee. 1 Saund. 276 a. n. [a].

2. Though the mortgagor be not tenant at will to the second assignee, yet he is not a disseisor, but a tenant at sufferance, and therefore the mortgagee (his estate not being divested) may assign, though the mortgagor be not a party, and the mortgagee never in possession. *Newport's case*, Skin. 423.

3. A mortgagee shall not be allowed to present to a living which becomes vacant, because nothing can be taken for it, but he is looked upon in equity as a trustee for the mortgagor or his grantees, and shall present such person as they shall name. *Gally v. Selby*, Com. 343. Stra. 403. S. C.

4. A mortgagee cannot make a lease of a house in mortgage, before a foreclosure, nor present on an avoidance. *Hungerford v. Clay*, 9 Mod. 1.

5. The mortgagee, for himself, his executors, administrators and assigns, covenants with the mortgagor, that he shall enjoy and take the profits till default of payment; the covenant being for his assigns, he shall be presumed tenant at will to all the assigns as well as the first mortgagee. *Newport's case*, Skin. 424.

III. RESPECTING THE EQUITY OF REDEMPTION AND FORECLOSURE.

1. In case of a common mortgage, as soon as the day of payment is past, the legal estate is absolutely vested in the mortgagee. *Marks v. Marks*, 10 Mod. 424.

2 A right of redemption only remains in equity. *Id. ibid.*

3. A mortgage by a popish heir may be redeemed by the next protestant kin. *Jones v. Meredith*, Com. 661.

4. One who claims under a voluntary conveyance may redeem a mortgage. *Jones v. Meredith*, Com. 669.

5. A mortgagor is not relievable in Chancery after twenty years; for the statute 21 Jac. 1. c. 16. limits the time of entry to that number of years, and it is best to adapt the rules of equity as near to the rules of reason

and law as may be. *White v. Ewer*, 2 Vent. 340.

6. A mortgage shall not be intended to be redeemed unless expressly shown. *Baily v. Taylor*, Yelv. 25.

7. An absolute conveyance will not easily be presumed to be a mortgage, especially if attended with a long uninterrupted possession. *C. T. Talb.* 61 to 64.

8. Equity will not interpose, on a covenant, that a mortgagee shall have the benefit of pre-emption, if it be not insisted on until after the estate is sold. *Orby v. Trigg*, 9 Mo. 2.

9. An equity of redemption is an estate in the land. *Casburne v. Inglis*, C. T. Hardw. 399.

10. Foreclosure of an equity of redemption is considered as a new purchase of the land. *Id. ibid.* 1 Saund. 277 b.

11. An equity of redemption is not liable to dower if in fee; nor is it legal assets in the heir, if the mortgage is in fee. 2 Saund. 46.

12. An equity of redemption cannot be taken in execution under 29 Car. 2. 2 Saund. 11 a. n. [m].

13. A covenant for further assurance does not oblige to release the equity of redemption. *Atkin v. Uton*, 1 Ld. Raym. 36.

14. Where a bill is exhibited in equity to foreclose the right of redemption, if the mortgagor be foreclosed, he pays no costs. *Howard v. Attorney-General*, 2 Mod. 174.

IV. WHERE THE MORTGAGOR ADVANCES A FURTHER SUM.

1. Where the mortgagee lends [957] more money* upon bond to the mortgagor, he shall not redeem without paying both; but if he mortgage the equity of redemption to another, it shall not be affected with that bond. *Anon.* 3 Salk. 84 240.

2. A mortgage of lands in Middlesex is duly registered; a second mortgage to another is also duly registered; the first mortgagee lends a further sum without notice; the registering the second mortgage is not a constructive notice to gain payment prior to the second sum lent by the first mortgagee. *Bedford v. Backhouse*, W. Kely. 5.

3. When a first mortgagee, after a second mortgage to another, advances a further sum without notice, he shall be paid his whole money in the first place. *Bedford v. Backhouse*, W. Kely. 6.

4. Where lands are thrice mortgaged, the third mortgagee may buy in the first incumbrance to protect his own mortgage, and then he has both law and equity. *Marsh v. Lee*, 2 Vent. 338.

5. He shall hold the land against the second mortgagee, until he be satisfied both the money he paid to the first mortgagee, and also his own which he lent upon the last mortgage. *Id. ibid.*

6. But where part only of the land is mortgaged to the first, and the whole to the second, and after to the third, here, if the third buys in the first title, it shall protect only that part that is the mortgage. *S. C.* 2 Vent. 339.

V. OF THE PREFERENCE GIVEN TO A MORTGAGEE.

1. A mortgagee or purchaser precedent, though by a defective conveyance, shall be preferred before assignees of commissioners of bankrupts. *Taylor v. Wheeler*, 2 Salk. 449.

2. If a purchaser or mortgagee come in upon a valuable consideration, without notice, and purchase in a precedent incumbrance, it will protect his estate, though he purchased in the incumbrance after notice of a second mortgage. *Marsh v. Lee*, 2 Vent. 339.

VI. WHEN IT IS ASSETS.

1. The reversion in fee in the mortgagor is legal assets in the heir if the mortgage be for years; but the equity of redemption is not legal assets if the mortgage be in fee. 2 Saund. 8 e.

2. Upon a mortgage in fee the redemption money shall be paid to the executor, and not to the heir. *Marsh v. Lee*, 2 Vent. 348. 351.

3. If a mortgagor confess a judgment subsequently to the mortgage, and die, and the mortgagee buy the equity of redemption of the heir, the money paid for this purchase is assets in the hands of the heir. *Freeman v. Taylor*, 1 Mod. 115.

VII. IN CASE OF DEATH, BY WHOM TO BE PAID.

A remainder-man in possession covenants to pay off an old mortgage on the premises, and dies; his personal estate is not liable to the mortgagee, but the estate in the hands of the next in remainder. *Evelyn v. Evelyn*, W. Kely. 19.

VIII. RESPECTING THE REMEDIES FOR THE MORTGAGOR;—

(a) Ejectment for the mortgaged premises.

1. At common law, the court would stay an ejectment brought on a mortgagee, on payment of the mortgage money. *Archer v. Snapp*, Andr. 343.

2. Where money is lent on mortgage, and afterwards on bond, an ejectment brought by the mortgagee shall be stayed on payment of the mortgage money only by the mortgagor. *Archer v. Snapp*, Andr. 341. *Stra.* 1107. *S. C.*

3. The law is the same in the case of the vendee of the equity of redemption. *S. C.* Andr. 341.

4. And it makes no difference that he retains out of the purchase-money sufficient to pay the bond debt, and gives bond for paying the money retained to the mortgagee, if the premises are not redeemable without such payment. *Id. ibid.*

5. But in case of an heir, he must pay both the money due on the mortgage and the bond. *Id. ibid.*

(b) *Debt on the mortgage deed.*

1. In debt on the mortgage deed, it is not necessary to state that interest, up to the day of default, has been paid; [*958] for* the principal and interest form separate debts. 1 Saund. 201 a. n. [n].

2. The interest subsequent to the day of the default must not be claimed as part of the debt, but as damages for the detention; it is, however, prudent to add a count for interest. 1 Saund. 201 a. n. [n].

(c) *Covenant on the deed.*

In covenant for the mortgage money, there is no necessity for a writ of inquiry. 2 Saund. 107 a. n. [b].

IX. HOW AFFECTED BY A FINE OR RECOVERY.

1. A mortgage is not affected by a fine levied by a mortgagor, who continues in possession. *Smith v. Pierce*, Carth. 101. 414. 1 Sid. 460.

2. If a mortgagee suffer a recovery, the estate of the mortgagee remains untouched by the recovery, for his right to the land is collateral. *Pell v. Brown*, 2 Ro. 222.

3. A son entitled to a remainder in tail, joins his father, tenant for life, in suffering a recovery; then they execute a mortgage; the son is not compellable to pay interest to the mortgagee during the life of the father. *Gay v. Cox*, 1 Ridgw. 153.

MORTUARY.

1. A mortuary is not due but by particular custom of the place. *Proud v. Piper*, 3 Mod. 268.

2. It cannot be sued for in equity. *Torrent v. Burly*, 2 Stra. 715.

3. The property thereof is not in the person before seizure, so as to maintain trespass or replevin. *Plow. 281*.

MURDER.

I. WHAT CONSTITUTES THE CRIME OF MURDER, p. 958.

II. WHAT IS NOT MURDER, BUT ONLY MANSLAUGHTER, p. 960.

III. WHEN HOMICIDE IS JUSTIFIABLE, p. 961.

IV. RELATIVE TO A CRIMINAL PROSECUTION FOR MURDER;—

(a) *Of the form of indictment*, p. 962.

(b) *When the party may be admitted to bail*, p. 962.

(c) *Of the plea*, p. 963.

(d) *Evidence*, p. 963.

(e) *Relative to presumption of law against the offender; and when malice is to be inferred*, p. 963.

(f) *Verdict*, p. 963.

V. RELATIVE TO INQUIRIES OF MURDER, p. 963.

I. WHAT CONSTITUTES THE CRIME OF MURDER.

1. It is murder to kill one suddenly without cause. *Rex v. Legg*, J. Kely. *27, 128.

2. If a master corrects his servant with a bar of iron, or strikes him with a sword, and so kills him, it is murder. *Grey's case*, J. Kely. 64. 133. *Keat's case*, Skin. 668.

3. So where a husband kills his wife by striking her with a pestle. *Greg's case*, J. Kely. 64. 133.

4. Or a mother her child, by kicking and stamping on it. *Greg's case*, J. Kely. 64. 134.

5. Or a parent leaves a child, so that it perishes by famine. *Beal and Carter's case*, 1 Leon. 327.

6. If a man beats a trespasser who yields to him, so that he dies, it is murder. *Holloway's case*, Palm. 546. Cro. Car. 131.

7. If a park-keeper, upon private malice against one who comes into the park, without any intent to hunt, kill him, it is murder. *Rex v. Wormal*, 2 Ro. 121.

8. A woodman finding a boy stealing in a park, tied him to a horse, and upon striking the boy, the horse ran away, and the boy was killed; this was held to be murder. *Holloway's case*, W. Jo. 198.

8. It is no excuse that the party died through his own negligence or disorder. *Rex v. Rees*, J. Kely. 26.

10. Confining a person with one infected with the small pox, who is afraid of* the distemper, and catches it, [*959] and dies of it, is murder. *Castell v. Rambridge*, Stra. 856.

11. If a gaoler confines his prisoner against his will in an unwholesome room, without allowing him the necessaries requisite to cleanliness, &c., whereby he contracts a distemper, of which he dies, this is murder by duress. *Rex v. Huggins*, Stra. 882. 2 Ld. Raym. 1578.

12. If, upon a sudden affray, the constable and his assistants come, by authority of law, to suppress the affray and preserve the peace, and, in executing their office, the constable or any of his assistants is killed, it is murder, although the murderer did not know the party killed. *Young's case*, 4 Co. 40 a.

13. So it is in the case of a sheriff, or any of his bailiffs, or other officers, or of a watchman. *Id. ibid.*

14. Where persons are doing an unlawful act, and murder ensues, it is murder in all, and it is lawful for any one to command the king's peace, and suppress them; and such attempt to suppress them is not such a provocation as to make killing manslaughter. *Ashton's case*, 12 Mod. 256. Palm. 35. *Rex v. Keate*, 5 Mod. 289. 292.

15. A, arrested, endeavours a rescue, and another of his party kills the officer; it is murder in A. *Stanley's case*, J. Kely. 87.

16. And so it is in one that comes in aid of A, though he knew not of the arrest. *Sir Charles Stanley's case*, J. Kely. 87.

17. So, where several attempting an unlawful act, are resisted, and one of the resisters is killed; all are guilty, though not

present. *Sir Charles Stanley's case*, J. Kely. 87.

18. A and others come riotously to the house of B; C, persuading peace, is killed by a stone thrown at random over a wall by one of A's servants; it is murder in all. *Rex v. Plummer*, J. Kely. 116. 12 Mod. 269. 631.

19. So, where several design a felonious act, and in doing thereof another is killed. *Rex v. Plummer*, J. Kely, 117. 12 Mod. 631.

20. Where an officer is killed in a riot, he that began the riot is guilty of murder, though he did not the fact, &c. *Reg. v. Willis*, Holt, 484.

21. A is privy to a design of B to beat C, and accompanies B in putting the design in execution, but does not otherwise aid, &c.; if C dies, A and B are both guilty of murder. *Lord Maken's case*, Holt, 480.

22. If a sheriff, justice of peace, chief constable, petit constable, watchman, or any other, be killed in the execution of their office, it is murder. *Mackalley's case*, 9 Co. 65 b. Cro. Jac. 280.

23. To kill an officer who comes to arrest one, although he uses not the words of arrest, nor shows his warrant, is murder. *Pewer's case*, Cro. Car. 183. 537, 538. 9 Co. 65 b.

24. If a minister of justice is killed in the execution of process, it is murder, although such process is apparently erroneous. *Mackalley's case*, 9 Co. 65 b.

25. So it is to kill a watchman in staying night-walkers. *Mackalley's case*, Cro. Jac. 280.

26. A, B, C, &c. attempting an unlawful act, are resisted by the king's officers; A kills B; it is murder in A, but not in C, &c., except they knew of A's design to kill B. *Rex v. Plummer*, J. Kely. 111. 113.

27. But if A had killed the officer, or in attempting to kill him had killed B, C, &c., it would have been murder in all. *Rex v. Plummer*, J. Kely. 114. 118.

28. Where persons assembled with force to seize goods, under pretence of lawful authority, and a woman unarmed coming out of the house was killed by a stone thrown by one of the assailants at another person in the gateway, this was held murder in them all. 2 Dy. 128. pl. 60.

29. A assaults B (without provocation) by drawing his sword, &c. and B in defence, draws his; they fight, and A kills B; it is murder in A. *Hugget's case*, J. Kely. 61.

30. It is murder, notwithstanding he was driven to the wall. *Anon. J. Kely. 58.*

31. Words are not a provocation sufficient to lessen the crime from murder to manslaughter. *Ld. Morley's case*, J. Kely. 55. 65. *Rex v. Keate*, Comb. 406, 407.

32. Nor a denial of a key by a servant to his master. *Keate's case*, Holt, 482. Skin. 666. 8 C.

33. By 1 Jac. 1. c. 8. s. 2., every person who* shall stab any [*960] person that has not then any weapon drawn, or that has not then first stricken the party which shall so stab, although not done with malice aforethought, shall be adjudged guilty of wilful murder: but it is provided, "that this shall not extend to any person, who, in keeping and preserving the peace, shall chance to commit manslaughter, so as the said manslaughter be not committed willingly, wilfully, and of purpose, under the pretext of keeping the peace." *Rex v. Tooley*, 11 Mod. 247. n.

34. A sneed was held to be a weapon drawn, within the meaning of the statute. *Keate's case*, Skin. 666.

35. Two men fight, the one throws a pot at the other, the other kills him with his sword; the pot was a weapon drawn at the time of the wounding, within the statute. *Rex v. Hunter*, 3. Lev. 255.

39. If a person shoot, intending to kill one, and kill another, it is murder. *Rex v. Plummer*, 12 Mod. 628.

37. If A assaults one upon malice prepense to kill him, and another, who defends the person assaulted, is killed, it is murder in A. Plow. 101.

38. He who gave the stroke, and he who was assisting, are both equally guilty. 3 Salk. 39.

39. Procuring before the birth the murder of an infant after the birth, is felony without clergy. 2 Dy. 186. pl. 2.

40. Poisoning is murder at common law. *Anon. J. Kely. 52.*

41. A mixed poison in some medicine sent by an apothecary to her husband, which did not kill him, but afterwards killed the apothecary, who, to vindicate his reputation, tasted it himself, having first stirred it about; held, this is murder in A. *Gore's case*, 9 Co. 81 a.

42. If A puts poison into a pot of wine, &c. to the intent to poison B, and sets it in a place where he supposes B will come and drink it, and by accident C, against whom A has no malice, comes, and of his own head, drinks the wine, of which he dies, it is murder; so also in the same case, if C, thinking sugar is in the wine, stirs it with a knife and drinks of it. Id. ibid.

43. A, without provocation, throws a bottle at B, and immediately draws his sword; B returns the bottle, and strikes A; A stabs B; it is murder. *Reg. v. Mauvridge*, J. Kely. 120. 125, 126.

44. If men fight upon appointment under pretence of defending their honour, and one kills the other, he is guilty of murder. *Rex v. Taberner*, 1 Ro. 360. 3 Bulst. 171.

47. If the quarrel is in the morning, and the fight in the afternoon, it is murder. J. Kely. 56. Id. 27. 127.

46. So, if they appoint a place to fight. Id.

47. If A and B having had a sudden quarrel blows pass, and a sufficient time then elapses for A to have cooled, (namely, an hour,) and afterwards he kills B, it is murder, *Rex v. Onsey*, 2 Stra. 766. 2 Ld. Raym. 1485. S. C. *Ld. Morly's case*, J. Kely. 56.

II. WHAT IS NOT MURDER, BUT ONLY MANSLAUGHTER.

1. The killing of a man by a lunatick, or of a thief or burglar in defence of a man's person or house, is not murder. *Hob. 134*.

2. If a husband kills a man in the act of adultery with his wife, it is only manslaughter, and not murder. 2 Vent. 158.

3. If persons quarrel on a sudden, and for conveniency go out into a park to fight, and death ensue on this sudden quarrel, it is not murder. *Rex v. Kirk*, 12 Mod. 304, 305.

4. Firing a pistol out of a chaise in the street, and death ensuing, held manslaughter. *Rex v. Burton*, 1 Stra. 481.

5. Death occasioned by throwing a stone over a wall to frighten people, not murder. *Rex v. Keite*, 1 Ld. Raym. 143.

6. If one prepares poison to kill vermin, and leaves it in places for that purpose, and with no ill intent, and one finding it, eats of it, and dies, it is not felony. *Gore's case*, 9 Co. 81 a. Jenk. Cent. 290. S. C. *Rex v. Saunders*, Flow. 474.

7. If two men, tilting or tourneying in the presence of the king, or two masters of defence playing their parts, kill one another, this is no murder. *Weaver v. Ward*, *Hob. 134*.

8. Several persons being met to do an unlawful act, one fires a gun and [*961] kills* one of his own party; it is not murder, not being found that he shot at the king's officers who opposed. *Rex v. Plummer*, 12 Mod. 637.

9. The act of one, whereby murder follows, must be in pursuance of the original unlawful design. *Rex v. Plummer*, 12 Mod. 630.

10. *Felo de se*, is not a murder within the exception of murder in the statute of pardons. *Tumles v. Ethrington*, 1 Lev. 120.

11. Intent to conceal a bastard child, not murder within the statute. *Rex v. Anne Davies*, J. Kely. 32.

12. All who are in the murderer's company at the time are not necessarily guilty of murder; as where A is in company with B casually, and B commits a murder, A is not guilty of any offence. *Ld. Mohun's case*, *Holt*, 479, 480.

13. So where A, knowing previously of the malice of B to C, is casually in company with B when C happens to come; B murders C, A is not guilty of any offence. S. C. *Holt*, 480.

14. A accompanies B in an unlawful action, in which C is not concerned; after that action is over, C comes in the way of

B; B kills C without the assistance of A; A is not guilty of murder. S. C. *Holt*, 481.

15. If two, on a sudden quarrel, fight immediately, it is only manslaughter. J. Kely. 56.

16. If two quarrel and fight, and another runs in to aid one of them, and kills the other, it is manslaughter. J. Kely. 61.

17. If a constable or other, coming to keep the peace, is killed, it is not murder, unless he declares, or the party knows, he came to that intent. *Rex v. Plummer*, J. Kely. 115, 116. 12 Mod. 631.

18. It is not murder to kill a sheriff who has not a legal warrant. *Rex v. Sir H. Ferrers*, W. Jo. 346.

19. If A yields to the arrest, and others endeavour to rescue him, and kill the officer, it is not murder in A. *Stanley's case*, J. Kely. 87.

20. One who assists the party arrested, not knowing of the arrest, is not guilty of murder though one be killed. *Rex v. Sir C. Standlie*, 1 Sid. 160.

21. Killing an officer acting irregularly, though the party did not know of the irregularity, or a thief whom the party took to be an officer, is only manslaughter. *Rex v. Tooley*, 2 Ld. Raym. 1202.

22. If a constable arrest a woman illegally as a disorderly person, and confine her in the round-house, and a person endeavouring to release her from such confinement, suddenly, and without any precedent malice, kill a man who is acting by the command and in aid of the constable, it is manslaughter only, and not murder. *Rex v. Tooley*, 11 Mod. 242. 2 Ld. Raym. 1300.

23. Killing in a sudden affray, made to deliver a stranger from a wrongful imprisonment, is not murder, but manslaughter. *Holt*, 487, 489, &c.

24. H and another went to the lodgings of B, and when they were in the lodgings, the assistant took down a sword in the scabbard, which hung in the room, and stood at the door of the chamber with the sword undrawn in his hand, and kept the door to prevent B from going out until they could bring a bailiff to arrest B for a debt which he owed to H; whereupon, upon some discourse between B and H, B took a dagger out of his pocket and stabbed H, and killed him: B was indicted on the statute 1 Jac. 1 c. 8; but judgment was given for the prisoner. 11 Mod. 247. n.

25. Correcting a servant with a sword is unlawful, and justifies the servant defending himself. *Rex v. Keite*, 1 Ld. Raym. 144.

26. A defendant arrested, strikes the officers, they afterwards kill him; held manslaughter. *Rex v. Reason*, 1 Stra. 499.

27. The statute of stabbing, 1 Jac. 1 c. 8, does not extend to persons present, aiding, and abetting. *Rex v. Keite*, 1 Ld. Raym. 141.

23. The words "not having then first struck," in the statute of stabbing, refer to the time of the mortal wound given. *S. C. 1 Ld. Raym. 142.*

III. WHEN HOMICIDE IS JUSTIFIABLE.

1. If one imprisoned for felony escape, and, upon attempt to retake him, resist, and is killed, it is not even manslaughter [*962] ter;* but if the imprisonment be only for debt, unless the keeper retreat as far as possible, it is manslaughter. *Cusfield v. —, 1 Ro. 189.*

2. Killing another in defence of oneself, and the possession of a room, is justifiable. *Rex v. Ford, J. Kely. 51.*

IV. RELATIVE TO A CRIMINAL PROSECUTION FOR MURDER;—

(a) Of the form of the indictment.

1. If the blow be given one day, and death follow the next, it may be alleged that the party committed the murder on the last day. *Wrote v. Wigges, 4 Co. 45 b.*

2. If the mortal blow is given on one day, and death ensues on another, and the indictment charges the accessories with being present, aiding, &c. on the first day, it is bad. *Heydon's case, 4 Co. 41 a.*

3. In an indictment for murder by administering poison, it must be expressly alleged that the person murdered received and drank the said poison. *Vaux's case, 4 Co. 44 a.*

4. An indictment for murder, "he not having first struck," not saying any thing of a weapon drawn, is ill. *Rex v. Neat, 12 Mod. 118.*

5. An indictment of murder *de quodam igne*, or of stealing the goods *cujusdem ignis*, is good. *Flow. 85. 129. Rushton's case, 2 Leon. 121.*

6. Without the word *murdravit* in an indictment for homicide, the charge amounts but to manslaughter. *3 Dy. 304. pl. 56.*

7. The certainty of the fact ought to be particularly alleged; if for murder, it must be alleged that a stroke was given. *Rex v. Griffiths, 3 Mod. 202.*

8. Where the mortal wound is given by a complete separation or perforation of any part of the body, as by cutting off the kneecap, the indictment need not show the depth and breadth of the wound. *Heydon's case, 4 Co. 41 a.*

9. An exception was taken to an indictment that the length or depth of the wound was not shown; but it was not allowed, for the means were alleged, *vis. by discharging a dagger loaded with powder and ball*; and the wound was described as *totaliter penetrans et per totum corpus*. *Long's case, 5 Co. 120 a.*

10. An indictment describing the place of the wound *super anteriorem partem corporis*, was held to be certain enough, and sufficient; so *super caput, super faciam, &c.* *Long's case, 5 Co. 120 a.*

11. An indictment for murder, alleging

that the prisoner struck the deceased in *sinistra parte ventris circa umbilicum*, is sufficient. *Walker's case, 4 Co. 41 a.*

12. An averment that A, B, and C, feloniously, and of their malice aforethought, made an assault upon S, and then and there feloniously struck the said S, and then and there gave the said S a mortal wound, is sufficient; for the words "feloniously and of malice aforethought," refer to all the subsequent words. *Heydon's case, 4 Co. 41 a.*

13. In an indictment for murder, *unam plagam mortalem, circiter pectus*, is not sufficient, because the part in which the mortal wound was given is not properly described. *Young's case, 4 Co. 40 a.*

14. An indictment *quod murderavit, for murdravit*, held bad. *Ryles's case, Cro. Eliz. 920. See also Long's case, 5 Co. 120.*

15. If, in an indictment for murder, it is averred that the person murdered died *de vulneribus et plagis predictis*, if one of the wounds is uncertainly alleged, it makes the indictment insufficient as to all. *Young's case, 4 Co. 40 a.*

16. An indictment for murder, omitting that the person slain was in *pace Dei*, was yet held good. *Rex v. Tucker, 4 Mod. 184.*

(b) When the party may be admitted to bail.

1. The King's Bench may bail in cases of suspicion of murder. *Rex v. Pepper, Comb. 298.*

2. The court will not bail a man found guilty of manslaughter, if it appear by the inquisition to be murder. *Rex v. Carter, 7 Mod. 172.*

3. The depositions taken by the coroner, and not the verdict, are to rule the court as to the expedience of bailing. *Rex v. Dalton, 2 Stra. 911.*

4. The statute 3 H. 7. c. 1. respecting bail,* extends only to [*963] cases of murder, not manslaughter. *Anon. J. Kely. 25.*

[See also ante, tit. BAIL, div. (B). Vol. I. p. 182.]

(c) Of the plea.

It is a good plea to an indictment for murder, that the party was appealed of murder, and found guilty of homicide. *Wetherell v. Darley, 4 Co. 40 a. Cro. Eliz. 296. S. C.*

(d) Evidence.

In murder, a discourse antecedent to the fact may be given in evidence. *Young v. Slaughterford, 11 Mod. 229.*

(e) Relative to presumptions of law against the offender; and when malice is to be inferred.

1. It is the province of the judge, and not of the jury, from the particular circumstances of the case, to determine what is malice, and whether the killer had sufficient time to cool. *Rex v. Oneby, 2 Stra. 766.*

2. On a killing without a provocation, the law supplies the malice. 5 Mod. 290.

3. If A says he will revenge himself of B, or that he will have his blood, this is express malice against B, and if a killing ensues, it is murder. *Rex v. Oneby*, 2 Stra. 766.

4. Malice may be inferred from the facts found; but the consent of one to the act of the other is matter of fact, and must be found by the jury. *Rex v. Huggins*, 2 Stra. 886. 2 Ld. Raym. 1581. 1584.

5. Where one man kills another, it is presumed murder, unless the suddenness of the quarrel, &c. appears. *Rex v. Oneby*, 2 Ld. Raym. 1493. 2 Str. 766.

6. Proof of the suddenness of the quarrel, &c. lies on the prisoner. *Rex v. Legg*, J. Kely. 27. 127. 2 Str. 766.

(f) Verdict.

1. Upon an indictment of murder, the jury may find that he killed him in his own defence. *Rex v. Griffith*, Plow. 101.

2. On an indictment of murder, though the party is acquitted thereof, he may be found guilty of manslaughter, and upon such verdict he shall receive judgment, as if he had been indicted of manslaughter; for the offence is in substance the same. 8. C. Plow. 101.

3. Though A, who actually killed, be acquitted, yet others present, aiding, &c. may be found guilty; for all present, &c. are principals in murder. *Reg. v. Willis*, Holt, 484.

4. When the jury doubt whether the facts proved amount in law to murder, they may find a special verdict, stating the facts as proved, and leaving the inference to the judges, who may give judgment of death if they think the offence is murder, though the killing is not found to be felonious. *Mackalley's case*, 9 Co. 65 b.

5. If the verdict find that the principal gaoler knew the condition of the room, and that, within fifteen days of the death, he was present with his deputy, and "saw the deceased under the duress of the said imprisonment," sufficient facts are not found to amount to murder. *Rex v. Huggins*, Stra. 882.

6. A finding of the stroke and death is not sufficient, without also drawing the conclusion that so the said A murdered the said B, &c. *Wrote v. Wiggs*, 4 Co. 45 b.

V. RELATIVE TO INQUISTIONS OF MURDER.

1. It is unnecessary to state, in an inquest of murder, that the party murdered was in the peace of God and the king. *Heydon's case*, 4 Co. 41 a.

2. It is no objection to an inquest of murder, that it is stated to have been taken before the coroner in the county, for it shall be intended to mean the coroner of the county. 8. C. 4 Co. 41 a.

[See further ante, tit. CORONER, div. IV.]

Vol. I. p. 371.; and tit. INQUISTION, Vol. I. p. 813.]

NAME.

OF NAMES IN GENERAL.

1. A man cannot have two christian names. *Evans v. King, Willes*, 554.

2. A dignity is parcel of the name, as well as the name of baptism. *Rex v.**

Bishop of Chester, Carth. 440. 1 [*964] Ld. Raym. 292. S. C.

3. Clarendieux is part of the name of the officer. *Holt v. Ward*, 2 Stra. 850.

4. A name of office or dignity does not leave a man by his going from one place to another. Plow. 75.

5. Names of persons not christened are surnames only. 1 Ld. Raym. 305.

6. The true name of a person or place is that which precedes, and not that which follows an *alias dictus*. Say. 279.

7. In artificial things, there needs no other description but only to name them by the usual names they are commonly known by. 2 Saund. 74.

NATURALIZATION.

1. Naturalization is always by act of parliament, and perpetual: if one be naturalized for a day, it is good for ever. *Godfrey v. Dizen*, Cro. Jac. 539.

2. In acts of naturalization, the naturalization is generally restrained by express words to the time of passing the act, or to the beginning of that session of parliament. *Collingwood v. Pace*, Orl. Bridg. 455.

3. If one be naturalized by act of parliament, and die without issue, his brother can inherit to him. 2 Ro. 94. 113.

4. An alien has issue one son, an alien, and another son born within the realm, and then is made a denizen, and dies; the alien son is naturalized, and purchases land and dies, the other brother can inherit to him. Palm. 14.

5. In order to break any rules of law or descent by an act of naturalization, it must contain special provisions for that purpose. *Collingwood v. Pace*, Orl. Bridg. 462.

6. A feme alien naturalized is entitled to dower. Palm. 18.

NAVY BILL.

The property in a navy bill does not pass without assignment. *Mackish v. Ekies*, Say. 73.

NE EXEAT REGNUM.

1. A writ of ne exeat regnum is grantable in Chancery to stop one from going beyond sea to avoid a sentence in the ecclesiastical court. 2 Vent. 345.

2. Ne exeat regnum is a writ applied to particular persons, and at first was chiefly used in matters of state; but in late times it

has been applied to courts of justice; it is not to be granted without oath. *East India Company v. Sandys*, Skin. 136.

3. It is a writ grounded upon the common law, and not given by any particular statute. *Rebours's case*, 3 Mod. 127.

4. The writ of *ne exeat regnum* ought not to be granted but upon great reason and examination. *Anon.* 7 Mod. 9.

5. It is lawful for any one to go beyond sea, unless there be a *ne exeat regnum* against him. 2 Ro. 12. 115.

6. It lies to prevent a person who has married an heiress without her parent's consent going beyond sea. *Calthrops v. Axtell*, 3 Mod. 169.

NEGATIVE PREGNANT.

1. In a negative plea, that three persons did not do such a thing, if it is not said *nec eorum aliquis*, it is bad, as being a negative pregnant. 2 Mod. 284.

2. Declaration on 5 & 6 Ed. 6, c. 20., for lending money for interest and usury, and that the defendant received usurious interest; plea, that he did not receive, is a negative pregnant, for by the loan the offence is complete. 1 Dy. 95. pl. 36.

3. It is bad on demurrer, but cured by verdict. 2 Saund. 319.

NEGRO.

Neither trespass nor trover will lie for taking a negro. Carth. 396. *Pickering v. Appleby*, Com. 355.

[965] NEW ASSIGNMENT.

[See post, tit. TRESPASS.]

NEW TRIAL.

[See post, tit. TRIAL.]

NIL CAPIAT.

1. Judgment of nil capiat will be entered, if the plaintiff demur to a plea in bar of the action, and it is decided in favour of the plea. 1 Saund. 80. n. (1.)

2. If several pleas in bar be pleaded, and on some issue is joined, and others are demurred to, if any one of the demurrers is decided for defendant, judgment of nil capiat shall be entered, either before or after the trial of the issues. *Id. ibid.* *Cooke v. Sayer*, 2 Barr. 749.

NIL DEBET.

1. Nil debet is a good plea when a specialty or record is but inducement to the action;

but not so when the action is grounded on a record or specialty, though facts are mixed with it. 1 Saund. 38 a. n. (3.) 2 Saund. 187 a. 187 d.

2. But if plaintiff do not demur, defendant is let into any defence he may have, and plaintiff must prove his own declaration. 1 Saund. 38 a. n. [k.]

3. Pleading nil debet instead of *nil detinet*, is cured by verdict. 2 Saund. 319 a.

4. Pleading nil debet in *assumpsit* is an issuable plea within a judge's order for time to plead, and therefore plaintiff cannot have leave to sign interlocutory judgment. *Baily v. Edwards*, C. T. Hardw. 179.

[See also ante, tit. DEBT, div. IX. (b) 3. Vol. I. p. 449.]

NISI PRIUS.

1. The authority of a judge of nisi prius is by commission of assize. *Bullock v. Parson*, 1 Salk. 454.

2. A judge of nisi prius acts rather in a ministerial than judicial capacity. *Reg. v. Halstone*, 10 Mod. 202.

3. A judge of nisi prius may receive a nonsuit at the assizes. *Greeves v. Rolfe*, 2 Salk. 456.

4. A *cognovit actionem* may be entered there. *Gree v. Rolfe*, 12 Mod. 653.

5. Pleas *puis darrein continuance* may be recorded there. 12 Mod. 653.

6. The reason why the nisi prius is on the *distringas* is, that the jury may be returned above, and the parties know them. *Anon.* 12 Mod. 370.

7. All crown causes in the court of King's Bench must be tried at bar, unless the attorney-general will grant a nisi prius. *Res v. Banks*, 6 Mod. 147.

8. On an information and not guilty pleaded, and the defendant at nisi prius confesses the action, either no notice should be taken of the nisi prius, or it should be shown that the jury were called. *Res v. Chaloner*, 12 Mod. 377.

9. A plea in abatement must be entered on the nisi prius roll. *Dobberton v. Chancellor*, 1 Ld. Raym. 329.

10. The day in bank and nisi prius as to pleading are the same. *Gree v. Rolfe*, 12 Mod. 654.

11. Where the day of nisi prius was after the day in bank, it was held not to be amendable. *Child v. Harvey*, Carth. 506. 1 Salk. 48. S. C.

12. Ejectment against seven, who all appear, plead, and join issue; on the plea roll, the *jurat* and *distringas* were against seven, the issue on the nisi prius roll was joined only by five, and verdict against seven; the nisi prius roll is amendable, for the judge had sufficient authority to try the cause. *White v. Bishop of Worcester*, 12 Mod. 107.

[*966] NOLLE PROSEQUI.

I. IN CIVIL PROCEEDINGS, p. 966.

II. IN CRIMINAL PROCEEDINGS, p. 966.

I. IN CIVIL PROCEEDINGS.

1. Where several defendants sever in their pleas, the plaintiffs may enter a nolle prosequi against one at any time before the record is sent down. *Greeves v. Rolls*, 2 Salk. 457.

2. A nolle prosequi may be entered as to one defendant after interlocutory judgment, not after final. *Lover v. Salkeld*, Salk. 455.

3. So, when there are several issues, it may be entered to such as go to part only of the action. 1 Saund. 207 b. Ib. n. [k.]

4. It is no bar to a future action for the same causes. 1 Saund. 207. *Gree v. Rolle*, 12 Mod. 654. Carth. 19. S. P.

5. In actions against several defendants for a tort, it may be entered to cure a wrong verdict against some, though they all joined in the same plea; and in such a case it is a bar to any future action. 1 Saund. 207 a. *Rodney v. Storde*, Carth. 19.

6. Where the cause of demurrer to a declaration is, that the counts are improperly joined, the plaintiff cannot enter a nolle prosequi as to some, and leave others remaining. *Tate v. Whiting*, 11 Mod. 196.

7. On a nolle prosequi, the plaintiff will not be allowed costs for the counts he has abandoned, though he succeed on others. 1 Saund. 207 d. n. [n.]

II. IN CRIMINAL PROCEEDINGS.

1. A nolle prosequi ought not to be entered on an indictment without leave of the court on motion. *Rex v. Parker*, 7 Mod. 86.

2. An informer cannot enter a nolle prosequi, for the king has an interest which the informer cannot discharge. 2 Ro. 33. 136.

3. The clerk of the crown cannot enter a nolle prosequi on an indictment without leave of the attorney-general. *Rex v. Cranmer*, 1 Ld. Raym. 721.

4. The king's attorney can enter a nolle prosequi at his pleasure. 1 Ro. 195.

5. A nolle prosequi may be granted upon an indictment against a surgeon for refusing to be a constable. *King v. Pond*, Com. 312.

6. The practice of the attorney-general entering a nolle prosequi upon an indictment, began in the latter years of the reign of Charles the Second; but on informations, the practice had existed long antecedently to that period. 6 Mod. 263.

7. A nolle prosequi does not discharge the crime; it only puts the defendant without day; and though there have never been any proceedings after a nolle prosequi, yet the attorney-general may, if he thinks proper, issue new process on the same indictment; but an acquittal on "not guilty" pleaded, whether by verdict or confession, goes to the fact charged, and clears the defendant

both of the indictment and the crime alleged against him. *Goddard v. Smith*, 6 Mod. 262. *Reg. v. Ridpath*, 10 Mod. 152, 153.

NON COMPOS MENTIS.

1. Idiocy is a natural insanity of mind from the birth of the party. *Rochfort v. Lord Ely*, 1 Ridgw. 517.

2. Insanity is the genus, of which idiocy is one species. S. C. 1 Ridgw. 533.

3. Accidental insanity is, when a person, having had a competent use of reason, loses it by some distemper in the humours of the body, or by hurt in the brain or its organs, or by the violence of disease. Id. ibid.

4. The words "unsound mind," and "unsound memory," were adopted in the reign of Edward the First. S. C. 1 Ridgw. 518.

5. A weakness of mind only, does not amount to insanity. S. C. 1 Ridgw. 521.

6. The law presumes an idiot incapable of ever attaining a competent degree of understanding. S. C. 1 Ridgw. 535.

7.* The law presumes a lunatic capable of recovering his under- [*967] standing. *Lord Ely's case*, 1 Ridgw. 520.

8. The law presumes every man who has attained the usual age of discretion to be of sound mind, until the contrary is proved. S. C. 1 Ridgw. 520.

9. In a court of law, no man can be considered an idiot or lunatic until he be found so on record. *Hume v. Burton*, 1 Ridgw. 521.

10. A man found idiot or lunatic may traverse the finding; but a finding of sanity is peremptory in the first instance. *Hume v. Burton*, 1 Ridgw. 523.

11. The finding upon an inquisition is not conclusive. *Rochfort v. Lord Ely*, 1 Ridgw. 549.

12. The king, as the political father of his people, has the care of the persons and personal estates of those who, from want of understanding, are incapable of taking care of themselves. By statute *de prerogativa regis* he shall have the real estates of idiots to his own use, finding them necessaries. *Lord Ely's case*, 1 Ridgw. 519.

13. The custody of persons and estates of idiots and lunatics was given to the crown by statute for the benefit of the subject. *Hume v. Burton*, 1 Ridgw. 224, 225.

24. The king shall provide for the safe keeping of the real estates of lunatics, so that they shall have a competent maintenance, and the residue is to be kept for their use. *Rochfort v. Lord Ely*, 1 Ridgw. 535.

15. Since the revolution, the crown has granted the surplus profits of the estate of an idiot to some of his family. *Lord Ely's case*, 1 Ridgw. 520.

16. If he release his right, that shall not bar the king, but he shall seize his lands

during his life. *Thompson v. Leach*, 3 Mod. 303.

17. Alienations not of record by an idiot after inquisition, may be avoided by *sci. fa.* *Hume v. Burton*, 1 Ridgw. 214. 228.

18. One non compos mentis may purchase lands, and may grant a rent-charge out of his estate, and shall not plead insanity to avoid his own acts. 3 Mod. 309.

19. A warrant of attorney executed by a non compos is void. *Hume v. Burton*, 83. 100. 261.

20. A person non compos mentis cannot dispose of his property. *Hume v. Burton*, 1 Ridgw. 77.

21. A surrender made by him is void. 3 Mod. 305.

22. If a man non compos mentis levies a fine, or suffers a recovery, or acknowledges a statute or recognizance, neither his heir nor executors can avoid them, for they are matters of record. *Beverley's case*, 4 Co. 123 b.

23. But if he suffer a recovery by attorney, it is error. *Hume v. Burton*, 1 Ridgw. 23.

24. Where the vouches in a common recovery appears by attorney, the caption of the warrant of attorney appointing such attorney, appearing upon the record to be taken by the chief justice of C. B. out of court, is not conclusive evidence of the capacity of such vouches as to the soundness of mind to make such attorney and suffer such recovery. 8 C. 1 Ridgw. 16.

25. The writ *dum non fuit compos*, lies only for privies in blood. 8 C. 1 Ridgw. 232.

26. A person non compos mentis cannot commit petit treason, murder, or felony, but may in some cases commit high treason. *Beverley's case*, 4 Co. 124.

27. Acts done during a lucid interval are binding. *Beverley's case*, 4 Co. 125.

NONCONFORMITY.

1. On a suggestion of conformity, after verdict for the plaintiff, on the 23 Eliz. c. 1., the court will allow the defendant time to enter the plea. *Peters v. White*, 2 Show. 239.

2. On a judgment on the statute of non-conformity, a *misericordia* should be entered, and not a *capiat*. 2 Show. 27.

3. An information is not grantable against a disseiter for not taking upon him the office of sheriff of London. *Rex v. Grosvenor*, 8 Str. 1193.

4. An *audita querela* lies on the bishop's certificate of conformity. *Peters v. White*, 2 Show. 240.

5.* A defendant, after judgment in a *qui tam* action on 20

Eliz. c. 1., cannot have an *audita querela* to prevent execution on a certificate of conformity, for he might have pleaded it to the action. *Id. ibid.*

6. A preacher at a meeting-house is not liable to a poor's rate. *Rex v. St. Thomas, in Southwark*, 2 Stra. 745.

NON DAMNIFICATUS.

1. The plea of non damnificatus is proper in actions of debt on bonds conditioned to save harmless; but not where the condition is to discharge or acquit the plaintiff from any particular thing. 1 Saund. 117.

2. It is not a good plea where the person and lands are to be indemnified. *Shaxton v. Shaxton*, 2 Mod. 305.

NON PROS.

WHEN A NON PROS MAY BE SIGNED AGAINST THE PLAINTIFF.

1. A plaintiff may be non pressed for not declaring, though the defendant appeared voluntarily. *Foster's case*, 7 Mod. 36.

2. If four persons are arrested on one writ, there can be but one non pros. *Barton v. Bartlett*, Prac. Ca. K. B. 159. 161. Holt, 367. S. C.

3. By a non pros, the plaintiff is put out of court against all the defendants. 1 Saund. 207 d. n. (2.)

4. A non pros shall be granted on an information after two assizes, and two notices of trial. 2 Show. 80.

5. If the declaration be not delivered the last day of the second term, defendant may sign non pros; he may at any time afterwards accept declaration. *Barnes v. Geering*, Prac. Ca. K. B. 160. 12 Mod. 277.

6. The rule and non pros for want of a declaration ought to be in that prothonotary's office wherein the plaintiff's attorney practises. *Harvey v. Weston*, Ca. Prac. C. P. 53.

7. A non pros for want of entering the issue, signed a day too soon, was set aside. *Margerum v. Fenton*, 2 Barnes, 257.

8. *Non assumpt* as to part, and issue on demurrer as to other part; a non pros for want of replication was set aside on payment of costs; a *respondeas ouster* being awarded on a demurrer. *Pace v. Ellison*, Ca. Prac. C. P. 83.

9. A non pros may be signed where plaintiff in replevin, being under order to plead issuably, demurs. 2 Barnes, 250.

10. The court refused to set aside a non pros obtained against a plaintiff who was a common informer. *Bennet v. Smith*, Prac. Ca. K. B. 160.

NONSUIT.

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II. WHEN THE PLAINTIFF CANNOT BE NONSUITED, p. 969.

III. WHEN A NONSUIT MAY BE SET ASIDE, p. 969.

IV. RESPECTING COSTS, p. 969.

V. EFFECT OF A NONSUIT, p. 969.

I. WHEN THE PLAINTIFF MAY BE NONSUITED.

1. At common law, a plaintiff might suffer a nonsuit after a verdict, if he did not like his damages; but that is now remedied by the statute 2 Hen. 4. *Kent v. Barker*, 5 Mod. 208.

2. In an action in an inferior court, if it appear that the cause of action did not arise within the jurisdiction, the plaintiff shall be nonsuited. *Squib v. Hole*, 2 Mod. 30.

3. It can only be at the instance of the defendant; but the plaintiff may be nonsuited in an undefended action; and it can only be for an objection apparent on the record. 1 Saund. 195 d. n. [f].

4. A nonsuit may be after payment of money into court. 1 Saund. 33 d. n. [g].

5. So it may be after demurrer joined and argued, or after a special verdict. [*969] *Semb** 1 Saund. 195 c. n. [f].

Henson v. Board, T. Jones, 1.

6. A nonsuit may be in term time. *Musgrave v. Estcourt*, 12 Mod. 417.

7. A man may be nonsuited without the consent of the court, but not discontinue without the consent of the court. March, 24. pl. 54.

II. WHEN THE PLAINTIFF CANNOT BE NONSUITED.

1. The court cannot order a nonsuit against the plaintiff's consent. 1 Saund. 195 d. n. [f].

2. In a writ of right, if the defendant make default on the essoin day, the demandant cannot be nonsuited. 2 Dy. 103. pl. 8.

3. The plaintiff appearing and arguing by his counsel, and praying judgment, cannot be nonsuited the same term. Cro. Jac. 35.

4. Upon an information in the name of the king, there cannot be a nonsuit, for he is always present in court. *Rex v. Adamson*, Sav. 56.

5. A jury was discharged, because the defendant did not appear to demand the plaintiff. *Arnold v. Johnson*, Stra. 267.

III. WHEN A NONSUIT MAY BE SET ASIDE.

1. A nonsuit is not to be set aside without consent. *Crawley v. Blewitt*, 12 Mod. 127.

2. Though plaintiff be nonsuited by the judge's mistake, yet it will not be set aside. *Love v. Day*, 1 Barnes, 226. 2 Ld. Raym. 1371.

3. A nonsuit will not be set aside, though plaintiff depended that defendant had made a mistake, the issue being on defendant. *Williams v. Jones*, 1 Barnes, 211.

4. A nonsuit may however be set aside on payment of costs. 2 Barnes, 248. *Contra*, 2 Barnes, 255.

5. Plaintiff nonsuited at trial dies before the day in bank; if judgment be signed after his death, it is reversible by writ of error, but will not be set aside on motion. *Misaubin v. Costa*, Ca. Prac. C. P. 110.

IV. RESPECTING COSTS.

1. Held that plaintiff ought to pay the costs of one nonsuit only, where a *latitat* was awarded against four defendants, (though they appeared severally by different attorneys,) and the nonsuit was for not declaring against them in two terms. *Anon*. Com. 74.

2. If the plaintiff is nonsuited in ejectment after evidence where there are two defendants, and one appears to confess lease, entry, &c., and the other not, the plaintiff shall pay costs. *Fagg v. Roberts*, 2 Vent. 195.

3. Proceedings in a second action were stayed until payment of the costs of a former nonsuit. *Anon*. 2 Ld. Raym. 1508.

4. A plaintiff suing in *forma pauperis* is not to pay costs on a nonsuit. *Ansell v. Slowman*, 8 Mod. 344.

5. But where a pauper was nonsuit, and proceeded in a new action without paying costs, the court dispaupered him. *Anon*. Prac. Ca. K. B. 166.

V. EFFECT OF A NONSUIT.

1. A nonsuit was formerly synonymous with a discontinuance. 1 Saund. 195 d. n. [f].

2. A nonsuit in an appeal before appearance is peremptory. *Holland v. —*, Cro. Eliz. 605. *Smith v. Bowen*, 11 Mod. 216. See Holt, 255.

3. Before appearance in a *nativo habendo*, judgment shall not be final, but in *miseri-cordia*. *Dighton v. Bartholomew*, Cro. Eliz. 881.

4. If several trespassers sever in their pleas, and the plaintiff be nonsuited against one before judgment, this is a bar against both; so if he enter a *nolle prosequi*. Hob. 70. 180.

5. In trespass against four, there can be but one nonsuit for want of declaring. *Allington v. Vavasor*, Salk. 455.

6. After judgment by default against one defendant, the plaintiff cannot be nonsuit as to another. *Greaves v. Rolls*, Salk. 456.

7. Though a man cannot be nonsuited against one party, and proceed with the other, yet he may be nonsuited for one part of the action, and proceed for the other. *Howels v. Eveley*, Hob. 100. Prac. Ca. K. B. 158.

8. After a nonsuit in replevin, it is too late to object that the avowry states a particular estate, without showing its commencement* or a seisin in fee. [*970] *Anon*. 6 Mod. 223.

9. Where the plaintiff is nonsuit on the issue, contingent damages on the demurrer shall not be assessed. *Snow v. Come*, Stra. 507.

10. If a plaintiff be nonsuit, and declares *de novo* before the end of the two terms, the same bail are liable. *Latimer v. Hone*, Prac. Ca. K. B. 159. 3 Keb. 636. S. C.

11. But if plaintiff be nonsuit, and commence a new action, the defendant will be admitted to common bail. *Barnes v. Geering*, Prac. Ca. K. B. 160. *Almansor v. Davilack*, Com. 94.

NON-TENURE.

1. A tenant who comes to the land by act in law and not by purchase, pending the writ, may plead non-tenure. 1 Ld. Raym. 229, 476.
2. The plea of non-tenure as to parcel should in general show who is tenant of the parcel; *aliter* if it be pleaded generally. Carter, 241. 243.
3. Non-tenure in *cessavit* is a good plea. 2 Ro. 128.
4. But it is no plea in a *sci. fa.* 2 Ro. 54.
5. Non-tenure, general or special, is not pleadable after imparlance. 2 Lev. 55. 205.
6. Non-tenure cannot be pleaded by implication. *Adams v. Savage*, 6 Mod. 226.
7. A plea of non-tenure to part, and entry into the residue is ill. Lutw. [16, 17.]
8. Upon error to reverse a fine, and non-tenure replied to a plea of a common recovery, and it was found that tenant had part of the land, the plaintiff was held entitled to judgment for the other part. W. Jo. 352, 353.

NOTICE.

I. RESPECTING NOTICE IN GENERAL;—

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- (b) *When notice is not necessary*, p. 971.
- (c) *When it is necessary to be alleged in pleading*, p. 972.
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II. RESPECTING NOTICES IN THE PARTICULAR CASES FOLLOWING;—

- (a) *Of the notice to appear*, p. 973.
- (b) *Notice of declaration*, p. 974.
- (c) *Notice of inquiry*;
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 2. Relative to the form, p. 974.
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- (d) *Notice of a motion*, p. 975.
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- (f) *Notice of a condition*, p. 975.
- (g) *Notice of a lapse*, p. 976.

(h) *Notice to a purchaser*, p. 976.

[*Respecting notice of trial, see post, tit. TRIAL.*]

I. RESPECTING NOTICE IN GENERAL;—

(a) *When notice is necessary.*

1. Notice of an award is necessary, where the party proceeds by attachment, or there is a special proviso for giving notice. 2 Saund. 62 a.
2. Notice must be given of a thing that is secret. *Foster v. Jackson*, Hob. 51.
3. Where one promises to pay as much for one load of wood received, as the vendor would procure for another load,* notice must be given of the sale [*971] and price. *Foster v. Jackson*, Hob. 51.
4. If lands be devised to the heir, with a condition, he must have notice of the condition; but notice is not necessary if lands be so devised to a stranger. 1 Mod. 87.
5. In debt by assignees of commissioners of bankrupts, notice is necessary to be given of the assignment. *Turner v. Maine*. 5 Mod. 444.
6. If a man promise to pay so much upon marriage, he ought to have notice of the marriage. *Haul v. Heming*, 1 Ro. 286.
7. A refusal by a copyholder to pay rent to the bargainee of a manor before any notice given to him, is no cause of forfeiture. *Fraunces's case*, 8 Co. 92 b.
8. Case does not lie for keeping a fierce dog, &c. without the defendants having notice. *Mason v. Keeling*, 1 Ld. Raym. 608.
9. Case does not lie for mischief done by an ox, &c. at pasture, without notice of his mischievous quality. *Id. ibid.*
10. Upon the countermand of a license, either in deed or in law, there ought to be notice given. *Web v. Paternoster*, Palm. 72.
11. Where one, in consideration of the forbearance of a suit, promises to pay the plaintiff his costs and charges at his first coming to D, (he giving a note of his costs and charges,) notice must be given not only of the costs, but of his first coming to D also. *Richards v. Carvamel*, Hob. 68.
12. Covenant to make further assurance, as by counsel of the covenantee, on request made, shall be advised; the counsellor should give his counsel to the covenantee, who must give notice thereof to the covenantor. *Staford v. Higginbottom*, 5 Co. 19 b. Cro. Eliz. 298. Moore, 595. S. C.
13. Notice ought to be given to a person elected into an office. Holt, 187. *Rex v. Harpur*, 5 Mod. 96.
14. Upon error brought, notice ought to be given to the sheriff, otherwise he shall not incur a contempt (for serving execution,) for which an attachment shall issue. March, 54. pl. 81.

(b) *When notice is not necessary.*

1. There are only three cases where notice is not requisite; 1st, in case of a condition

precedent; 2dly, where the thing is of a public nature; 3dly, where the party takes it upon himself. *Malloon v. Fitzgerald*, Skin. 123.

2. When a matter does not lie more properly in the knowledge of one party than another, notice is not requisite. 1 Mod. 87. 1 Saund. 117 a. n. (2.) 11 Saund. 62 a.

3. If a man binds himself to perform the award of J S, and J S makes an award, the obligor must take notice at his peril. *Fraunces's case*, 8 Co. 92 b. 1 Ro. 286. 314.

4. So, if he be bound to pay what shall be found in arrear before an auditor. 1 Ro. 286. 314.

5. Upon a bond conditioned to acquit of suits, the obligee is not bound to give notice that there were suits. *King v. Atkins*, 1 Sid. 442.

6. If a bond be conditioned to do such an act, the obligee need neither give notice nor make request. *Norton v. Simmes*, Hob. 14. *Foster v. Jackson*, Hob. 51.

7. A man covenants to pay 200l. for the support and maintenance of his wife, within two years after he shall be required, to such person as she shall by deed appoint; she appoints, and dies before notice given; the money is due upon the covenant. *Roe v. Marshall*, Skin. 34.

8. It is a rule, that every man is bound to take notice, when there is no one bound to give notice. 1 Mod. 87.

9. The defendant upon an award was to pay to the plaintiff 8l. or 3l. and costs of suit expended in an action of trespass betwixt the plaintiff and the defendant, as should appear by a note under the hand of the plaintiff's attorney, &c.; the plaintiff is not bound to cause his attorney to give notice, or make tender of the note to the defendant, but he ought to seek the attorney and request it. *March*, 108. pl. 186. and 156. pl. 225.

10. Where a third person is named in the consideration of an *assumpsit*, of whom the defendant may inform himself, notice need not be given of performance. *Smith v. Gosse*, 2 Ld. Raym. 1127.

11. When notice ought to be given, the law appoints who shall give it; where [*972] none is bound to give it, the party ought* to take notice of it at his peril. *Rundale v. Eeley*, Carter, 172.

12. Notice need not be given at common law to the parson for setting out tithes. *Shotton v. Friend*, Carth. 143.

13. If the promise to give a portion on the daughter's marriage be made by the father, no notice is necessary; otherwise, if a stranger make the promise. *Alfright v. Blackmore*, Lat. 97.

14. Where a promise is made to pay, &c. upon an act being done by the plaintiff to a stranger, there it seems no action lies without notice; but where the thing is to be done

between strangers, no notice is necessary. *Brown v. Stephens*, 1 Sid. 36. 2 Sid. 115.

15. A person who comes into a corporation is bound to take notice of the bye-laws. *Brig v. Adams*, Holt, 182.

16. Notice is not requisite to be given of an assignment by commissioners of bankrupts. *Slaughter v. Pierpont*, Lutw. [162, 163.] 456.

17. If a lessee give bond to deliver possession at the end of the term, and the lessor assign before that time, yet the lessee may give possession to the assignee of the reversion, and he is not obliged to give notice of the assignment to the first lessee. *Pitcher v. Tovey*, 4 Mod. 72, 73.

18. Where estates cease by limitation of uses, and the land is limited over to another, no notice need to be given. *Rundale v. Eeley*, Carter, 172.

19. All subjects are bound to take notice of the king's great seal and privy seal. *East India Company v. Sandys*, Skin. 225.

(c) *When it is necessary to be alleged in pleading.*

1. If the defendant pleads a composition, and does not allege that notice thereof was given to plaintiff, it is bad. Lutw. [243.]

2. An avowry for an amercement in a court-leet for not accepting the office of constable, must state that he had notice of his election to the office. *Fletcher v. Ingram*, 5 Mod. 129. 1 Ld. Raym. 71. S. C.

3. Held upon the acts for discharge of poor prisoners, that it was not sufficient for a defendant in his plea to say, that he had given notice to the plaintiff in the action in which he pleads such plea, but he ought to aver that he had given notice to the party at whose suit he was committed, though he be not plaintiff. *Lane v. Tenoe*, Skin. 362.

4. Notice of an assignment of a term need not be pleaded, because the assignor is only liable by reason of the land, and when he has parted with that, he ought not to be further charged. *Pitcher v. Tovey*, 4 Mod. 72, 76.

5. One has a reversion expectant on a lease for years by conveyance to uses; in debt for rent reversed on the said lease, it is not necessary to allege that the defendant had notice of it. *Brownlow v. Huxley*, Letw. [130, 131.] 373.

6. Notice is not necessary to be alleged where the matter is presumed to be known without it; as where A, in consideration B would deliver up a bond to C, assumes to pay B 30l.; action lies on B's delivering up the bond to C, without alleging notice to A of such delivery, because it is to be intended. *Smith v. Goff*, Salk. 457.

(d) *Relative to the form of a notice.*

1. Notices of trials and inquiries, and countermands thereof, are to be in writing. *Anon.* Ca. Prac. C. P. 3.

2. If money is to be paid after marriage

upon request, the request is a sufficient notice. *Hodges v. Moor*, Lat. 15.

3. A promise is made to pay within three months after the age of eighteen years, or eighteen days after marriage, after notice, whichever should first happen; if a general notice is given, it will relate to both. *Read v. Bullington*, Lat. 158.

(e) *Relative to the time for giving notice.*

1. In general, proceedings will be stayed, if notice has been delivered after nine o'clock. *Kettle v. Bulstrode*, 2 Barnes, 246.

2. But, by the practice of the crown office, a notice may be delivered after nine of the clock in the evening. *Rex v. Read*, Say. 165.

(f) *When a term's notice is necessary.*

1. Where there have been no proceedings for a year, a term's notice must be given. *Blackmore v. Parsons*, 2 Barnes, 242.

2. This does not extend to motions to end proceedings. *Roe dem. Hutchins v. Dunning*, 2 Barnes, 244.

(g)* *What is meant by short notice.*

[*973] On an order for short notice of inquiry or trial, two days are necessary at the least. *Buller v. Johnson*, 1 Barnes, 220, 221.

(h) *Relative to the continuance of a notice.*

1. Notice of trial or inquiry cannot be continued more than once; by continuing is meant giving short notice. *Boyes v. Tursh*, 1 Barnes, 206.

2. Continuance of notice of inquiry should be served two days before. *Price v. Bambridge*, 1 Barnes, 213.

(i) *To whom the notice should be given.*

1. Notice by a husband to a tradesman's servant not to trust the wife, is sufficient notice. *Robinson v. Goenold*, Holt, 103.

2. There must be personal notice before an attachment will go for not performing an award. *Anon.* 12 Mod. 257.

3. If an agreement be to give notice to A, without saying, "or his executors and administrators," yet it is not personal; but, after the death of A, notice to his personal representatives is sufficient. 2 Mod. 268.

4. Upon covenants on marriage, for settling a jointure as counsel shall advise, the notice for the settlement ought to be to the counsel, not to the party himself. *Gorge v. Lane*, 2 Ro. 333.

5. All notices, where the party has a known attorney, must be given to the attorney or his agent, and not to the party himself. *Tushburn v. Haselock*, 2 Barnes, 240. Say. 133.

6. Where the defendant's attorney is not known, notice of trial or of executing a writ of inquiry may be given to the defendant. *Higgins v. Stuart*, Ca. Prac. C. P. 62.

7. Where the attorney cannot be found, notice may be served on the party himself. *Miller v. Parsons*, 2 Barnes, 242.

8. Where neither attorney nor party can

be found, the court must be applied to. S. C. 2 Barnes, 242.

(j) *How it should be stated in pleading.*

1. The allegation of *premissorum non ignarus*, or *licet scipius requisitus*, is not sufficient, where notice is material. *Semayne v. Gresham*, 5 Co. 91 b. Moor 661. Yelv. 28. Cro. Eliz. 908. S. C. *Haul v. Heming*, 1 Ro. 286.

2. It cannot be pleaded to be given to executors without averring the death of the testator. Hob. 93.

3. If a proviso in a deed regulates the manner of giving notice, the notice must be pleaded according to the proviso. *Clayton v. Kinnaston*, 1 Ld. Raym. 421.

4. If a condition be to be performed upon notice in writing, it must be averred in the pleading that the notice was in writing. 2 Mod. 268.

(k) *Consequence of notice becoming impossible.*

Where one is bound by deed to do an act, of which he is to give notice, though such notice is dispensed with by becoming impossible, yet the act must be done. *Nurse v. Frampton*, Salk. 214.

(l) *Consequence of want of notice.*

1. Want or defect of notice is aided by appearance. 2 Ld. Raym. 124. Holt, 444. 498.

2. A feme sole makes a lease, and marries; the lessee, before notice, pays rent to her; this does not bind the husband. *Tracy v. Dutton*, Palm. 207.

II. RESPECTING NOTICES IN THE PARTICULAR CASES FOLLOWING:—

(a) *Of the notice to appear.*

1. Notice to appear must be given with all process served; and the want of it is not helped by the plaintiff's entering an appearance. *Longbotham v. Knap*, 1 Barnes, 291. Id. 164.

2. In a notice under a copy of a writ served on the defendant, his name was omitted; proceedings were set aside. *Clark v. Baget*, W. Kely. 131.

3. A notice of process directed to plaintiff instead of defendant, is bad. 1 Barnes, 298.

4. Notice of copy of process held to be good on appearance-day, but afterwards held, it must be on the essoin-day. *Aleop v. Bagott*, 1 Barnes, 205, 206, 207.

5. Though return-day be on Sunday, notice to appear must be for that day.* 1 Barnes, 208, 209, 210. [*974] Ca. Prac. C. P. 97, 98. 100.

6. Notice to appear in the copy of process must be for the appearance-day, and not the return-day. *Aleop v. Bagget*, Ca. Prac. C. P. 92.

7. Proceedings were stayed, notice on process being to appear on the 27th of October next, instead of this instant October. *Darker v. Edwards*, 2 Barnes, 240. 243. 246.

(b) *Notice of declaration.*

1. Notice of declaration without date is

bad. *Hannaford v. Holman*, 1 Barnes, 210. 298.

2. The nature of the action must be expressed in the notice, as, whether in debt or case, &c. *Taylor v. Sherman*, Ca. Prac. C. T. 122. 1 Barnes, 171. 204. 208. 216.

3. Notice of declaration left under the door of an empty house, defendant being served there with writ, held regular. *Sheridan v. Ashby*, 1 Barnes, 289.

4. But put under a latch, without knocking, &c., irregular. *Talbot v. Odeham*, 1 Barnes, 301.

5. Notice of declaration to one defendant, when there are two, is irregular. *Coulson v. Turnbull*, 1 Barnes, 171. 204. 208. 216.

6. Notice of declaration served on a Sunday held bad, and an imparlance granted. *Walker v. Towne*, 2 Barnes, 245.

7. Notice of declaration left *de bene esse*, without indorsing the declaration, is not sufficient. *Thomlinson v. Gorton*, 2 Barnes, 247.

8. Declaration in the office in time, but notice not delivered till after two terms from the return of the writ, held irregular. 1 Barnes, 204. 205.

[See also *ante*, tit. DECLARATION, div. XV. Vol. I. p. 465.]

(c) *Notice of inquiry* ;—

1. When necessary.

1. Notice ought to be given of executing a writ of inquiry of the value of the land on a *grand cape*. *Perkins v. Lambe*, 3 Lev. 409.

2. Notice ought to be given of executing a writ of inquiry of damages in dower. *Strangeways v. Ascough*, Ca. Prac. C. P. 14.

3. In all writs of inquiry of damages, as well in real as personal actions, notice ought to be given. March, 82.

4. Notice must be given of the execution of a *scire fieri* inquiry, but not of an *elegit* or extent. *Steed v. Layner*, 2 Ld. Raym. 1382. 8 Mod. 366. *Copley v. Delanoy*, Ca. Prac. C. P. 1. 2 Saund. 68 f. n. (2).

2. Relative to the form.

1. Notice to execute a writ of inquiry by such an hour is uncertain. *Isen v. Fowen*, Stra. 1142.

2. Notice of inquiry at eleven is good, if executed before twelve. *Lark v. Denny*, 1 Barnes, 221.

3. Notice of executing an inquiry before the judge of assize should be general, and not for a particular day. *Waite v. Smales*, 2 Barnes, 111.

4. Notice of inquiry at ten, or as soon as sheriff, &c., is bad. *Hannaford v. Holman*, 1 Barnes, 210.

5. It must be executed between two certain hours. Prac. Ca. K. B. 157.

6. Notice of inquiry between ten and two is bad; it must not be above two hours. *Foster v. Smales*, 1 Barnes 210. 213.

7. The notice is bad if no hour is mentioned, though defendant said he would make no

defence. *Langstaffe v. Lamb*, 1 Barnes, 207.

8. A notice of executing an inquiry must be certain as to the place. *Bratthwait v. Allen*, 2 Barnes, 245.

9. The notice should express the sign or name of the house. *Squire v. Almond*, 1 Barnes, 214. Prac. Ca. K. B. 157.

10. Notice of inquiry at the Three Tons in Brook-street, without adding Holborn, is bad; so, for want of adding the county. *Le Mark v. Newnham*, 1 Barnes, 218, 219.

11. So the town. *Hollis v. Westbury*, 1 Barnes, 221.

12. Notice of executing an inquiry, mistaking the plaintiff's name, is bad, and the inquiry, &c., will be set aside. *Mash v. Harrow*, 2 Barnes, 247.

13. A writ of inquiry may be set aside for uncertainty in the notice as to the time and place, &c. *Squire v. Almond*, Ca. Prac. C. P. 113. Id. 133.

3. In relation to the time.

1. An inquiry was set aside for want of fourteen days' notice, [*975] though defendant was an attorney, he living forty miles from London. *Hopkins v. Knapp*, 2 Barnes, 203.

2. Where a term's notice of trial is required, there must, at the same distance of time, be the like notice of executing a writ of inquiry. *Peyton v. Burdus*, 6 Mod. 146. n. Prac. Ca. K. B. 156.

3. There must be a term's notice of executing a writ of inquiry, where there has been no proceeding for a year. *Peyton v. Burdus*, Stra. 1100. 1 Barnes, 205. 209. 225. *Sed vide Anon.* Ca. Prac. C. P. 4.

4. The execution will be set aside, if a term's notice is not given in such case. *Paul v. Gledhill*, Ca. Prac. C. P. 97.

5. The same notice is necessary of executing a *scire fieri* inquiry, as of an inquiry of damages. *Tiney v. Watson*, 2 Barnes, 237.

4. To whom it should be given.

1. Where there are two defendants, and the plaintiff appears for them, notice of inquiry must be given to both. *Kingdon v. Herne*, Ca. Prac. C. P. 94.

2. Notice of executing an inquiry, given in the country, is good. *Smith v. Lacock*, 2 Barnes, 239.

3. It must be given to the attorney, and not the defendant, after the appearance has been entered. *Lee v. Bradford*, 1 Barnes, 219. *Harding v. Stafford*, Prac. Ca. K. B. 157.

5. When waived.

After notice given of executing a writ of inquiry before the sheriff, an application to the court to have it executed before the chief justice at the sitting, is no waiver of the first notice, nor is it necessary to give fresh notice, or to appoint any particular hour for the executing it. *Perry v. Trefusis*, W. Kely. 60.

[See also *ante* tit. INQUIRY, div. Vol. I. p. 811.]

(d) *Notice of a motion.*

1. Notice must be given of a motion to discharge a rule. *Reg. v. Kirby*, Gilb. 311.
2. Notice must be given of a motion to enlarge a rule for showing cause, when the time for showing cause is expired. *Dale v. Carless*, Ca. Prac. C. P. 67.
3. On the last day of term, no motion can be made in arrest of judgment without notice. *Camp v. Gale*, Ca. Prac. C. P. 106.
4. Notice should be given of a motion to make the submission to an award a rule of court. *Anon.* 12 Mod. 525.

(e) *Notice to quit.*

1. Demise from A to B for twenty-one years, if both should so long live; but if either should die before the end of the term, then the heirs, executors, &c. of the person dying, should give twelve month's notice to quit; held, that the lease could only be determined by twelve month's notice given by the representatives of the party dying before the end of the term; and, consequently, that such notice given by the lessor to the representatives of the lessee, (who died during the term,) did not determine it. *Legg dem. Scott v. Benson*, Willes, 43.

2. The notice must be signed by all of several executors and trustees. 1 Saund. 276 a. n. [e].

3. Where power is given to a party to determine a lease on giving a notice in writing, he cannot determine it by a parol notice. *Willes*, 44.

4. If tenant from year to year cease to occupy, an action for rent against him is within the statute of limitations, though there was no notice to quit. 2 Saund. 67 a. n. [x].

(f) *Notice of a condition.*

1. Where conditions are annexed to estates to pay money, notice is necessary; but where estates are limited upon performance of collateral acts, notice is not necessary. 3 Mod. 30.

2. The heir himself ought to have notice of such conditions which his ancestor has put upon his estate, because he has a good title by descent. 3 Mod. 34.

3. If a father give an estate in tail to his daughter, provided she marry with the consent of trustees, the estate tail is not determined by her marrying without such consent, although she had notice* collaterally of the condition on which the estate was given. *Mallowne v. Fitzgerald*, 2 Show. 316.

4. If an estate be settled on A, provided that she do not marry without the consent of B, the estate will be forfeited if she marry without such consent, although she had no notice of the limitation previous to the marriage. *Porter v. Fry*, 1 Mod. 86.

5. The feeoffee of land, or bargainee of reversion by deed indented and enrolled, shall not take advantage of a condition for non-

payment of rent reserved on a lease upon demand by them, unless they have first given notice to the lessee of the forfeiture, &c. *Fraunces's case*, 8 Co. 92 a.

(g) *Notice of a lapse.*

1. Notice of refusal ought in all cases to be given to the patron. *King v. Bishop of Hereford*, Com. 360, note.

2. A patron ought to take notice, of a vacancy upon the statute of pluralities, and if he does not, a lapse will incur; but at common law, this was at his election. *Rex v. St. John's College*, Skin. 396.

3. If one be presented to a benefice under the age of twenty-three years, no lapse shall incur to the bishop without knowledge given to the patron. March, 119, pl. 190.

4. Lapse shall not incur upon a deprivation, unless notice be given to the patron by the ordinary himself. 3 Mod. 31.

5. A bishop ought to plead notice, if he would take advantage of a lapse. 1 Ro. 70.

(h) *Notice to a purchaser.*

1. A purchaser for valuable consideration without notice, having the legal estate in him, can always defend himself in equity, whether the bill be filed for discovery or relief. *Duchess of Chandos v. Brownlow*, 2 Ridgw. 422.

2. An infant purchaser is bound by a condition in a deed without notice. *Williams v. Fry*, 2 Lev. 21.

3. If an infant purchase an advowson, and the incumbent die, lapse shall incur, although he had no notice of the death of the incumbent. 1 Mod. 86.

4. The recital in a deed of a fact which may or may not, according to circumstances, amount to a fraud, will not of necessity affect a purchaser for value, denying notice of the fraud. *Kenney v. Browne*, 3 Ridgw. 512.

5. If a man pleads a valuable consideration in Chancery to save his estate from judgment, he must also set forth that he had no notice of the judgment. *Anon.* 2 Vent. 361. *Vide* 2 Ch. Ca. 73.

NUISANCE.

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I. WHAT CONSTITUTES A NUISANCE.

1. Keeping swine in a city is a nuisance at common law, and indictable. *Rez v. Wigg*, Salik. 460. 2 Ld. Raym. 1163. S. C.
2. An action on the case lies for erecting a hogstye so near the house of the [*977] plaintiff that the air thereof was corrupted. *Aldred's case*, 9 Co. 57 b.
3. The trades of soap-boiling, calendering, and brewing, though lawful, yet if carried on to the annoyance of the neighbourhood, are nuisances. *Rez v. Pierce*, 2 Show. 327.
4. So, the erection of a tallow furnace by a chandler, to the annoyance of an innkeeper and his guests. *Morley v. Pragwell*, Cro. Car. 510.
5. A brewhouse, tanhouse, and glasshouse may be nuisances to another house. *Palm*, 536. 1 Vent. 26.
6. So also, a lime-kiln, if the smoke enter the plaintiff's house, so that he cannot dwell there; so of a dye-house, &c., if the filth runs into his fish pond. *Aldred's case*, 9 Co. 57 b.
7. If the owner of a river neglect to scour it, by which land is overflowed, he is indictable. *Rez v. Wharton*, 12 Mod. 510.
8. Making great noises in the night is a nuisance. *Rez v. Smith*, 1 Stra. 704.
9. A rope-dancer's booth in the street was held to be a nuisance, and a writ to the sheriff was awarded to prostrate the building; or the master and workmen may be indicted. *Half's case*, Vent. 196. 1 Mod. 76. 2 Keb. 846.
10. To bring a large ship of three hundred tons into Billingsgate dock, which is a dock only fitted to receive smaller vessels, and not free for all ships, is a public nuisance. *Rez v. Leach*, 6 Mod. 145.
11. Placing gates across a highway is so. *W. Jo.* 221.
12. Keeping gunpowder in great quantities is a nuisance. *Rez v. Taylor*, 2 Stra. 1167.
13. If a man be continually driving a cart along a horse-way, so as to render it less convenient to riders, it is a nuisance. 6 Mod. 155.

II. WHAT IS NOT A NUISANCE.

1. There cannot be a nuisance to a fair, market, or franchise. 11 Mod. 67. *Sed quere*.

2. Erecting a dove-cote by a freeholder is no nuisance. *Earl of Northumberland's case*, Poph. 141.

3. A pigeon-house is not a common nuisance. *Duell v. Saunders*, 2 Ro. 4. Id. 40.

4. Darkening the street by a larger house is not a nuisance. *Rez v. Wigg*, 1 Ld. Raym. 737.

5. The building of a wall, so as to intercept the prospect of another, is not a nuisance. *Knowles v. Richardson*, 1 Mod. 55. *Arnold v. Jefferson*, Holt, 499.

III. RELATIVE TO THE CONTINUANCE OF A NUISANCE.

1. Though a thing may have existed for many years, yet if it be a nuisance that will not make it lawful. *Anon.* 12 Mod. 342.

2. The continuance of a nuisance is a new nuisance. *Wüthers v. Henley*, 1 Ro. 241.

3. Case lies against the heir of feeoffee for continuing a nuisance, although it was created before his time, viz. in the life of the ancestor or feeoffer. *Moore*, 353.

4. But not for the continuance of a nuisance to feeoffee, who come to the land after the nuisance was created, unless defendant has repaired, &c. *Bennick v. Comeden*, *Moore*, 449. 599.

IV. REMEDY FOR THE PARTY INJURED BY A NUISANCE;—

(a) *By a quod permittat*.

1. Quod permittat lies for the feeoffee for a nuisance levied in the time of the feeoffer. *Penruddock's case*, 5 Co. 100 b.

2. It may be brought against him who did the wrong, without any request made; but it cannot be brought against his feeoffee without a previous request to reform the nuisance. *Id.* *Ibid*.

3. Quod permittat lies only against the tenant of the freehold. *Rosewell v. Prior*, 12 Mod. 639.

4. The defendant in a quod permittat pleaded that the house was erected in the place of an ancient house, and it was found against him generally; held that the whole should be prostrated. *Mo.* 866.

[*See post*, tit. QUOD PERMITTAT.]

(b) *By an assize*.

Where one has a freehold in a house, and a way to it over defendant's land, [*978] held* he must bring assize if it be stopped up; he cannot bring an action on the case. 2 dy. 250. pl. 68.

(c) *By an action on the case*;—

1. When it lies.

1. An action on the case lies to recover damages for a nuisance; this is the modern and usual remedy. *Kendrick v. Bartland*, 2 Mod. 253. *Baten's case*, 9 Co. 53 b.

2. An action lies for a nuisance by erecting a smith's forge next to the house of the plaintiff, *per quod*, &c. *Bradley v. Gill*, Lutw. [29].

3. An action lies for the continuance of it. 12 Mod. 639.

4. A fired a small pipe and cock into the main pipe, and diverted a water-course to B's house; after his death, his wife occasionally used it; it was held to be a fresh diversion in her. 3 dy. 319. pl. 17.

5. Any one may have an action for a particular injury done to him by a common nuisance. 2 Ro. 4. 26.

2. When not.

1. An action will not lie for a common nuisance, from which no man sustains a particular damage more than another. *Thomas v. Sorrell*, Vaugh. 335. 341. *Fineux v. Hovenden*, Cro. Eliz. 664. *Iveson v. Moore*, 1 Salk. 15. 1 Ld. Raym. 486. Holt, 6. 10. Com. 58. S. C. *Paine v. Partrich*, Carth. 193. *Williams v. Jones*, 5 Co. 72 b.

2. The reason is, to avoid a multiplicity of suits, and because the king is intrusted with the remedy. *Iveson v. Moor*, Com. 59.

3. If a man have a particular damage by a sordid way, he is generally without remedy, because it ought to be repaired by some township or vill, against whom an action will not lie, but an indictment only. *Thomas v. Sorrell* Vaugh. 340.

4. If two houses, whereof one hangs over the other, come both into one hand, the wrong is purged. *Robins v. Barnes*, Hob. 131.

5. If they come into several hands again, no action lies, nor can complaint be made for redress of the precedent injury. Id. *ibid*.

6. If, after the houses be divided, one of them be pulled down and built up larger, a *quod permittat* will lie; but judgment cannot be given *prostrare*, any more than the increase of the overhanging. *Robins v. Barnes*, Hob. 131.

7. If a man have a house and ancient lights, and purchase the house and lands adjoining, and build thereon, though the houses be afterwards divided, yet the privilege can never be restored. *Robins v. Barnes*, Hob. 131.

3. Parties to the action;—

(i.) Plaintiff.

Where a nuisance is made to the land of two tenants in common, they shall join in the action. *Saul v. Barnish*, Cro. Jac. 231.

(ii.) Defendant.

1. The erector is liable for all consequential damages, which he cannot purge by assignment over. 12 Mod. 639.

2. Tenant for years erects a nuisance for which damages are recovered; he assigns the term, or makes an under lease; if the nuisance is continued, an action may be brought against either. *Rosewell v. Prior*, 12 Mod. 635. Salk. 460. S. C.

3. But only one satisfaction can be had. S. C. 12 Mod. 640.

4. Before the stat. West. 2. c. 14., an action lay not against the erector after assignment. S. C. 12 Mod. 637.

4. Declaration.

1. In an action on the case for a nuisance, it is sufficient to say he was possessed, &c., without showing what estate he had. *Norris v. Baker*, 1 Ro. 394.

2. In an action on the case for stopping a gutter, a declaration in a *que* estate to the house to which the stoppage was a nuisance, without alleging a seisin in fee, is bad. *Pepyn v. Bustine*, 2 Show. 81.

3. In case for stopping lights, it must appear that the lights were ancient. *Rosewell v. Prior*, Salk. 459.

4. The word "*connuoit*" after verdict was held to import time out of mind. Id. *ibid*.

5.* In an action for a nuisance, if it be laid as continuing after it [*979] has been abated, yet the plaintiff shall recover for damages for the injury he sustained previous to the abatement. 2 Mod 253.

5. Defence and plea.

1. No one can prescribe to make a nuisance. *Fowler v. Sanders*, Cro. Jac. 446. 491.

2. Recovery in a former action is a good bar to an action for erecting the same nuisance. *Johnson v. Long*, 1 Ld. Raym. 370.

3. In an action for a nuisance if the plaintiff entitle himself generally by saying that he was possessed for a term of years, it is well enough; for, not making title to his lease, he need not set forth particularly the commencement of it. *Searle v. Bunnion*, 2 Mod. 71.

4. Plea that the defendant has removed the nuisance is bad. *Westlen v. Eales*, Fort. 333.

6. Evidence.

The gist of the action in nuisance is the damage, and therefore evidence may be given of consequential damages; not so in trespass, which is one entire act. Case of the *Farmers of Hampstead Water*, 12 Mod. 519.

(d) By presentment at the leet.

Such nuisances as a leet has power to redress ought to be immediate and public nuisances. 2 Ro. 51. See Cro. El. 664.

(e) By information.

1. An information lies for cutting down the banks of a public river, and thereby diverting the course of the water, although that part of it is by act of parliament vested in private persons, and an action given them for damages done to it; for it is a public nuisance. *Rex v. Stanley*, 2 Show. 30.

2. An information for a nuisance was refused, application to the party not being shown, &c. *Rex v. Green*, Keny. 379.

(f) By indictment;—

1. When it lies.

1. A nuisance must be general to be indictable. *Rex v. Village of Hornsey*, 1 Ro. 406.

2. An indictment as for a nuisance lies for keeping gunpowder; if at the time of setting

up the house in which the gunpowder was kept, no house was near, but afterwards some are built, it is at the peril of the builder. *Anon.* 12 Mod. 342.

2. Relative to the form of the indictment.

1. An indictment for a nuisance in the Thames without setting out the *termini*, held good. *Rex v. Haddock*, Andr. 137.

2. So of a highway. *S. C. Andr.* 145.

3. An indictment for a nuisance must state the place where the nuisance was committed, and describe where that place is situated. *Rex v. Record*, 2 Show. 216.

4. An indictment laying a nuisance to be committed near the highway, and also near several dwelling-houses, is well enough. *Rex v. Pappineau*, Stra. 686.

5. An indictment for stopping *quandam viam valde necessarium*, was quashed for the want of the word *regiam*, and because the party indicted had no addition. *Keene's case*, 4 Leon. 121.

6. An indictment of nuisance for stopping a watercourse in Kensington, because it ran in *detrimentum omnium inhabitantium*, &c. is bad. *Throngood's case*, 1 Mod. 107, 108.

7. When a thing is not a nuisance in itself, but only becomes so by particular circumstances, the indictment ought to show the special matter, and not conclude generally *ad commune nocumentum*. *Anon.* Palm. 368. 374.

3. Relative to the quashing of the indictment.

1. The court never quashes an indictment for a nuisance on motion; but the defendant must demur. 11 Mod. 305. *Reg v. Wigg*, 2 Ld. Raym. 1163.

2. Nuisances ought to be certified into the court, that they are abated or avoided, before the indictment shall be quashed. *Leyton's case*, Cro. Car. 584.

4. Judgment.

Judgment of abatement is unnecessary, when the nuisance is temporary; [*980] as,* for steeping stinking skins, &c. *Rex v. Pappineau*, 1 Stra. 686.

(g) *By abating or removing the nuisance.*

1. A public nuisance may be abated, doing no unnecessary damage to the party. *James v. Hayward*, W. Jo. 222, 223.

2. If one erects a house which stops my lights, I may pull it down. *Rex v. Rosewell*, 2 Salk. 459.

3. A judge upon his own view may order a nuisance to be abated. 1 Mod. 76.

4. After a conviction, a writ shall go to the sheriff to abate it at his own charge. *Anon.* Comb. 10.

5. A feoffee may abate a nuisance before any prejudice done, as well against the feoffee who did not the nuisance, as against the tortfeasor himself. *Penruddock's case*, 5 Co. 100 b. Cro. Eliz. 234. Jenk. 260. S. C.

6. A nuisance may be redressed by the party grieved entering and abating the nuisance; but in this latter case, he shall not have an action or recover damages. *Baten's case*, 9 Co. 53 b.

7. If the owner of two houses sell one which was a nuisance to another, he cannot abate the nuisance. Mo. 866.

8. A nuisance cannot be abated by a judgment in case, but there must for that purpose be either an assize or a *quod permittat*. 2 Mod. 253.

9. A thing that will be a nuisance when completed, yet cannot be abated till it be actually so. *Rex v. Wharton*, 12 Mod. 510.

10. In a justification for abating a nuisance, it need not be shown that he did it doing as little hurt as could be. *Lodie v. Arnold*, Salk. 458, 469.

OATH.

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III. RESPECTING THE POWER OF ADMINISTERING AN OATH, p. 980.

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V. CONSEQUENCE OF NOT TAKING THE NECESSARY OATHS, p. 981.

VI. CONSEQUENCE OF BREAKING AN OATH, p. 981.

I. WHEN AN OATH IS NECESSARY.

1. In all bills in equity, where the loss of a deed is suggested in order to give jurisdiction to the court, the fact must be verified on oath. *Howard v. Attorney-General*, 2 Mod. 173.

2. One robbed, if he refuse to take the oath, cannot sue the hundred. *Ascomb v. Hundred of Spelholme*, Salk. 613.

3. The king is not bound to give livery to the heir till the oath of supremacy taken. Hob. 74.

II. WHEN NOT.

1. A consor of the college of physicians may execute that office without taking the oaths to government. *Rex v. Burrell*, 5 Mod. 431.

2. Special bailiffs, named by the plaintiff, to execute a warrant upon a *latitat*, are not bound previously to take the oath required by the 27 Eliz. *Anon.* W. Jo. 249.

III. RESPECTING THE POWER OF ADMINISTERING AN OATH.

1. The ecclesiastical court cannot examine the delinquent upon oath. Hob. 84.

2. If the spiritual court call a man to take an oath tending to accuse himself, a prohibition lies. *Week's case*, 2 Mod. 278.

3. By the 13 Car. 2. c. 12., the *ex officio* oath used in the spiritual courts is abolished. *Waterfield v. Bishop of Chichester*, 2 Mod. 118.

4. But the spiritual court may compel a churchwarden to take the oath of office, and may administer oaths in other than testamentary and matrimonial causes. *Waterfield v. Bishop of Chichester*, 2 Mod. 119.

5. The secondary cannot examine upon oath. 2 Ro. 499.

6. Where a corporation has power to make statutes, they cannot give themselves a power to administer an oath. [*981] *Rez* v. Dean and Chapter of Dublin*, 1 Stra. 537.

7. Where the charter does not give a power of administering oaths of office, there must be a *dedimus* for that purpose. S. C. Stra. 539.

8. Affidavits taken before commissioners by 29 Car. 2. c. 5. must be in a cause in court. *Rez v. Jones*, Salk. 461.

9. Justices have no discretionary power to omit tendering the oaths. *Rez v. Newton*, Stra. 413.

IV. HOW IT SHOULD BE ADMINISTERED.

1. It is a good custom for persons to be admitted to freedom to be obliged to swear on the New Testament. *Rez v. Bosworth*, 2 Stra. 1112.

2. It is no exception to the oath of allegiance, that the words of the statute are to King James, and in administering the oath King Charles is named. *Rez v. Green*, 1 Vent. 171, 172.

3. Jews are allowed to cover when they swear. *Serra v. Menes*, 2 Stra. 821.

4. A Mahometan may be sworn on the Koran. *Fachina v. Sabine*, 2 Stra. 1104.

V. CONSEQUENCE OF NOT TAKING THE NECESSARY OATHS.

1. Debt lies on the statute 25 Car. 2. c. 2. against a colonel in the army for not taking the oaths to government as directed by the statute. *Godden v. Hales*, 2 Show. 475.

2. If an alderman omitted to take the oaths, and subscribe the declaration at the time of his taking his oath of office, his election to such office became absolutely void, although the oaths were not tendered to him; but by 5 G. 1. c. 6., all persons required to take the oaths shall be confirmed in such offices, notwithstanding their omitting to take the oaths. *Rez v. Sanchar*, 2 Show. 67, 68. *notie*.

3. The acts of a sheriff who has not taken the oaths required by 13 Car. 2. st. 2. c. 1. though void as to himself, are good as to strangers. *Rez v. Sanchar*, 2 Show. 68.

4. If a man be indicted for not taking his oath being chosen head-borough, it must appear that he was warned before a justice of the peace, and there refused. *Rez v. Frigg*, Aleyn. 78.

5. Refusal of the oath of supremacy incurs a *praemunire*, upon 3 Jac. c. 4., after tender by a justice of gaol delivery, though never tendered by the bishop; and though in the indictment the tender did not appear to have been per justice of, &c. as required by the statute, yet (it appearing in the *placita*) it is good. *Rez v. Vaughan*, Skin. 11.

6. An indictment on the 3 Jac. 1. c. 4.

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reciting, that the "defendant refused the oath," is [good, although the words of the statute are "refuses to take the oath." *Rez v. Vaughan*, 2 Show. 196.

VI. CONSEQUENCE OF BREAKING AN OATH.

Though an oath be voluntary, yet, if broken, the party is punishable in the court of King's Bench. *Anon.* 3 Salk. 248. Cro. El. 486.

OCCUPANT.

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VI. RELATIVE TO HIS POWER, p. 982.

VII. RELATIVE TO HIS LIABILITY, p. 983.

I. WHEN THERE MAY BE AN OCCUPANT.

1. There may be an occupant of an estate at law; but if tenant by courtesy, or in dower, grant over their estate, and the grantee die, none can enter as occupant. 2 Ro. 123.

2. One sort of occupancy is, where, by the death of tenant *pur auter vie*, not only the freehold is in abeyance, but there is also a *possessio vacua*; in such^a case, the estate is gained by entry; the [*982] other is, when the freehold is in abeyance, but the possession is in some other person. *Geary v. Bearcroft*, Orl. Bridg. 491.

3. A man can only be an occupant of a void possession, or of a possession which he himself has. *Holden v. Smallbrooke*, Vaugh. 192.

II. WHEN NOT.

1. There can be no occupancy of any thing wherein another has a right. *Holden v. Smallbrooke*, Vaugh. 188, 189.

2. No occupancy of an estate tail. Plow. 558.

3. There can be no occupant of a copyhold estate without a special custom. *Smartle v. Penhallow*, Holt, 164.

4. Two cannot have severally possession of the same thing at one time. *Holden v. Smallbrooke*, Vaugh. 189, 192.

5. Occupancy cannot be of a rent-charge, for none can make title to it unless he is a party to the deed, or derives title under it. *Crawley's case*, Cro. Eliz. 721, 901.

6. A rent is granted to A for the life of B; if A dies, the rent ceases, and there can be no occupant. *Smartle v. Penhallow*, 2 Ld. Raym. 1000.

7. There can be no occupant of land belonging to the king. Mo. 393, 394.

8. If a man die seized *pur auter vie* of a rent, tithe, &c. or other thing, whereof there can be no occupancy, either directly, or by consequence as adjuncts of something else, by the death of the grantee in all these

cases the grant is determined as if there never had been any; but when those things are granted in the same deed, together with other things of which there may be an occupancy, then they shall be subject to the occupancy. *Holden v. Smallbrooke*, Vaugh. 201, 202.

9. Where the limitation is to heirs, it excludes occupancy. *Daker v. Searle*, Cro. Eliz. 407.

III. WHO MAY BE AN OCCUPANT.

1. Tenant for years or at will may be an occupant. *Holden v. Smallbrooke*, Vaugh. 192. *Geary v. Bearcroft*, Carter, 59, &c.

2. If lessee for years, becoming occupant, disclaim the estate by occupancy, it will not revive the estate for years. *Geary v. Bearcroft*, Orl. Bridg. 493.

3. Tenant *pur auter vie* makes a lease for years, and dies; the lessee for years is occupant. S. C. Orl. Bridg. 498.

4. Tenant *pur auter vie* makes a lease for years; lessee for years makes a lease at will; lessee at will shall be occupant. *Geary v. Bearcroft*, Carter, 59.

5. No occupancy begins with the freehold; but it begins by possessing the land, and the law casts the freehold upon him. *Holden v. Smallbrooke*, Vaugh. 195.

6. A freehold vests in a special occupant by descent, without entry or claim. Comb. 290.

7. The administrator is an occupant since the statute, when there is no special occupant; and estates *pur auter vie* are not liable to distribution. *Oldham v. Pickering*, Holt, 503.

8. But occupancy is not wholly taken away by statute 29 Car. 2. c. 3. *Bradburn v. Kennerdale*, Holt, 539, 540.

IV. WHO NOT.

1. A claim without actual possession cannot make a man a natural occupant. Vaugh. 188.

2. None can be an occupant unless in possession. *Lord Windsor's case*, 3 Leon. 36.

3. No man can be occupant by doing an injurious act. *Geary v. Bearcroft*, Orl. Bridg. 498.

4. Rent *pur auter vie* to one of his executors and assigns; the executor cannot be a special occupant, because it is a freehold; otherwise of an heir. Mo. 664.

V. WHAT HE IS ENTITLED TO.

1. An occupant shall enjoy whatever is belonging to that which he occupies. *Holden v. Smallbrooke*, Vaugh. 196.

2. An occupant becomes an assignee in law to the first lessee. S. C. Vaugh. 204.

VI. RELATIVE TO HIS POWER.

He has power to pass away his interest. *Holden v. Smallbrooke*, Vaugh. 205.

VII.* RELATIVE TO HIS LIABILITY

[*983] LIT.

1. The occupant is liable to pay

the rent. *Holden v. Smallbrooke*, Vaugh. 202, 203.

2. If tenant *pur auter vie* grants a rent-charge, the occupant shall be charged with it. *Geary v. Bearcroft*, Carter, 67.

3. The heir shall be charged, in the case of a special occupancy, with payment of debts, not legacies. *Oldham v. Pickering*, Salk. 464.

4. An administrator shall be charged in like manner, where he is a special occupant. S. C. Salk. 465.

5. An estate *pur auter vie* is only assets in respect of creditors, and not chargeable with legacies, unless thereout expressly given; and the executor or administrator (if no debts appear) will be occupant. *Oldham v. Pickering*, 12 Mod. 103.

OFFICE AND OFFICER.

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I. RESPECTING THE CREATION OF AN OFFICE.

1. The erecting new offices for the benefit of a private man is against law. *Walter Chute's case*, 12 Co. 116.

2. The Bishop of St. D. by license founds a college, with canons secular, reserving to himself *officium decani tanquam decanus ut est in ecclesia Menevensi*, and having assigned a benefice to one of the canons, translates it to the deanery; this translation is void, especially for his own benefit; and the creation of the deanery is also void, for want of sufficient words to create such office. *Reg. v. Bishop of St. David's*, 3 Dy. 287. pl. 50.

II.* RESPECTING THE MODE OF

[*984] GRANTING AN OFFICE;—

(a) *In relation to the person granting.*

1. An office forfeited to the king is in him, and he may grant it before any office found. *Woodward v. Faze*, 3 Lev. 290.

2. The election of judge of the sheriff's court in London is in the common-council, and not in the lord mayor or sheriffs. *Thompson v. Goodfellow*, 2 Show. 173.

3. The office of exigenter is in the gift of the chief justice of C. B., and the king's grant thereof (even during a vacancy of the chief justiceship) is void. 2 Dy. 175. pl. 25.

(b) *In relation to the description of person to be appointed.*

1. An archdeacon cannot be appointed to the office of expeditor. *Dr. Lee's case*, 1 Mod. 282.

2. The grant of the offices of chief prothonotary in C. B., and coroner and attorney of B. R., to unskilful persons, is void. 2 Dy. 150. pl. 1.

(c) *In relation to the number of persons.*

1. A ministerial office may be granted to two, *conjunctim et divisim*, but not a judicial office, unless warranted by custom. *Jones v. Bea*, 4 Mod. 17. Carth. 214. S. C.

2. But if one dies, it does not survive, unless said to the survivor. Salk. 465.

3. The bishop may grant the office of register, chancellor, official, or commissary, to two. *Jones v. Bea*, 1 Show. 289. 12 Mod. 10. Carth. 214. S. C.

4. A grant to two persons of the office of stewardship of an honour, and of the keeping the court leet and court baron within the honour, with the perquisites, "to hold them after a prior grant determined for thirty years, if they or either of them should so long live," is good; and the grantees may, after the grant takes effect, maintain an *indebitatus assumpsit* for taking the fees incidental to the court baron, or for monies had and received to their use. *Howard v. Wood*, 2 Show. 22.

5. In the King's Bench, the office of prothonotary is granted to two persons; so two persons make one *custos brevium*. *Jones v. Bea*, 1 Show. 289.

6. But, in the Common Pleas, the office of prothonotary is granted to one only, because the custom does not authorize a grant to two. *Jones v. Bea*, 1 Show. 289.

7. The grant of the office of one of the auditors of the court of wards to two and the survivor of them, is good. The statute 32 Hen. 8. c. 46. makes the auditors one officer. *Curle's case*, 11 Co. 2 b.

8. The office of *custos rotulorum*, or chief justice, is not grantable to two. Hob. 153.

9. The office of steward of a court, when full, is not grantable to another but by the king. *Coll v. Bishop of Coventry*, Hob. 150, 151.

10. If two persons be appointed jointly to the office of clerk of the papers, a new grant made on the surrender of one of the appointees, with the consent of the other, is good. *Woodward v. Aylon*, 2 Mod. 96.

11. A prescription in an office to be executed by four persons to be named by the king from time to time, is good. *Duppa v. Stephens*, Lutw. [133, 134.] 381.

(d) *In relation to the commencement and duration of the office.*

1. An office of trust and confidence cannot be granted for years. *Bedell v. Constable*, Vaugh. 181.

2. The offices in the gift of the chief justice are not grantable for less than life. Hob. 153.

3. The office of marshal of the King's Bench is not grantable for years. Cro. Car. 587. W. Jo. 463. 3 Mod. 145.

4. That office was held to be grantable at will. 9 Co. 98. Dy. 176. pl. 28. 3 Mod. 149. *Sed vide* 27 Geo. 2. c. 17.

5. The marshal of B. R. may grant the office for life, but cannot give the grantee power to make a deputy. 3 Mod. 147. 2 Ro. Abr. 154.

6. Whether such office is grantable in trust, see *Rex v. Lenthall*, 3 Mod. 145.

7. The office of a register of a bishop may be granted in reversion. *Rex v. Kemp*, 4 Mod. 279.

8. The office of a steward of a manor is not grantable as a reversion, except by* the king; and the grant [*985] being void, that of the fee for exercising it is void also. 3 Dy. 159. pl. 18. *Sed vide* 2 Lev. 245.

9. But it may be granted to the son after the death of his father (grantee for life) by the same deed. 3 Dy. 270. pl. 23.

10. The grant of a stewardship of a court-leet for years in reversion, is void. *Howard v. Wood*, 2 Lev. 245.

11. The king grants an office to A *durante bene pacis*, and after grants it to B, to commence after the death, surrender, or forfei-

ture, of A; the latter grant is good. *Rex v. Kemp*, 2 Salk. 465.

12. The king cannot grant *reversionem officii*; when one is officer for life, if the king, without reciting it, grants the office to another for life, the second grant is void for want of a recital. *Earl of Rutland's case*, 8 Co. 57 a.

13. Held, that the office of auditor of the court of wards, being partly ministerial and partly judicial, could not be granted in reversion, for that it was by act of parliament made so entire, that the ministerial part could not be divided from the judicial. *Curle's case*, 11 Co. 2 b.

(e) *Whether by parol or by deed.*

1. The nomination of an officer by parol may be good by custom or statute. 1 Ld. Raym. 163, 164.

2. The *custos rotulorum* may appoint a clerk of the peace by parol. *Saunders v. Owen*, 12 Mod. 199. Salk. 467. 479.

3. A steward to hold courts, with a salary, may be appointed by parol, and debt, though not annuity, will lie for such salary. 2 Dy. 248. pl. 79.

4. The officer of controller of the pipe surrendered in court; and another was admitted without writing, only an entry made of it in court. *Sir A. Bradrif's case*, Hard. 476.

5. An office for life is not grantable by parol. *Owen v. Saunders*, 1 Ld. Raym. 159.

6. The nomination of auditor of the court of wards was necessary to be under the great seal. *Curle's case*, 11 Co. 2 b.

7. The office of marshal of K. B. lies in grant, and cannot be transferred without deed. 3 Mod. 147.

(f) *When and how the party is put into possession.*

In an elected office, the party must be invested to gain possession; but in a patent office, he is in possession by the creation. 1 Mod. 122, 123.

III. WHO ARE EXCUSED FROM SERVING OFFICES.

1. A woman is eligible to the office of sexton, and may vote for a candidate for that office. *Olive v. Ingram*, 7 Mod. 263.

2. Refusing the test enacted by stat. 13 Car. 2., is no defence for not taking an office. *Rex et Reg. v. Larwood*, Holt, 505.

3. A dissenter that has not received the sacrament twelve months before, may plead the statute 13 Car. 2. st. 2. c. 1., to excuse him from serving offices in corporations. *Mayor, &c. of Guilford v. Clarke*, 2 Vent. 247, 248.

4. A tenant in ancient demesne is not privileged from serving the office of high constable. 2 Show. 75.

5. An inhabitant of a particular leet is not thereby exempt from serving the office of high constable of the hundred. *Rex v. Jennings*, 11 Mod. 215. 227.

IV. CONSEQUENCE OF REFUSAL TO ACCEPT AN OFFICE.

1. The court will not grant an information for refusing to accept the office of common-councillman; but the corporation may, by a bye-law, inflict a penalty for such refusal. *Anon.* 11 Mod. 132.

2. If one refuses to accept of an office in a corporation, for which he is fined, debt lies for it. *Starr v. Mayor, &c. of Exeter*, 3 Lev. 116.

3. In an indictment for refusing to serve the office of constable, it must appear that the court-leet was held at the time prescribed by Magna Charta; but it may be held at another time by prescription. 11 Mod. 227.

4. In an indictment for not serving the office of constable, stating that he was duly elected at a court-leet, it shall be presumed that he was elected to the office* of high constable. *Rex v. Jennings*, 11 Mod. 227. [*986]

V. RELATIVE TO THE ASSIGNMENT OF AN OFFICE, AND ALSO RESPECTING DEPUTIES.

1. Offices of personal trust cannot be assigned, for the trust is not personal, which any man may have. Vaugh. 180.

2. When an officer has power to make assignees, he has an implied power of making deputies. *Earl of Shrewsbury's case*, 9 Co. 40 b.

3. An assignee of an office has an estate and interest in the office itself, and does all things in his own name, and generally his grantor shall not answer for him; but a deputy has no estate or interest in the office, and does all things in the name of an officer himself, and for him his grantor shall answer. *Earl of Shrewsbury's case*, 9 Co. 46 b.

4. A deputy may be made without deed. 3 Mod. 150.

[See also the next division; and ante, tit. DEPUTY, Vol. I. p. 487.]

VI. RELATIVE TO THE SALE OF OFFICES; AND HEREIN OF THE 5 & 6 Ed. 6. c. 16.

1. Judicial offices are saleable that are not within the statute of Ed. 6. *Semb. Reg. v. Mayor of Norwich*, 2 Ld. Raym. 1246.

2. The statute of 5 Ed. 6. c. 16., concerning the sale of offices, does not extend to the office of secretary to the governor of Barbadoes; *sed quare*, for the office is granted by patent under the great seal of England. *Daw v. Pinder*, 2 Mod. 45. 47 *notis*.

3. The statute 5 & 6 Ed. 6. c. 16., respecting the sale of offices, extends not to Jamaica or the colonies. *Culliford v. Cardonell*, Com. 2. note.

4. A bond given by any of the officers mentioned in that statute for securing all the profits of the office to the person appointing, is void by the statute. Willes, 577.

5. Bonds given to make payments for obtaining for the obligors offices in the revenue, are illegal, and Chancery will relieve

against them. *Law v. Law*, C. T. Talb. 140. 143.

6. An agreement with the warden of the Fleet, (who held only for life under the crown,) that for a sum of money he would surrender the office to the king, to the intent that he should procure from the king a grant of the office to the purchaser, is void by statute 5 & 6 Ed. 6. c. 16., though that office has been and may be granted to a subject in fee. *Higgins v. Bambridge*, Willes, 241.

7. A bond given to secure the payment of such consideration money cannot be enforced in a court of law; but it is not sufficient in a plea to an action on such a bond to state generally, that the case is within the statute; the defendant must set forth in his plea, facts to show that the case is within the statute. Willes, 241. 247.

8. Offices in fee are not within the statute of Ed. 6.; as where grantee for years of the bailiwick of the duchy makes a grant for a less term, rendering rent, and making his lessee his deputy, this is not within the statute, the reversion being in the king. *Ellis v. Ruddle*, 2 Lev. 151.

9. The exception in the statute 5 & 6 Ed. 6. c. 10., that the act shall not extend to any office of which any person seised of any estate of inheritance, means only offices of which subjects are seised of estates of inheritance. Willes, 246.

10. The office of register of an archdeaconry is an office within the meaning of that statute. *Layng v. Paine*, Willes, 573.

11. If a person hold an auditor's office, and depute another to exercise the said office during his good behaviour, a bond given by such deputy to pay his principal yearly, during the said deputation, 200l., and that in consideration thereof the deputy shall have all the rents and profits of the said office to his own use, is void by 5 & 6 Ed. 6. c. 16., for it is a bond to pay a certain sum at all events. *Godolphin v. Tudor*, 6 Mod. 234.

12. So is a bond given by such an officer to surrender whenever the person appointing shall choose. Willes, 574.

13. A security by a deputy to account for half the profits of an office to the principal, and to retain the other half to himself, is not a sale within the statute 5 & 6 Ed. 6. c. 16.

Culliford v. Cardonell,* Com. 1. [1897] 12 Mod. 90. S. C. Comb. 356. Salk. 466. 468.

14. So, when the profits are certain, he may grant the office to a deputy, reserving any sum out of the profits; but when the profits are uncertain, he cannot grant the office, &c. to a deputy, reserving a certain sum at all events. Willes, 576. *Culliford v. Cardonell*, Com. 1. 12 Mod. 90.

15. An officer, having a certain salary or profits, may make a deputation of the office,

reserving a sum not exceeding the certain profits. Willes, 576, note. Salk. 466. 468.

VII. RELATIVE TO THE DISCHARGE OF AN OFFICER.

The court may discharge a placet *ore tenus*, without entering it of record. 2 Dy. 114. pl. 74.

VIII. RELATIVE TO THE RESIGNATION OF AN OFFICE.

1. The office of an alderman may be resigned without deed. *Rez v. Rippon*, 1 Ld. Raym. 563.

2. Resignation of an alderman by letter is revocable before the place is filled up. *Rez v. Rippon*, 1 Ld. Raym. 563.

IX. RELATIVE TO THE FORFEITURE OF AN OFFICE.

1. The wardenship of the Fleet is forfeited by suffering voluntary escapes. *Rez v. Manlove*, 3 Lev. 288. Holt, 504, 505.

2. An office at will may be forfeited. 1 Ld. Raym. 52.

3. If a park-keeper cut trees without a warrant, it is a forfeiture of his office. Mo. 707. 786. 1 And. 29.

4. Non-attendance is a good cause of forfeiture of the office of recorder. *Reg. v. Bailiffs of Ipswich*, Salk. 435.

5. When an office concerns the administration of justice, or the commonwealth, and the officer *ex officio* or of necessity ought to attend without any demand or request, non-user or non-attendance in court is a forfeiture of the office; but when the officer need not attend or exercise his office but on demand or request made, non-user is no cause of forfeiture, unless there have been a request and a subsequent neglect. *Earl of Shrewsbury's case*, 9 Co. 46 b. *Rev v. Pomfret*, 10 Mod. 108. See also 3 Mod. 146.

6. In offices of a private nature, to be performed without request, non-user or non-attendance is no cause of forfeiture, unless it be a cause of prejudice or damage. *Earl of Shrewsbury's case*, 9 Co. 46 b. 10 Mod. 108. S. P. *City of Exeter v. Glide*, 4 Mod. 34.

7. The office of receiver of the court of augmentations is not forfeited for non attendance on any sovereign when distressed by rebels, under 11 H. 7. c. 18., except that by whom the appointment was made. 2 Dy. 210. pl. 28.

8. If the king grants an office of trust, and the officer commits treason, the office will be forfeited to the king. 2 Ro. 314.

9. Reproachful language by an officer may be a cause to bind him to his good behaviour, but no forfeiture of his office. 4 Mod. 34.

10. The act of a deputy may forfeit the office of the principal. Salk. 19. pl. 5.

11. If an archdeacon grants the office of register for money, it is forfeited to the king, and not to the bishop. *Poulson v. —*, 3 Lev. 389.

12. The forfeiture of an office for life is to

him in reversion, and not to the king. *Holt*, 504, 505. 2 *Lev.* 71.

[See also *Com. Dig. last ed.* Vol. III. p. 136. 137.]

X. WHEN AN OFFICE IS DETERMINED OR BECOMES VOID.

1. If a remembrancer of the Exchequer be made a baron of the Exchequer, the first office becomes void. 2 *Dy.* 197. pl. 47.

2. Delivery of the writ of discharge of the old sheriff to the clerk of the county, sitting in the county court in the absence of the sheriff, determines his authority. *Anon.* 3 *Dy.* 355. pl. 36.

3. The office of receivership of the court of augmentations was held to be so incorporated with that court as to be void on its dissolution by act of parliament. 2 *Dy.* 216. pl. 55.

4. Acceptance by a judge of C. B. of the patent creating him a judge of [*988] B.^a R., vacates his former patent. 2 *Dy.* 158. pl. 34.

5. If a sheriff succeed to a peerage *tempore parliamenti*, his office is not thereby determined. 3 *Dy.* 355. n. (a).

6. Where an officer is at pleasure, the choice of another is a determination. *Rex v. Mayor of Canterbury*, *Stra.* 674.

XI. RELATIVE TO THE DISTURBANCE OF AN OFFICE, AND THE REMEDY.

1. If, while a recorder, sheriff, or other officer be taking a poll, any person take away the poll-book, or other papers, and thereby prevent the poll from proceeding, it is a disturbance of office, for which an action on the case will lie. *Show v. A Burgess of Colchester*, 2 *Mod.* 228.

2. So, case lies for disturbance of a seat in the church, without title shown in the declaration. *Ashley v. Freckleton*, 3 *Lev.* 73.

3. Or for disturbing one in the exercise of the office of parish-clerk. *Lee v. Drake*, 2 *Salk.* 468.

4. The holding of courts and taking the fees is an express disturbance; and if any disturbance is found, which is alleged in the declaration, it is sufficient. *Earl of Shrewsbury's case* 9 *Co.* 46 b.

5. If a man receive the profits of an office on pretence of title, the person who has a right to the profits may recover them by an action of *indebitatus assumpsit*, as for monies had and received to his use. *Arris v. Stukeley*, 2 *Mod.* 262.

6. In an action on the case for disturbing the plaintiff in the exercise of his office, the declaration may aver the disturbance to have been *vi et armis*: the plaintiff may have this action, although he might have had an assize. *Earl of Shrewsbury's case*, 9 *Co.* 69 b.

7. Case lies by the keeper of a forest for disturbing him in taking profits due by prescription to his office, but he ought to show the certainty of the profits to recover damages. *Moore*, 706.

8. A special verdict in *assumpsit* for the profits of a patent office, finding that the defendant had received the profits for seven years, is good, although it appear that the patent had not been made more than two years. *Arris v. Stukeley*, 2 *Mod.* 263.

XII. REMEDY TO RECOVER AN OFFICE.

1. An assize lies to recover the office of serjeant at mace in the house of commons. *Craig v. Norfolk*, 1 *Mod.* 122.

2. To maintain an assize for a patent office, the party must prove a seisin in law. 1 *Mod.* 122.

3. No writ of *quod permittat* lay for an office. *Webb's case*, 8 *Co.* 47 b.

4. To obtain a mandamus to be restored to an office, it must appear what the office is, that the court may judge whether it is of that nature for which the law allows this species of remedy. *Anon.* 2 *Mod.* 316.

5. A mandamus confers no right, but the title to it remains as before. *Gilb.* 259.

XIII. RELATIVE TO THE FEES AND PERQUISITES.

1. A new office can be granted without any fee, annual or casual. *Mo.* 808.

2. The king, by privy seal, reciting that unserviceable munition belonged to the master of the ordnance, granted it to him, who thereupon sold it, and died; held, such munition cannot be claimed as ancient fees, the office having been erected in 35 H. 8.; such grant is void, and the executor of the grantee is chargeable to the king for the said munition. *Earl of Devonshire's case*, 11 *Co.* 89 a.

3. An annuity granted by reason of an office, is determinable with the office. *Plow.* 162. 381.

4. A rent granted for the exercise of an office cannot be served from the office but by extinguishment of both. *Plow.* 381.

XIV. WHAT ESTATE A MAN HAS IN AN OFFICE.

1. If a man have an office granted to him, to enjoy so long as he shall behave himself well in it, he has an estate for life in the office. 1 *Show.* 523. 525. 531. 536.

2. It is so even in the case of the king. *Harcourt v. Fox*, 1 *Show.* 557.

3. If an office be granted to two persons, without words of survivorship, and one of them die, the interest is determined as to both. *Slater v. Carew*, 1 *Mod.* 187.

4. An office granted at will is at the will* of the king, and not of [*989] the party, and may be surrendered. *Salk.* 466. *Holt*, 420. *Rex v. Kempe*, 1 *Ld. Raym.* 51.

The offices of commissary and official are hereditaments belonging to the bishop and archdeacons. *Walker v. Lamb*, *W. Jo.* 263.

6. Officers of justice have estates for life in their offices, at common law. *Harcourt v. Fox*, 4 *Mod.* 169.

7. A parish-clerk is a temporal officer, and has a freehold life estate in his office. *Pitts v. Evans*, 7 *Mod.* 254. *Salk.* 536.

8. The office of clerk of the peace is a free-

hold *quædam se bene gesserit*. Holt, 514. *Rex v. Cumberland, Clerk*, 11 Mod. 80. 12 Mod. 13. 42.

9. And therefore he is not removable by a new *custos rotularum*. *Harcourt v. Fox*, 12 Mod. 42.

10. He is not removable except for misdemeanour, and articles in writing must be exhibited against him. *Rex v. Evans*, 12 Mod. 13.

11. Grant of the office of register to the court of admiralty is a freehold for life; and though they do proceed by the civil law, yet the right of that office shall be tried at the common law. *Jones v. Landaff (Bp.)*, 4 Mod. 27, 28.

12. The office of a register of a bishop is likewise a freehold, and the right shall be tried at law. *Jones v. Landaff (Bp.)*, 4 Mod. 28.

13. If two men have an office for their lives and the survivor of them, and one of them surrender to the other, and then a new grant is made to this other and a stranger, he has debarred himself of the survivorship, and he and the stranger are jointly seized. *Woodward v. Aston*, 2 Mod. 96.

14. If the office of comptroller of the customs, or any other office of trust, be granted by patent to two persons *durante bene placito*, the patent is determined by the death of one of the grantees. *Arris v. Stukeley*, 2 Mod. 260.

XV. RELATIVE TO THE LIABILITY OF AN OFFICER, GENERALLY.

1. An officer, who does nothing but in what belongs to him, is not liable for a premeditated tortious act of others. *Olliott v. Bessey*, T. Jones, 214.

2. A constable is favoured in law as to execution of process. *Crump v. Halford*, 4 Mod. 352.

3. An officer is excused for executing a writ after an act of bankruptcy, or a judgment vacated, but the party not. *Turner v. Felgate*, 1 Lev. 95. *Bayley v. Banning*, 1 Lev. 173.

4. Where a *latital* goes to a county palatine, and it is not signed by an attorney of that county, according to usage, this is no excuse to the officer for disobeying the writ. *Chapman v. Mattison*, Andr. 196.

5. A bad writ or warrant will justify the officer who executes it, if the court or magistrate had jurisdiction. *Morse v. James*, 7 Mod. 246.

6. An officer is justified in taking a man in execution under process of an inferior court, although the proceedings are erroneous. *Spaib v. Hole*, 2 Mod. 29.

7. An officer executing a void or illegal warrant is excusable where the court has a general jurisdiction of the cause, for this may be a mistake. *Crump v. Halford*, 4 Mod. 350.

8. Where a particular jurisdiction exceeds

its authority the officer is liable, because all is void. *Crump v. Halford*, 4 Mod. 350.

9. Though the customer of a port must by 1 El. c. 11. make a deputy, still if he certify falsely into the Exchequer, through the concealment of that deputy, he is liable for the penalties of 3 H. 6. c. 3. 2 Dy. 238, pl. 38.

10. The collectors of the window duty are only answerable for what they respectively receive, but not for the deficiency of each other. *Rex v. Inhab. of Artillery Ground, Park*. 167.

XVI. RELATIVE TO THE CIVIL REMEDY AGAINST AN OFFICER;—

(a) By action of trespass.

1. Trespass will not lie against them for replevying goods, unless the party claim a property at that time. *Hallett v. Burt*, Carth. 381.

2. If process be awarded by a court having jurisdiction of the matter, though the process be mis-awarded, the officer is not a trespasser. *Turberville* [*990] v. *Tipper*, 2 Ro. 493.

3. An officer who refuses a good bail-bond on arresting a man on mesne process is not a trespasser *ab initio*. *Smith v. Hall*, 2 Mod. 32.

4. If an officer or minister of the law is resisted or assaulted in the execution of his office, he is not bound to fly to the wall or other side. *Mackalley's case*, 9 Co. 65 b.

(b) By action on the case.

1. Case lies against an attorney appearing without warrant. *Dorington v. Edwin*, Comb. 2.

2. It lies against a summoner of the spiritual court for returning one "warned" when he was not, on which excommunication followed; and it is not necessary to show the suit or the authority of the official. *Peole v. Godfrey*, Cro. Jac. 351. Moore, 835. 1 Ro. 63.

3. Altering a record of the spiritual court is an offence of temporal cognizance, for which an action on the case will lie. *Kenton v. Wallinger*, Cro. El. 838.

4. So it lies against an officer for not inrolling a bargain and sale within six months. Mo. 126.

5. Where an officer does any thing against (or refuses to do) the duty of his place, whereby damage accrues to the party, an action lies. *Turner v. Sterling*, 2 Vent. 26.

6. An action lies against the clerk of the errors for certifying a wrong record. Anon. 6 Mod. 245.

7. Against the mayor of London for not granting a poll upon a doubtful election. *Turner v. Sterling*, 2 Vent. 25.

8. Also against a mayor and commonalty for a false certificate of the custom of London, but not against the recorder. *Day v. Savage*, Hob. 87.

9. Case lies against a mayor of a corpora-

tion for not admitting one to give his vote at election of a new mayor. *Herring v. Finch*, *comb.* 2 Lev. 250.

10. Against a returning-officer for refusing to permit a free burgess to vote. *Ashby v. White*, 2 Ld. Raym. 938. 1 Salk. 19.

11. So, against an archdeacon for refusing to induct; but not against an ordinary for refusing to institute. *Moore*, 835. 1 Ro. 63.

12. Case lies by an administrator against the bailiff of a liberty for executing a *fi. fa.*, and removing the goods off the premises before the landlord was paid a year's rent. *Palgrave v. Windham*, 1 Stra. 212.

13. Against a bailiff for concealing a *fi. fa.* after he had levied money upon it. *Bell v. Catesby*, 1 Ro. 78.

14. Against a bailiff of a franchise for the negligent execution or the false return of a writ. *Moore*, 432.

15. Action lies against a curate for erasing sentence of excommunication, and inserting the plaintiff's name. *Kenton v. Wallinger*, Cro. Eliz. 838.

16. If a judge refuse a plea which by law he ought to receive, an action on the case lies against him. 2 Ro. 498.

(c) *Proceedings in such action.*

All actions brought against the officers mentioned in 21st Jac. must be laid in the proper county; and if the plaintiff is nonsuited, or discontinued, or a verdict be against him, they shall have their double costs. *Stiles v. Cox*, Vaugh. 111—117.

XVII. RELATIVE TO THE CRIMINAL RESPONSIBILITY OF AN OFFICER;—

(a) *By information.*

The court will not grant an information against an officer for neglecting to hold a sessions, unless the neglect was wilful and corrupt. *Rez v. Halford*, 7 Mod. 179.

(b) *By indictment.*

1. If a man be made an officer by act of parliament, and misbehave himself in his office, he is indictable for it at common law; and any public officer is indictable for misbehaviour. *Anon.* 6 Mod. 96.

2. If a justice commit a person for further examination, the officer is indictable for not carrying him to prison, although he produce the prisoner on the day of the next examination. *Rez v. Johnson*, 11 Mod. 62.

3. If an officer of the court does not appear upon a bill or information exhibited against him, judgment shall be
[*991] given* against him without process. *Rez v. Pagett*, 1 Sid. 134.

OFFICE FOR THE KING.

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I. WHEN AN OFFICE IS NECESSARY.

1. In some cases, the king shall be in possession by seizure without office; in some, by office without seizure; in some, by office and seizure; in some cases, the king shall be in seisin without any office or seizure. *Reynell's case*, 9 Co. 95 a.

2. In general, an office for the king is as necessary as an entry for a common person. *Bushell's case*, Vaugh. 153.

3. In general, as the king takes by matter of record, his estate cannot be divested without office or matter of record. *Cholmley's case*, 2 Co. 50 a.

4. On a clause of re-entry, there must be an office; but if the office is found, though not returned, before the grant, yet if it is afterwards returned, the grant is good, and the lease is void by the office without seizure. *Knight v. Breach*, 5 Co. 54 b.

5. In the case of an alien person attainted, (so long as he lives), king's villein, alienation in mortmain, condition broken, &c., the freehold is not vested in the king until office found under the great seal. *Queen v. Page*, 5 Co. 52 a.

6. An office was necessary in all cases, (before the statute of 33 H. 8. c. 20.), to vest the lands of a person attainted of treason in the king. *Nichols v. Nichols*, Plow. 486.

7. A, tenant for life, remainder to B in fee; A is attainted; the king seizes; B may enter on the king; *aliter*, if an office had found A seized in fee, &c. *Linch v. Coot*, Salk. 469.

8. When the office finds the descent of a remainder, there ought to be a new office of the death of tenant for life. *Puckering's case*, Hob. 91.

9. But by the course of the court, the feodaries' certificate is allowed in such case. Hob. 9.

10. The terre-tenants shall not render recompense to the king for the profits of the lands before office found. 3 Leon. 242.

II. WHEN AN OFFICE IS NOT NECESSARY.

1. The queen becomes possessed without office of the lands of traitors and their conditions. Mo. 303.

2. An office countervails entry; and where no entry is requisite in case of a common person, there needs no office found for the king. Poph. 53.

3. No office, or *monstrans de droit*, is necessary to divest an estate in the king which depends on the estate of another. *Cholmley's case*, 2 Co. 50 a.

4. If a bishop be attainted, there is no necessity for an office, for the king is in possession without office. 2 Ro. 321.

5. Upon an information grounded on indictments against an hereditary sheriff for voluntary escapes of felons, and holding his tourn *in loco iurato*, the office may be seized into the king's hands *quousque*, without *scire facias* or other process. 2 Dy. 151. pl. 4.

6. Where the title of dower stands with the queen's title, and affirms it, the demandant on the petition need not have an office found for her; otherwise, if the title of the demandant in the petition disaffirms the queen's title. *Menville's case*, 13 Co. 19.

7. Upon contempts, where the king is only to have the profits, as in chattels *nomine pence*, he can seize without any [*992] office. *Doe dem. Sir T. Knowles v. —*, Sav. 8.

8. An estate vested in the king may be defeated by force of a condition by act of law without office. *Chobmley's case*, 2 Co. 50 a.

9. If a lease be made by the queen on condition that if the rent be unpaid the lease shall be void, upon non-payment the freehold is in the queen without office found. *Anon.* Sav. 70.

10. But the lessee is not an intruder before office; and the queen can grant before office. Mo. 291.

III. RELATIVE TO THE FORM OF THE OFFICE AND INQUISITION.

1. One joint inquisition is bad upon two writs. 2 And. 203, 204.

2. King's tenant at will may forfeit, but there must be an inquisition. *Rez v. Kemp*, Salk. 466.

3. An inquisition finding some points well, and nothing as to others, may be supplied by a *melius inquirendum*. *Layton v. Manlove*, Salk. 469.

4. *Contra*, where it is defective in the points found. *Id. ibid.*

5. If an inquisition seize two parts of the land, two parts of the advowson are seized by consequence without mention of the advowson. Hob. 127.

6. Though an office find more than is really due, yet it is sufficient. *Knight v. Breach*. 5 Co. 54 b.

7. An office finding the attainted person seized at the time of his attainder is sufficient to entitle the king, and if it find more, the residue is but surplusage. *Case of Allon Woods*, 1 Co. 40 b.

8. An office is instead of a demand of rent; and it ought to find the king's title precisely. Mo. 199.

9. Where the lands of one attainted for treason are forfeited by act of parliament from such a day, an office to entitle the king ought to find certainly what lands the party attainted was seized of at the day, or it shall be void. *Nichols v. Nichols*, Plow. 485.

10. Where upon an office found a title appears for the king, but it is not found in what degree, there the best shall be taken for the king. *Fraser v. Progers*, Skin. 178.

11. Upon an extent of lease for years, it must find the certainty of the term. 2 Leon. 121. 3 Leon. 204.

12. Upon assignment of a debt to the king, the office must find goods since the assignment only. 3 Leon. 197.

13. An inquest of office is not subject to an attainr; they are only to find naked matter of fact. *Bushell's case*, Vaugh. 153.

14. An office found before the escheator *virtute officii*, returned into Exchequer instead of the Chancery, is good. *Case of Alton Woods*, 1 Co. 40. b.

IV. WHAT OFFICES ARE GOOD.

1. An office may be good, though it be not so certain as a plea should be. Mo. 716.

2. An office finding a seisin in fee at the day of his death is good. *Gascoyn v. Longville*, Cro. Eliz. 895.

3. Where the king's title is found by one office, it is a record entire of itself, and shall not be taken as it stands in comparison with another office. *Lawrence v. King*, Aleyn, 30.

4. An office to entitle the queen to the freehold lands of an alien must be by commission under the great seal, and such office is an office of entitling, which vests the estate and possession of the land in the queen, where she had but a right or title before; the same of a purchase by the king's villein, or by a body corporate, or person attainted of felony. *Queen v. Page*, 5 Co. 52 a.

5. An office of instruction, which is, when the estate is in the king before, but the particularity of the land does not appear on record, as in the case of one attainted of high treason, king's tenant attainted of felony, and dying, &c., may be under the Exchequer seal. *Id. ibid.*

V. WHAT OFFICES ARE VOID.

1. An office is void which does not find the dying seized, and which finds some foreign matter; a *melius inquirendum* shall not issue upon a void office. Mo. 217.

2. An office finding that one died seized* of a reversion or re- [*993] mainder is void for uncertainty. Mo. 723.

3. If an office be found upon a *melius inquirendum*, which does not show the warrant of the first office, both are void. *Jon's case*, Hob. 38.

4. If found upon a *melius* after an *ignoramus*, it is void, if the *melius* were restrained to the king's tenure only, and not at large. Hob. 3.

5. It is void for not finding who was heir. 2 And. 203, 204.

6. An office found in one county of all the lands, whereof some lie in another county, is no office in law but for the proper shire. *Puckering's case*, Hob. 91.

7. An office is insufficient when it does not appear what authority the commissioners had, but generally *inquisitio capta*, &c. *coram*, &c. *virtute cujusdam commissionis eis directæ*. *Queen v. Page*, 5 Co. 52 a.

VI. WHEN AND HOW THE OFFICE MAY BE TRAVERSEED OR QUESTIONED.

1. At common law, if an office found the title of the king to a freehold, the party had no remedy by traverse, or *monstrans de droit*; but if the title of the party were found in the same office, he might then have his *monstrans de droit*; in this case, he could not enter on the king, but he might enter on the king's patentee; in all cases where, by the common law, one might have a *monstrans de droit* or traverse against the king, he might enter upon his patentee. *Holland v. Fisher*, Orl. Bridg. 218.

2. Inquisitions for the king of lands forfeited for treason are traversable. *Holt*, 376.

3. Between the return of an office and the grant of letters patent, there ought to be a month by the statute of 18 Hen. 6. that the parties might come and tender a traverse. *Frasier v. Progers*, Skin. 178.

4. It is not traversable whether it be found in the proper county or not. 2 And. 34, 35.

5. Nor whether any title was found for king. 2 And. 197.

6. He who is right heir, and grieved by the office, shall have a new writ of *diem clausit extremum* or mandamus, and may traverse the finding. *Kenn's case*, 7 Co. 45 a. *Hulme's case*, 13 Co. 61. Ley. 13.

7. The traverser of an inquisition for the king is to be considered as a defendant; and the prosecutor may carry down the record. *Rez v. Roberts*, 2 Stra. 1208.

VII. RELATIVE TO THE EFFECT OF AN OFFICE.

1. Where an office is found, if the defendant has no title, then the king has one by his office. *Rez v. Bp. of Worcester*, Vaugh. 62.

2. Where the king's interest shall commence by office before seizure, see *Laurence v. King*, Aleyn. 30.

3. An office found by a commission out of the Exchequer is not an office of entitling, but of instruction, where the king was entitled before, and serves only to instruct the king's officers of the certainty of the land, that it may be put in charge, and not to create a title in the king; an entry may be against such office of instruction. *Holland v. Fisher*, Orl. Bridg. 220.

4. A woman takes a husband, and has issue, and lands descend to her, and the husband enters, and afterwards the wife is found an idiot by office; the king shall have the land. *Plow*. 264.

5. If two parts of the land lie seized by inquisition for the king, two parts of the advowson are seized by consequence without mention of it. *Hob*. 127.

6. Nothing in deed or in law vests in the king till office. 2 Ro. 375.

7. A grant before office found is not good. *W. Jo*. 217.

8. By the office and award of the seizure, the king is in possession without any writs or commission awarded for that purpose. *Reynel's case*, 9 Co. 95 a.

9. An office neither determines any man's right, nor does any party put any trial upon it. *Bushell's case*, Vaugh. 153.

VIII. RELATIVE TO THE PLEADING AN OFFICE.

An office for the king must be pleaded under the great seal. 1 Leon. 65.

ORDER* OF JUSTICES. [*994]

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I. GENERAL RULES RELATIVE TO THE FORM OF ORDERS, AND THEIR CONSTRUCTION.

1. Special orders assigning a reason must contain certainty. *Holt*, 507, 508.

2. In a special order of sessions, nothing is to be intended; and the whole case must be taken to be stated. *Parish of Woolstanton v. Utazeter*, Andr. 372.

3. An order, if certain to a common intent, is good. Between the *Parishes of Radcliffe and Exall*, Stra. 211.

4* In an order of sessions, the [1906] court presumes "*omnia esse rite acta*." 1 Saund. 313. n. (1).

5. Where, in a sessions order relating to a settlement, several circumstances are set out inducing fraud, this is not sufficient, unless the fraud be expressly found. *Parish of Woolstanton v. Parish of Utazeter*, Andr. 362.

6. In orders relating to settlements, the court must take the facts for granted as they are set forth, notwithstanding there appear circumstances sufficient to induce the belief of a fraud. *Frenckham v. Pepperbarrow*, 10 Mod. 293. *Horton v. Houghton*, 10 Mod. 393. S. P.

7. Where an order gives a special reason for a settlement, and the conclusion in point of law will not warrant the premises, B. R. will rectify their judgment, but will not examine into the fact where they give no reason at all. Between the *Parishes of Ryslip and Hendon*, Holt, 572. 557.

II. RESPECTING THE FORMATION AND DIFFERENT PARTS OF AN ORDER:—

(a) By what justices it should be made.

1. An order made by justices who are not said to be of the division, is good, for the sta-

tute is only directory. *Rex v. Ashley*, 12 Mod. 138.

2. Order signed separately by two justices not present together, is bad. *Walter v. Rumbal*, 1 Ld. Raym. 55.

3. They must appear to be justices of the peace in the order itself. *Walton v. Chesterfield*, 5 Mod. 322.

4. Orders by justices residing in the county, not enough, without saying "of" or "for" the county. *Rex v. Dobbyn*, Salk. 474.

5. An original order must show one of the two justices to be of the quorum. *Rex v. Inhabitants of Standish*, Burr. Sett. Ca. No. 50.

6. A justice of peace ought not to join in an order relating to himself; such an order may be quashed. Holt, 517. Salk. 607.

(b) At what sessions; and herein respecting an adjournment.

1. Orders on 43 Eliz. c. 2. must be said to be *ad quaterteralem sessionem*, &c. *Rex v. Turnock*, Salk. 474. *Purnall's case*, Salk. 476.

2. An order of sessions mentioned to be made at Michaelmas, and respited from the last translated sessions, is good without showing where the latter were held. *Parishes of Woolstanton and Utazeter*, Andr. 372.

3. Otherwise in case of an adjourned sessions. S. C. Andr. 372.

4. The sessions by an order stated the special circumstances, and adjourned the further consideration of a case before them; and another sessions, by a second order, proceeded to adjudication; held, that a regular continuance was not necessary to appear upon the face of the second order. *Rex v. Reading*, C. T. Hardw. 79.

5. In orders of sessions, it is necessary to show the commencement of the sessions, but not the adjournment. *Rex v. Inhabitants of Middlessex*, Andr. 101.

6. Where an order is made at an adjourned sessions, it must appear the sessions began in time. *St. Michael Coalany v. St. Matthew's*, 2 Stra. 832.

(c) Relative to the statement of the county.

1. An order of two justices must show the county in which it was made. *Anon.* 11 Mod. 266.

2. The order for maintaining a bastard child must specify in what county it was born. *Rex v. Green*, C. T. Hardw. 364.

3. In an order of justices, it is sufficient that the county appear in the margin. Between the *Parishes of Spalding and Bourn*, C. T. Hardw. 122.

4. But a sessions order against selling ale, &c. was quashed, because the county was only in the margin, and not in the body of the order. *Rex v. Austin*, 8 Mod. 309.

5. Where two counties are previously mentioned, "county aforesaid" is bad for uncertainty. *The parishes of Chesham in Bucks, and Stepney in Middlesex*, C. T. Hardw. 100.

(d) *Relative to the time*

If a time for presenting be limited by the statute creating an offence, the precise day, both of the offence and of the order, must be shown in an order of justices of the peace; but if no time be limited, it is not necessary to show either day. *Rex v. Bissez*, Say. 306.

Salk. 369.

[*996] (e)* *When it should be in writing.*

1. Where a statute directs a complaint to be made in writing, it must be recited so. *Rex v. Furness*, Stra. 264.

2. An order of a justice, discharging a servant, must be in writing, because it is an act of jurisdiction. *Rex v. Inhab. of Hanbury*, Burr. Sett. Ca. No. 115.

(f) *Relative to the statement of the evidence.*

1. It is not necessary to set out the evidence in an order of justices. Say. 305. Andr. 81. S. P.

2. On removal of a clerk of the peace, the evidence need not be set out in the order. *Rex v. Lloyd*, 2 Stra. 996.

3. But if an order appear to be made on insufficient evidence, it is ill. *Rex v. Inhab. of Bedell*, Andr. 10.

4. A sessions order reciting the evidence only, without stating facts, is bad. *Rex v. Inhab. of Markley*, Andr. 151.

(g) *Relative to the summons.*

It is not necessary to set forth the summons, or appearance. *Rex v. Inhab. of St. Leonard Shoreditch*, Stra. 630.

(h) *Relative to the presentment.*

Where in an order a presentment is stated, "whereby it appears," &c., this is sufficient. *Rex v. Inhab. of Middlesex*, Andr. 101.

(i) *Relative to the adjudication.*

1. In an order, there must be either an express adjudication, or a plain reference. *Rex v. Inhab. of Bourne*, Burr. Sett. Ca. No. 12.

2. The sessions need not set forth the reasons of their judgment. Salk. 607, 608.

3. An adjudication was held good, though following a recital. Between the *Parishes of Chesham and Stepney*. C. T. Hardw. 100.

4. An order of two justices was quashed, because it was "doth adjudge," instead of "do adjudge." *Reg. v. Weston*, 2 Ld. Raym. 1198. *Green v. Pope*, Holt. 107.

5. An order was quashed for want of an adjudication. *Rex v. Inhab. of Mansfield*, Burr. Sett. Ca. No. 188.

III. RESPECTING THE FORM AND VALIDITY OF PARTICULAR ORDERS;—

(a) *In relation to apprentices.*

1. The sessions may originally make an order for discharging an apprentice, and may order the master to refund part of the money; it must appear that the master was summoned. *Rex v. Dillon*, 12 Mod. 498.

2. Where in a special order of sessions relating to the settlement of a poor apprentice, it is stated, that the indentures were allowed and confirmed by two justices, with-

out saying "*quorum unus*," it is bad. Between the *Parishes of Woolstanton and Utoseter*, Andr. 371.

3. Justices cannot order a sum of money to be paid for drawing indentures of apprenticeship, but should order a rate to levy so much per week, till a convenient sum be raised. *Anon.* 12 Mod. 417.

4. Discharging an apprentice without assigning a good reason, is ill. *Rex v. Davie*, Stra. 704.

5. An order to bind a poor child out an apprentice should mention the churchwardens. *Rex v. Fairfax*, Holt. 570, 571.

6. When the justices discharge an apprentice, they may order a restitution of the money. *Dillon's case*, Holt. 68.

(b) *In relation to constables.*

1. In the exercise of their jurisdiction, over the appointment of constables conferred on the sessions by statute 13 & 14 Car. 2. c. 12, the statute must be strictly pursued; thus an order of sessions for the appointment of constables in Chepstow "for a year, or until others are chosen," instead of "until the lord holds his court," was held bad. *Rex v. Davis*, C. T. Hardw. 282.

2. An order of sessions, that a constable shall return money and plate, &c., is good. *Reg. v. Lloyd*, Comb. 204.

(c) *In relation to orders of bastardy and filiation.*

1. In an order of justices adjudging one to be the reputed father of a bastard child, it must appear that one of them was of the quorum, and that the examination was by two. *Rex v. Somerton*, 12 Mod. 393.

2.* An order of filiation, made on the examination of one jus- [*997] tice, is bad, although two justices made the adjudication; for the examination is a judicial act, and both must be present. *Rex v. West*, 6 Mod. 180. 11 Mod. 59. S. C.

3. An order of bastardy must be on complaint of overseers. *Rex v. Adams*, 11 Mod. 294.

4. In an order of bastardy made at the session, a summons will be presumed. *Rex v. Cleg*, Stra. 475.

5. An order of bastardy need not say that the child is chargeable. *Rex v. Gribble*, 11 Mod. 293. *Rex v. Wentworth*, lb. 306.; and *Rex v. Jenkins*, lb. 340.

6. It must appear in the order that it was a bastard. *Atkinson v. Spence*, 5 Mod. 420.

7. In an order of bastardy, it must appear that the child was born in the parish to which relief is ordered. *Rex v. Butcher*, Stra. 437.

8. The justices may order a sum in gross to maintain a bastard child. *Atkinson v. Spence*, 5 Mod. 419.

9. An order upon the father of a bastard, to give security for indemnifying the parish

for the future, is good. *Rez v. Miles*, 10 Mod. 271.

10. An order to pay so much, disbursed for a bastard child, and other necessary charges, is bad. 11 Mod. 294.

11. An order upon a reputed father, to pay so much until the child is ten years old, and then so much as an apprentice fee, is bad. *Rez v. Atkins*, 11 Mod. 172. Ib. 294.

12. An order on a reputed father to pay the child so much, and the mother so much a-week for ten years, is bad. *Rez v. Collins*, 11 Mod. 178.

13. Where an order of bastardy appears to be made on the evidence of the mother (who was a feme covert), "and on other proof," this is sufficient, though the wife's evidence alone is not good. *Rez v. Inhab. of Bedell*, Andr. 8. C. T. Hardw. 379. S. C.

14. And in the same case, an order of sessions made for quashing the original order because the husband was alive, was held ill; as it appeared the husband had no access. S. C. Andr. 8.

[See also *ante*, tit. BASTARD, div. VII. Vol. I. p. 220.]

(d) *In relation to orders of maintenance.*

1. Justices cannot make an order of maintenance, except on complaint of the overseers. *Rez v. Inhab. of Puttenham*, 11 Mod. 222.

2. An order to pay money to a poor person, must mention him to be poor and impotent. *Rez v. Inhab. of Hyworth*, Stra. 10.

3. An order cannot be made to compel the husband to allow maintenance to his wife and family while resident with them. *Rez v. Davison*, 11 Mod. 268.

4. An order of maintenance for an excessive sum, is bad. *Anon.* 11 Mod. 59.

5. An order of justices to pay money for the relief of a poor person, until further order, is good. *Rez v. Grilly*, 10 Mod. 308.

6. An order upon a father-in-law to maintain his son's widow, quashed, because not expressed that he was of sufficient ability. *Reg. v. Dunn*, 10 Mod. 221.

7. An order of sessions for the maintenance of a daughter, quashed; because not said she was unable to work. *Rez v. Gully*, 10 Mod. 307.

8. An order for relief of H and four poor children, was quashed, because not expressed that H was indigent. *Reg. v. Inhab. of Manchester*, 10 Mod. 220.

9. An order of justices for maintenance of a poor child dropped in Christ-church hospital, was quashed. *Salk.* 485.

(e) *In relation to overseers.*

1. An order appointing overseers "for the year ensuing" is good. *Rez v. Inhab. of Farlow*, 11 Mod. 403.

2. An order appointing overseers, may be removed before appeal. *Rez v. Harman*, 7 Mod. 287.

3. Justices may order the last overseers to

pay their successors what money is in their hands. *The Churchwarden of Topham's case*, *Salk.* 484.

4. Yet an order that one overseer shall return 3l. fraudulently obtained, held ill, for he ought to be indicted. *Anon.* Comb. 287.

5. The justices cannot make an order on the overseers to pay a surgeon's bill for attending a pauper. *Rez* [*998] *v. Belsim*, 11 Mod. 178.

(f) *In relation to scavengers.*

An order appointing scavengers (on 2 W. & M. c. 8.), without showing them to be able persons, is ill. *Rez v. Justices of Middlesex*, Andr. 72.

(g) *In relation to rates.*

1. The sessions, on appeal of particular persons, may set a side a poor-rate, and make a new rate, or order the churchwardens, &c. to make one. *Case of Parish of St. Leonard's*, Holt, 508, 509.

2. An order for raising vagrant money ought to be made quarterly or half yearly, and to specify the time for which it is raised. *Rez v. Justices of the Peace of Middlesex*, Stra. 1028.

3. The justices cannot make a standing rate, or confirm an old rate, for it may grow unequal. *Rez v. Inhabitants of Audley*, Holt, 576.

4. An order for a parish to contribute so long as the justices shall think fit, is ill. *Rez v. Inhabitants of St. Mary the Virgin in Marlborough*, Stra. 700.

5. An order for contribution to scavengers' rates is good. *Lewesley v. Budd*, 5 Mod. 68.

6. When in an order for repairing a bridge, a general rate is laid on the parishes, &c., and the churchwardens are directed to assess the inhabitants, this is good on 1 Anne, sess. 1. c. 18. *Rez v. Inhabitants of Middlesex*, Andr. 101.

7. An order for repairing a bridge, setting out that it is a public bridge, and out of repair, is sufficient, on 1 Anne, sess. 1. c. 18., without showing by whom it ought to be repaired. Andr. 285. S. C.

8. The justices charged all the inhabitants generally to the scavenger's rates, according to the statute of 2 W. & M., and the question between inhabitants of N was, whether the inhabitants of that part of the parish which inhabited within the county, out of the paving, should be contributory to the assessments for the paving; the order was confirmed, for the words of the act are general; and where the law does not distinguish, the court ought not. *Case of Parish of Newington Butts*, Skin. 643.

9. In an order made by two justices to tax parishes in aid, it must appear that the parishes taxed are within the hundred; and therefore, if it only states them to be within the county, it is bad, for by the 43 Eliz. c. 2., it is the sessions only that can tax the county,

if the hundred is unable to afford relief. *St. Benedict v. St. Peter, Norwich*, 11 Mod. 269.

10. An order for a parish to contribute must be in a sum certain. *Rez v. Inhabitants of Telcombe*, 1 Stra. 314.

(h) *In relation to servants.*

Justices cannot by their order annul a contract between master and servant, under colour that the servant is a poor person, &c. *Between the Parishes of Farringdon and Wilcot*, Holt, 577, 578.

(i) *In relation to a surgeon's bill for the cure of a pauper.*

An order of justices on the parish to pay a surgeon for curing the leg of a poor person was quashed, for that it did not appear that the churchwardens and overseers employed the surgeon. *Case of Inhabitants of St. Paul*, Fort. 313.

(j) *In relation to orders to prosecute.*

An order of sessions to prosecute a man as a common barretor, at the charge of the county, was quashed. *Reg. v. Savill*, 2 Ld. Raym. 871.

(k) *In relation to orders, acquitting or convicting.*

The authority given to justices out of sessions, in cases of bastardy, is by stat. 18 Eliz. c. 3., and which confers no power to convict or acquit; therefore an order made by such justices to acquit or discharge the person charged with being the putative father of a bastard child, is bad. *Rez v. Jenkin*, C. T. Hardw. 301.

(l) *In relation to a special order.*

A special order of sessions ought not to conclude to the opinion of B. R. *Anon.* Salk. 486.

(m)* *In relation to a conditional order.*

[*999] 1. Justices of the peace cannot make a conditional order of removal. *Oakham v. Whittlesea*, 11 Mod. 171.

2. Order made conditional, "if B. R. be of such opinion," may be quashed. *Grindon v. Overcott*, 12 Mod. 323.

3. An order of sessions for one to relieve his father, till sessions order the contrary, is good. *Jenkin's case*, Salk. 534.

IV. WHEN SEVERAL ORDERS ARE NECESSARY.

1. Two persons cannot be removed by one order, although to the same parish, if their settlements are independent of each other. *Rez v. Tutton*, 11 Mod. 356. *Between the Parishes of Cheuton and Crompton Martin*, Stra. 471.

2. Orders on two different statutes must be distinct. *Between Inhabitants of Eaton Bridge and Westram*, Salk. 487.

V. RELATIVE TO THE REMOVAL OF AN ORDER.

1. An order of justices cannot be removed until after appeal. 7 Mod. 10.

2. When two justices make an order, they may certify it to the sessions, and then the sessions are legally possessed of it, and

it is removable by *certiorari*. *Rez v. Marlborough*, 12 Mod. 402, 403.

3. A general order cannot be removed by a special *certiorari*. 7 Mod. 97.

4. If an order for which an appeal lies be removed by *certiorari* before appeal, it ought not to be filed until the court is informed of the matter, and then they will grant a *procedendo* notwithstanding a *certiorari*. 6 Mod. 40.

5. On *certiorari*, the justices can only return the order in *hac verba*. *Between the Inhabitants of Westons Rivers, and St. Peters Morby*. Salk. 493.

6. Defect of an order cannot be made good by matter alleged in the return. Salk. 493.

VI. RELATIVE TO APPEALS.

1. An appeal to the next quarter sessions after notice is good, but it ought to appear so in the order, and that the appellant has no notice of the intervening sessions. Comb. 218. 418.

2. An order of sessions upon appeal need not say of the party grieved. *Rez v. Inhabitants of Almunbury*, Stra. 96.

[See ante, tit. APPEAL, div. II. Vol. I., p. 77.]

VII. RESPECTING THE CONFIRMATION OF AN ORDER.

1. The court of K. B. *ex debito justitiae* is bound to confirm an order, if nothing appears why it should be set aside. *Overcott v. Grindon*, 12 Mod. 376.

2. Motion to affirm order of sessions, on the ground, that although it had been removed into K. B. two terms, no proceedings had been had thereon, granted, unless cause shown before the end of the term. *Rez v. Inhabitants of Oulton*, C. T. Hardw. 206.

VIII. OF THE CONFIRMATION OF AN ORDER IN PART.

An order of justices or of sessions may be confirmed in part and quashed in part. *Rez v. Fox*, Say. 311. Comb. 287. 1 Sid. 150. *Bridges v. St. Mary-le-bone*, 11 Mod. 65. *Reg. v. Simmons*, 11 Mod. 136.

IX. RELATIVE TO THE SUPERSEDING OF AN ORDER.

1. Justices of the peace may supersede their own orders for surprise. *Parishes of St. Pancras and Rumbold in Essex*, Stra. 60.

2. They may alter and set aside their own orders the same sessions, for the sessions are but one day in law; but if the justices alter their judgment and make a new order, they must certify only the latter. *Between Inhabitants of St. Andrew's and St. Clement's Danes*, 2 Salk. 494. 606. Holt, 511, 512. 6 Mod. 287.

3. A subsequent order is a virtual repeal of a prior order to the same effect. *St. Clement's v. St. Andrew's*, 6 Mod. 287.

4. Where an order of two justices was superseded only by the sessions, the order of sessions was quashed in B.* R., because the sessions have power [*1000] to quash or affirm, but not to

supersede. *Rex v. Harwell*, 5 Mod. 306. *Rex v. Inhabitants of Oking*, 3 Salk. 256. 2 Salk. 472.

X. RELATIVE TO THE QUASHING OF AN ORDER.

1. An order was quashed for want of showing that the justices had jurisdiction. *Rex v. Inhabitants of Stepney*, Burr. Sett. Ca. No. 8. Stra. 300.

2. An order of sessions on appeal is final, though the statute does not expressly say so, and the court of King's Bench cannot examine the fact, but only quash the order if contrary to law on the face of it. *Anon.* 12 Mod. 20.

3. An order of sessions quashing an order of removal by two justices of A, reciting that they had perused the charter of A, and that it did not appear thereby that either was of the quorum, quashed. *Parish of Albrighton v. Parish of Skipton*, 1 Stra. 300.

4. The sessions having returned reasons for quashing an order of justices by which a magistrate was appointed overseer of the poor, held, that unless such reasons appear clearly wrong, and to have been the only ones acted upon, sufficient cause is not manifest to the court for reversing the decision founded upon them. *Rex v. Gayer*, Keny. 492.

XI. OF THE MOTION TO QUASH AN ORDER.

1. A motion to quash an order of sessions, or an order of justices of the peace, cannot be made upon the last day of the term. *Rex v. Shepard*, Say. 66.

2. An order of bastardy cannot be excepted to unless the party be in court. *Rex v. Inhabitants of Bedell*, Andr. 10.

XII. RELATIVE TO THE AMENDMENT OF AN ORDER.

The sessions cannot amend orders by adding new averments, or amend in any matter of substance. *Rex v. Inhabitants of Great Bedwin*, Stra. 1158. Burr. Sett. Ca. No. 58. S. C. Andr. 67.

XIII. EFFECT OF AN ORDER WHEN NOT APPEALED AGAINST.

1. An order of two justices binds against all parishes till repealed. *Between the Inhabitants of King's Norton and Swoolhill*, Salk. 481. 492. 524. 527.

2. An order of two justices not appealed from is final upon the parish upon which it is made, till a new settlement is gained. *Between the Inhabitants of Chelbury and Chipping Farrington*, Salk. 488, 489. *Rex v. Inhabitants of Berkswell*, Burr. Sett. Ca. No. 60. Ib. No. 96.

3. That parish is concluded against all the world. *Rex v. Inhabitants of Silchester*, Burr. Sett. Ca. No. 176.

XIV. EFFECT OF DISCHARGING, REVERSING, OR QUASHING, AN ORDER.

1. An order discharged binds the contending parishes. *Rex v. Inhabitants of Cirencester*, Burr. Sett. Ca. No. 6. 127. Holt, 577.

This rule holds only where the circumstances remain the same. *Rex v. Inhabitants of Osgathorpe*, Burr. Sett. Ca. No. 89.

3. It only binds the contending parishes, and not a third parish. *Rex v. Inhabitants of Bentley*, Burr. Sett. Ca. No. 135. Stra. 232. S. P. *Between the Inhabitants of Myn-ton and Stony Stratford*, Holt, 577.

4. An order reversed upon appeal is final to the parties, but does not bind a third person. *Somerby v. Stretton*, 11 Mod. 309. *Between the Inhabitants of St. Michael Bedingham and Kingston Bowrey*, 2 Salk. 486. *Between the Parishes of Swancomb and Shinsfield*, Salk. 492. 524. 527.

5. If, upon an appeal to an order of removal, it be quashed upon the merits, the quashing is conclusive upon the parish removing, as to the parish to which the removal was; if it be confirmed upon the merits, the confirming is conclusive upon the parish to which the removal was, as to all parishes. *Rex v. Inhabitants of Bradenham*, Say. 287.

6. A reputed father shall be bound over, although the order of bastardy be quashed. 11 Mod. 59.

7. The first order failing, all the subsequent orders fall to the ground. *Anon.* Salk. 482.

8.* If order of justices be quashed in B. R., the order of [*1001] sessions fails. *Anon.* 12 Mod. 548.

9. The validity of a previous order of two justices held so far to depend upon the special facts stated in a subsequent order of sessions, that if these be insufficient to maintain the adjudication of the sessions, the order of the two justices, as well as that of the sessions, will be quashed. *Rex v. Reading*, C. T. Hardw. 79.

XV. EFFECT OF CONFIRMING AN ORDER.

1. If an order of justices is confirmed on appeal, the appellants are concluded. 12 Mod. 548.

2. An order confirmed at sessions binds the parish charged as against all the world. Burr. Sett. Ca. No. 127. Holt, 577. Salk. 492. 524. 527. *Ph. of Little Bitham v. Somerby*, Stra. 232. *Sed vide* Carth. 516.

3. So if it be not appealed from. *Rex v. Minton*, 12 Mod. 668. *Rex v. Inhabitants of Woodchester*, Burr. Sett. Ca. No. 67.

XVI. EFFECT OF A NEW ORDER ON APPEAL.

The sessions must either reverse or affirm an order; they cannot make a new order on a third parish; a subsequent order on an appeal cannot make good a void order. *Anon.* Holt, 508. 3 Salk. 254.

XVII. EFFECT OF AN ORDER INCONSISTENT WITH A FORMER ONE.

If the sessions make an order directly contrary to an order before made in the same sessions, the last order shall prevail, although

there be no express words of repeal in it. *St. Clement's v. St. Andrew's*, 6 Mod. 287.

XVIII. REMEDY FOR DISOBEYING AN ORDER.

1. The sessions cannot commit a man for disobeying an order of filiation, but must proceed on his recognizance. *Rex v. West*, 11 Mod. 59.

2. An indictment lies for disobeying an order for the relief of a poor man made at the quarter sessions; but if it is not expressed in the order to be made at the *quarter sessions*, it is bad. *Rex v. Turner*, 5 Mod. 329.

3. An indictment lies for not paying the costs of an appeal to a poor's rate, pursuant to an order of sessions. *Rex v. Boys*, Say. 144.

4. In an indictment for disobedience to an order of sessions, the order of sessions ought to be set out in the words thereof. *Rex v. Boys*, Say. 143.

XIX. COSTS, WHEN PAYABLE.

Costs are not to be paid where any material part of an order (removed into K. B. by *certiorari*) is quashed. *Rex v. Inhabitants of Madley, in Staffordshire*, Stra. 1198.

ORDER OF A COURT.

An order made at a mineral court at Mendipp, that the defendant should forfeit his mineral tools and goods, and be banished from the hills for ever, was held to be against law; such order of an inferior court can be warranted only by statute or custom. *Anon.* 4 Mod. 148.

ORDINARY.

1. By the ancient canon law, there was but one bishop who had sole jurisdiction, and was the immediate ordinary throughout. *Jones v. Jones*, Hob. 186.

2. Probate of wills did not originally belong to the ordinary. *Grandison v. Dover*, 3 Mod. 24.

3. If the executors refuse to prove the will, he may grant administration till they do it. *Coll v. Bishop of Coventry*, Hob. 144.

4. The ordinary may enforce the executors to pay debts upon contracts, as well as legacies or marriage money. *Edgcomb v. Dee*, Vaugh. 97.

5. The ordinary originally had nothing to do with the estate of an intestate, for *bona intestati capi solent in manus regis*. *Abraham v. Cunningham*, 2 Mod. 148. 3 Mod. 25. S. P.

6. But by 13 Edw. 1. c. 19., and the 31 Edw. 3. c. 11., he has a property [*1002] in the goods of intestate, not absolutely, but conditionally. 2 Mod. 148.

7. An action lay against him at common law, if he got the goods and refused to pay

the intestate's debts. 3 Mod. 25. *Snelling v. Norton*, 5 Co. 82 b. Noy, 53. Cro. Eliz. 409. S. C. *Sed vide* 3 Mod. 60. Plow. 277. 280. *contra*.

8. Before the statute of Westm. 2., he was alone intrusted with the distribution of the intestate's estate; but by that statute, he was bound to pay debts as far as he had assets. *Palmer v. Allicock*, 3 Mod. 59.

9. By the statute of the 31 Edw. 3. c. 11., he was bound to grant administration to the next of kin; afterwards, by the statute of 2 Hen. 8., he was compelled to grant it to the widow or next of kin, or both. S. C. 3 Mod. 60.

10. He cannot grant administration where there is an executor named in the will. 2 Mod. 149.

11. He might have committed administration of the goods of intestates before the statute of 31 Edw. 3. c. 11., and such administrators were in all respects in the same plight with the ordinary himself. *Graysbook v. Fox*, Plow. 278. 280. 290.

12. Before the statute of distributions, he always took a bond of the administrator to distribute as the ordinary should direct. 3 Mod. 60.

13. He cannot maintain an action in right of an intestate. *Masters v. Lewis*, 1 Ld. Raym. 57.

14. He cannot sue for or release any debts due to intestates. *Graysbook v. Fox*, Plow. 277. 278.

15. He cannot compel an administrator to distribute the surplusage. *Slawney's case*, Hob. 83. 191.

16. On a plaint against him, the intestate's goods cannot be attached. *Masters v. Lewis*, 1 Ld. Raym. 56.

17. The distribution or disposing of seats or pews within the body of the church, and the charges of repair, belong to him. *Boothby v. Baily*, Hob. 69.

18. No ornaments can be set up in the church without the consent of the ordinary. *Palmer v. Bishop of Exon*, Stra. 576.

19. He cannot appoint churchwardens. *Staller v. Frestar*, Stra. 52.

20. He must see the cure served, if the parson fail, at his own costs. *Coll v. Bishop of Coventry*, Hob. 144.

21. If he celebrate divine service in any parish, he may require the offering of that day. *Coll v. Bishop of Coventry*, Hob. 144.

22. The ordinary can sequester, if the patron do not present, and the incumbent cannot be deprived. *Coll v. Glover*, 1 Ro. 453. Hob. 144. S. C.

23. A donative is exempt from the ordinary's jurisdiction, yet the clerk of it may be punished by ecclesiastical censures, but not to deprivation. *Finch v. Harris*, 12 Mod. 640, 641. *Vide* 1 Ro. 453., *contra*.

24. An ordinary, as to the examination and institution of a clerk, is not a minister,

but a judge. *Hele v. Bishop of Exeter*, 4 Mod. 135.

25. An appeal lies from his sentence to his metropolitan. *Cart v. Marsh*, Str. 1080. Flow. 277. 282.

ORIGINAL WRIT.

1. In actions by original, there must be fifteen days between the teste and the return, both of writs and process. *Gately v. Gillingham*, 11 Mod. 260.

2. A bill in K. B. is considered as an original writ. 2 Saund. 1. n. (1.)

3. A *cap. ad rest.* is proof of its having been sued out. 2 Saund. 1 s. n. (1.)

4. An original is determined by death or outlawry. *Coak v. Hamilton*, 10 Mod. 369.

5. It does not abate by the demise of the crown, by 1 Anne, c. 8. *Reg. v. Hire*, 10 Mod. 258.

6. The want of an original writ was formerly cause of reversal, but that was remedied by statute 18 Eliz. c. 4.; but where there is an original writ, which in matter of substance varies from the declaration, the defect is not remedied by that statute. *Yelv. 118. Bishop v. Harcourt*, 5 Co. 37 a. 11 Mod. 2 S. P. 1 Saund. 318. 2 Id. 101 s.

7. But a vicious original writ is now cured after verdict by the stat. Geo. 1. 1 Saund. 288 b. n. [h].

8. The word "attached" instead of "summoned" does not vitiate, even on special demurrer. 1 Saund. 317 a.

9.* The court will now amend [*1003] any defect in the original arising from the misprison of the clerk. 11 Mod. 2. n.

10. Defendant cannot take advantage of a bad original, but upon oyer, or *certiorari*. *Essex v. Thurston*, W. Kely. 138.

11. And oyer cannot be demanded. 1 Saund. 9 c. n. [f]. 318 a.

12. So that no advantage can now be taken of a defective original, or a variance between it and the declaration. 1 Saund. 318 a.

13. Upon an original writ, no writ of error lies to the exchequer chamber. 1 Saund. 346 f. n. (4).

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I. WHO MAY BE OUTLAWED.

1. The king's servant may be outlawed. T. Raym. 152.

2. Anciently no person could be outlawed but for felony and treason, and the punishment was death; but afterwards, process of outlawry was ordered to lie in all actions that were *quare vi et armis*; and since, by divers acts of parliament, outlawry lies in debt, account, case, &c. *Rex v. Eardberry*, Fort. 37.

3. Though defendant appears publicly, yet, if he keep out of the way of an arrest, he may be outlawed. *Bennet v. Sydenham*, 1 Barnes, 230.

4. In case of a total absconding, no endeavours to arrest are necessary. *Farnworth v. Smith*, 2 Barnes 260.

5. Persons committing treason of any sort may be outlawed while beyond sea; the statutes 26 Hen. 8. c. 13., and 5 & 6 Edw. 6. c. 11., extending to all treasons. 3 Dy. 287. pl. 49.

6. But persons beyond the seas may not be legally outlawed, unless in the particular* cases especially provided for. *Thornby v. Fleetwood*, 10 mod 357.

7. A man in prison ought not to be outlawed by him who imprisoned him. *Anon.* 2 Vent. 46.

8. Outlawry of an infant is not void, but voidable by error. 2 Dy. 239. pl. 39.

9. A feme covert outlawed without her husband, was discharged on motion. *Griffith's case*, 12 Mod. 444, 445.

II. IN WHAT ACTIONS OUTLAWRY LIES.

1. Outlawry lies not but where the suit is by writ. *Crew v. Bailes*, 1 Leon. 329.

2. Outlawry does not lie in detinue of charters. 2 Dy. 222. pl. 33.

3. No outlawry at the suit of an attorney upon a writ of privilege. *Crew and Bail's case*, Prac. Ca. K. B. 87.

III. IN WHAT COUNTY IT SHOULD BE.

1. The *capias* on which the writ of *exigent* lies, must be into the county where the action is brought; if it issue on the *testatum* into a foreign county, it is error. 3 Dy. 295. pl. 18.

2. Outlawry in a foreign county is regular, if in the county where the action arose. *Norton v. Gilbert*, Ca. Prac. C. P. 78.

IV. HOW THE PROCEEDINGS SHOULD BE.

1. The *capias alias*, and *pluries* may be sued out together. *Farnworth v. Smith*, 2 Barnes, 260.

2. On process to outlawry, no affidavit for bail is required. *Id. ibid.*

3. Date to such process is not usual. *Id. ibid.*

4. A *capias* thereupon must be returnable the term ensuing. *Nector v. Gennet*, Cro. Eliz. 467. 21 H. 7. 16. 8 Ed. 4. 4.

5. The defendant has till the *quarto die post* to appear to the *exigent*. *Colt v. Holl*, Co. Prac. C. P. 28.

6. Upon outlawry, he ought to appear in person; but, upon affidavit of sickness, the court will give leave to appear by attorney; but the entry ought to be in *propria persona*. *Anon.* Cro. Jac. 462. 615.

7. The return ought to set forth the particular days on which proclamation was made. *Anon.* Coldsb. 97. Prac. Ca. K. B. 164.

8. If a *capias utlagatum* be executed on Sunday, the defendant may be discharged, but an attachment will be denied. *Osborn v. Carter*, Ca. Prac. C. P. 90. 1 Barnes, 228.

9. On a *capias utlagatum* returned *non est inventus*, defendant appearing *gratis* cannot plead to the outlawry, for the plaintiff is out of court; nor is it known that he is the party outlawed, unless brought in by a *cepi corpus*. 2 Dy. 192. pl. 25.

10. A man is not outlawed till the writ is returned of record. *Anon.* 1 And. 36. pl. 91.

11. In London, the recorder passes judgment of outlawry. 3 Dy. 317. pl. 6.

V. RESPECTING AMENDMENTS.

An outlawry upon murder was faulty, and the court awarded a *certiorari* to the cor-

oners, that they might amend it. *Plumme's case*, Palm. 480.

VI. RESPECTING A SUPERSEDEAS.

1. After return of the *exigent*, but whilst in the hands of the sheriff, a *superseas* allowed on payment of costs. *Witball v. White* 2 Barnes, 261.

2. *Superseas* to the *exigent* should be delivered to the sheriff before return. *Peach v. Wadland*, 1 Barnes, 229.

VII. EFFECT OF DEATH;—

(a) Of the plaintiff.

1. If an *exigent* be awarded against one, and after, he is *quinto exactus*, and before the return of the *exigent*, he dies, yet the outlawry shall stand in force. *Hartland v. Yates*, Prac. Ca. K. B. 161.

2. Proceedings refused to be stayed, where plaintiff died after the day of outlawry, but before the return. *French v. Manby*, 2 Barnes, 262.

3. A *capias utlagatum* issued after plaintiff's death without revival by *sci. fa.* was set aside. *Rex v. Manby*, Barnes, Supp. 45.

(b) Of the defendant.

A *capias utlagatum* cannot be [*1005] sued out after the death of the defendant. *Burlow v. Dickson*, Ca. Prac. C. P. 36.

VIII. CONSEQUENCES OF OUTLAWRY.

1. Outlawry is a conviction in treason and felony. *Rex v. Earler*, Fort. 40.

2. The law accounts the person outlawed guilty of the fact. *Reg. v. Simpson*, 10 Mod. 379, 380.

3. The court cannot give judgment against persons outlawed for felony unless they are present, it being for a corporal punishment. *Rex v. Harrison and Duke*, 12 Mod. 156. Holt, 399.

4. One outlawed for a misdemeanor only cannot be thereon fined for the fact. *Rex v. Tippin*, 2 Salk. 494.

5. The blood is corrupted and estate forfeited. *Reg. v. Simpson*, 10 Mod. 379.

6. Upon outlawry for lesser crimes, or in personal actions, the party is put out of the protection of the law, and shall be imprisoned if found. S. C. 10 Mod. 380.

7. He forfeits all his goods and chattels to the king. 10 Mod. 380.

8. Debts or duties due by simple contract are forfeited by outlawry. *Slade's case*, 4 Co. 92 b.

9. Likewise the issues and profits of his lands, as long as the outlawry remains in force. *Thoraby v. Fleetwood*, 10 Mod. 358, 359. *Reg. v. Simpson*, 10 Mod. 380.

10. On a *levari facias de exitibus terre* upon an inquisition on a *capias utlagatum*, cattle of a stranger levant and couchant upon the outlaw's land may be taken and sold. *Britton v. Cole*, 1 Ld. Raym. 306. 12 Mod. 175. 5 Mod. 118. S. C.

11. The king may dispose of the land itself

of a person outlawed by the course of the Exchequer. T. Raym. 17.

12. Outlawry on mesne process does not make the debt a lien on the land. *Ery v. Ery*, Salk. 80.

13. The special *capias utlagatum cum ex-tradi facias* does not authorize the sheriff to sell the goods taken under it. 2 Dy. 222. pl. 23.

14. The king is not entitled to the real estate or chattels real without office, but to chattels personal he is. 12 Mod. 177.

15. Copyhold lands are not liable to be seized upon an outlawry, because it would be prejudicial to the lord of the manor. *Rez v. Budd*, Park. 190.

16. A disseisee outlawed shall not forfeit his lands. *Beverley v. Archbishop of Canterbury*, Owen, 3.

17. The king under an outlawry may redeem a mortgage, and so may a subject after a lease granted by the crown, and not before. *Attorney-General v. Barnett*, Park. 268.

18. Alienation before inquisition taken is a bar to the king; and so also after inquisition and before seizure, except as to the issues and profits. *Semb. Thornby v. Fleetwood*, 10 Mod. 359. 409. 12 Mod. 176. *Britton v. Cole*, 1 Ld. Raym. 307.

19. A lease or other estate made by a person outlawed, after outlawry and before inquisition taken, will prevent the king's title, if it be made *bona fide* and upon good consideration. *Attorney-General v. Freeman*, Hard. 101.

20. By outlawry, a lease for years is forfeited before seizure; and if sold before seizure, the king shall avoid the sale. *Anon.* 12 Mod. 438.

21. If a man be imprisoned at the time of the outlawry pronounced, he will forfeit his goods; for they are forfeited by the award of the exigent. *Carter's case*, 2 Ro. 11.

22. After outlawry in a personal action, and before seizure, the party outlawed may alien; thus, if he levies a fine, the connusee shall retain against the king; otherwise, if the seizure be before the fine levied, the king shall not be ousted of his pernamcy. *Windesore v. Seynoll*, T. Raym. 17. 1 Lev. 33. S. C.

23. If lands are seized into the king's hands upon an outlawry, the person outlawed cannot by any act of his defeat the king's interest, but a stranger that has a right may. *Attorney-General v. Fox*, Hard. 422.

24. Lease rendering rent made by the queen to an outlaw is good, and not forfeited; but if the queen's lessee be outlawed, the term is extinguished, and is not revived by a general pardon. *Knowles v. Poesel*, Mo. 237.

25. If the plaintiff in *quare impedit* after judgment be outlawed, the queen shall have *est. fe.* to execute the judgment. Mo. 241.

26.* A person disabled by outlawry may sue for the king, though [*1006] he cannot sue for himself. 2 Mod. 267.

IX. RELATIVE TO THE LESSEE OR TENANT OF AN OUTLAW.

1. Lessee of an outlawed person cannot maintain trespass, but must be relieved by *monstrans de droit*. *Britton v. Cole*, 1 Ld. Raym. 307.

2. A lessee of an estate, upon an outlawry, shall be compelled to account for the profits which he might have received, with a creditor of the person outlawed who has an interest in the same lands by extent. *Master v. Whitefield*, Hard. 106.

X. HOW THE INQUISITION SHOULD BE.

In an inquisition upon an outlawry, the jury find A seized in fee of a messuage, and of several pieces and parcels of lands in T, in the occupation of such and such, and find the value; they find likewise a seisin in fee of two marshes in T by particular names, and their values, and in whose occupation; Cory and others appeared as terre-tenants, and demurred; the inquisition was held to be certain enough as to the marshes, and that an inquisition may be good in part and void for the remnant, as where several values are found; and that here was a good terre-tenant, though the land was only found to be in his occupation, and that they might join in demurrer, though their occupations were several. *The Protector v. Cory*, Hard. 59.

XI. RESPECTING THE REVERSAL OF AN OUTLAWRY;—

(a) *What is a good ground for reversing an outlawry.*

1. If the defendant be in prison or beyond sea at the time of the exigent awarded, the party or his executors or administrators may have a writ of error to reverse the award of the exigent. *Fozley's case*, 5 Co. 109 a. *Skin. 16.* 1 Barnes, 228, 229.

2. An administrator obtained judgment, and died; his executors sued a *scire facias* on the judgment, and outlawed the defendant; held, the outlawry is erroneous. *Brudnel's case*, 5 Co. 9 a.

3. An outlawry may be reversed for not saying that the county court was held *pro comitatu*. *Rez v. Oneby*, 1 Show. 309. 2 Show. 60. 1 Vent. 108. 3 Mod. 90.

4. An outlawry must state where the county-court was held, or else it is reversible. *Rez v. Cope*, 11 Mod. 173. *Rez v. Yeates*, 12 Mod. 542. 544.

5. Outlawries reversed for want of the words "by judgment of the coroner." *Memo-randum*, 2 Show. 60.

6. So, it was reversed for want of the party's addition in an indictment. 2 Leon. 200. Cro. Jac. 616.

7. Outlawry reversed, because the original was against Lewellin with a single l,

and the other proceedings with a double *U. Prac. Ca. K. B.* 162.

8. Outlawry reversed in debt against A and B, and judgment given, and a *capias* against B only, because it ought to have been against both. *Beverley v. Beverley*, Cro. Eliz. 648.

9. Outlawry reversed without writ of error, for the omission of the words "*tribus se-paralibus diebus*" in the writ of proclamation. 2 Dy. 206. pl. 10.

10. An outlawry is bad where there are several, if it be said *non comperuit*, but do not say, *nec eorum aliquis comperuit*. *Anon.* 3 Mod. 90. 2 Show. 60. Palm. 388.

11. If, in a record of outlawry, the year of our Lord be written in figures, instead of in words at length, it is erroneous. *Rex v. Read*, 2 Show. 60.

12. Outlawry reversed, because in the *exigent* no place is mentioned for the sheriff to have the body. *Cesar v. Stone*, Prac. Ca. K. B. 163.

13. So, because *exigent* bore teste after the return of it. Prac. Ca. K. B. 165.

14. So, for incorrect language, as *utlest* for *utlegatus est* in the *exigent*. — *v. White*, Prac. Ca. K. B. 166.

15. "*Utlegatus*" for *utlagatur*," reversed. *Reg. v. Wooms*, 1 Lev. 164.

16. If the party be outlawed the day on which he was *quinto exactus*, it is error, for he has all the day for appearance. *Archer v. Dalbye*, Palm. 280.

17. Outlawry reversed by pardon, which related to the first of November, [*1007] the* defendant being *quarto exactus* the twenty-third of November. *York v. Allen*, Prac. Ca. K. B. 162.

18. Reversed, because the defendant had before purchased *supersedeas*. Mo. 73. 1 And. 36.

(b) *How it should be reversed.*

1. Outlawry for treason cannot be reversed without the consent of the attorney-general. *Halloway's case*, 3 Mod. 42.

2. On error to reverse an outlawry for felony, a *scire facias* must issue. *Reg. v. Stelford*, 10 Mod. 188.

3. Otherwise, where the outlawry is for treason. *Reg. v. Simpson*, 10 Mod. 188, 189.

4. Before outlawry for murder can be reversed, a *scire facias* must go to all the lords mediate and immediate, or else the attorney-general must confess on record that there are no lands or tenements. *Rex v. Young*, 12 Mod. 544, 545. *Arthur's case*, 1 Ld. Raym. 154. Salk. 495, S. C.

5. Held, that outlawry is a personal action in K. B. cannot be reversed without writ of error. 2 Ro. 25.

6. The coroner on *certiorari* returning defendant duly outlawed, is not sufficient to make him an out-law; and the court will reverse it without writ of error, if it appear that the defendant delivered a *supersedeas* at the fifth county court. 2 Dy. 222. pl. 23.

7. If a *capias utlagatum* go into Middlesex against a defendant, called late of *London*, alias *dictus* of M, in the county of K, and the proclamations were in K, when in fact he was commorant in Middlesex, he may avoid the outlawry under 6 H. 8. c. 4, without writ of error; but if the action be brought in another county than *London* or *Middlesex*, the proclamations need not be where he is commorant; and if he be wrongly named in the writ, he may avoid it by the statute of additions. 2 Dy. 213. pl. 44.

8. Outlawries in trespass *quare clausum fregit*, defendants have a right to reverse at their own expense, on entering common appearances and payment of costs. *Ashley v. Stockwell*, 2 Barnes, 263.

9. Held, that outlawry could not be set aside on affidavit that the defendant was beyond sea; this being a ground of error, and not merely an irregularity. 1 Ld. Raym. 349. *Peach v. Wadland*, 1 Barnes, 228, 229.

10. But it is now held to be discretionary in the court to relieve by motion, or put parties to a writ of error. *Ashley v. Stockwell*, 2 Barnes, 264.

11. Defendant need not appear in person to reverse it, except in treason or felony; though formerly otherwise. *Anon.* Salk. 496. *Sir W. Read's case*, Palm. 194.

12. Where the outlawry is against baron and feme, error to reverse it must be by both of them in person. Cro. Eliz. 611.

13. If two are outlawed, error to reverse it must be in the name of both; but one of them may be summoned and severed, and then it shall be only for his benefit that appeared. *Symmons v. Briscoe*, Salk. 496.

14. In a writ of error to reverse an outlawry, the same outlawry is no good plea. T. Raym. 462.

15. The court will not assign counsel in an outlawry in treason, until the prisoner has showed material error. *Rex v. Griffin*, &c., Mod. 168.

(c) *When bail is necessary on reversal.*

1. On a writ of error to reverse an outlawry, bail may be put in at any time before the reversal. *Wilbraham v. Doyley*, 1 Ld. Raym. 605. *Duckett v. Martin*, Stra. 951.

2. On reversing an outlawry, the court have a discretionary power to order special or common bail. *Serescold v. Hampson*, 2 Stra. 1178.

3. In personal actions, outlawry may be reversed without putting in bail. *Rex v. Earberry*, Fort. 39.

4. If one comes in or appears *gratias*, he may reverse it without bail; *aliter*, if by *cepi corpus*. Salk. 496.

5. An outlawry commenced and prosecuted during defendant's residence in Ireland, reversed without bail or appearances. *Reilly v. O'Connor*, Barnes Supp. 45, 46.

6. One outlawed for a seditious libel was

bailed on bringing a writ of error. *Res v. Erbury*, 8 Mod. 177. Fort. 39. S. C.

7. In error to reverse outlawry for matter of law, he need not give bail to [*1008] the* original action, as he must for want of proclamations. *Wilbraham v. Derby*, 12 Mod. 545.

8. Defendant was outlawed, and the court were of opinion that in a case requiring special bail, he could not appear without putting in bail. *Combrell v. Daley*, Prac. Ca. K. B. 166. 3 Burr. 1920.

9. Upon outlawry on an indictment, the court refused to bail the defendant. *Res v. Earberry*, Fort. 39.

10. The recognizance of special bail to reverse an outlawry is to answer the condemnation money; other special bail is "or to render the body to prison." *Wilbraham v. Daley*, 12 Mod. 545, 546. *Anon.* Ca. Prac. C. P. 29.

(d) *In the case of an outlaw surrendering himself.*

1. One apprehended by an officer may surrender within the year, in order to reverse an outlawry for treason. *Res v. Johnson*, Stra. 624. Comb. 298.

2. Formerly, an outlawry for treason, if the party was taken within the year, but did not render himself, he had not the benefit of the statute 5 & 6 Ed. 6. c. 11.; but in such case, the benefit of the statute is now allowed. *Armstrong's case*, 3 Mod. 47. *Id. notis.*

(e) *When the plaintiff may be compelled to reverse the outlawry.*

1. If a person who is visible be outlawed, the outlawry shall be reversed at the charge of the plaintiff. *Hill v. Wilks*, 12 Mod. 418.

2. If a person visible be outlawed in the same county where he dwells, the court will not oblige the plaintiff to reverse the outlawry; *aliter*, if in another county. *Hayes v. Langbotham*, Ca. Prac. C. P. 61.

3. Plaintiff is not compellable to reverse an outlawry at his own expense, except on account of misbehaviour; where there is a mistake or error in law, reversal must be by writ of error. *Lloyd v. Williams*, C. T. Hardw. 193.

(f) *Consequence of reversal of outlawry;—*

1. With respect to the outlaw's property.

1. Upon reversal of outlawry, party can enter into his lands, and is not put to his petition of right. *Anon.* 1 And. 188. pl. 223. Ib. 277.

2. Goods sold by the sheriff on a *capias utlagatum* shall be restored to the party on reversal of the outlawry, though a sale of goods on a *fi. fa.* shall not be avoided by a subsequent reversal of the judgment. *Hoe v. Boulton*, 5 Co. 89 b. Mo. 468. S. C.

3. If goods be seized into the king's hands in an outlawry, there shall be no restitution, though the outlawry be reversed. *The Banker's case*, 5 Mod. 61.

4. If an outlawry be reversed, the party shall be restored to money levied on the *capias utlagatum*, though paid into the Exchequer. *Buckley v. Wilkinson*, 2 Show. 68.

5. If he reverse the outlawry for error, he shall have *sci. fa.* to remove the incumbent of the queen; but if one having an advowson be outlawed, and the church is void, and the queen presents and then the outlawry be reversed, the incumbent cannot be removed. Mo. 269.

2. With respect to proceedings previously commenced against him.

1. Though outlawry be reversed, the original stands. March 9. pl. 12.

2. On reversing an outlawry, the plaintiff may declare in a new original in another county than where the action was first laid. *Whitwick v. Hovenden*, 3 Lev. 245.

3. Outlawry before judgment determines the process, and the plaintiff must bring a new action; otherwise, if after judgment. *Leighton v. Garnon*, Cro. Eliz. 706, 707.

4. If there be an outlawry upon an indictment, and the outlawry is reversed, the indictment stands good, and open to proceed upon. *Morgan v. Tomkins*, 6 Mod. 115.

XII. RESPECTING THE PLEA OF OUTLAWRY.

1. Outlawry in the husband cannot be pleaded where he and his wife sue as administrators. *Sween v. Porter*, Hard. 60.

2. It bars not an *audita querela* if brought upon the same record. *Edgar v. Crisp*, 2 Leon. 175, 176.

3. The outlawry of the plaintiff may be* pleaded to an action [*1009] or information *qui tam*, although the penal statute empowers any person to sue or prosecute; and if the outlawry be in the same court in which the informer sues, it need not be pleaded *sub pede sigilli*. 2 Mod. 267, 268.

4. It is a good plea in trover, or debt upon bond, but not upon simple contract. *Markham v. Pitts*, 2 Leon. 205.

5. Outlawry in Lancaster is pleadable in B. R.; but outlawry in Chester is not. 3 Salk. 111.

6. It may be pleaded in abatement, though it might be pleaded in bar. *Semb. Powis v. Williams*, Lutw. [683, 684.] 1604.

7. Outlawry is no plea after imperlance. 2 Ro. 59. *Contra*, *Wortly v. Savil*, W. Jo. 239.

8. It need not be alleged that a *cap. utlagatum* after judgment issued in term time. Lutw. [116.]

9. Outlawry in another court, pleaded in abatement must be pleaded *sub pede sigilli*. *Moore v. ———*, Com. 307, 6 Mod. 181.

10. Otherwise, when pleaded in bar, or if the outlawry is in the same court. *Moore v. ———*, in note, Com. 307. *Atkins v. Baylis*, 2 Mod. 267.

11. To a plea of outlawry in abatement, plaintiff replies *comorance* in another vill; adjudged a good replication. *Anon.* 1 Leon. 87. pl. 108.

12. To avoid an outlawry, a man may show that he was living at the place the day the writ was purchased. *Mo.* 70.

13. Outlawry cannot be avoided by a plea (in a collateral action) that the outlaw had not a right addition of the place of his abode. *Draycot v. Curzon*, Lutw. [17, 18.] 40.

14. Defendant pleads outlawry in the plaintiff, who replies *nul tiel record*; the fact was, that at the time of the plea he was outlawed, but before the day for bringing in the record it was reversed; court awarded a *respondens ouster*. *Isay v. Gray*, Cro. Jac. 484. *Prac. Ca.* K. B. 165.

15. A plea of outlawry does not abate the writ; it is only a disability of the person till he sues out a charter of pardon. *Rex v. Earberry*, Fort. 38.

16. When the cause of action accrues at a time a person is outlawed, a plea of outlawry overthrows the writ, and after removal of outlawry must begin *de novo*; but where the disability comes after the cause of action accrued, the plea of outlawry is only a temporary disability, and does not abate the writ, but only *quousque*. *Lady Falkland v. Stacion*, 12 Mod. 400.

XIII. RESPECTING A CERTIFICATE OF OUTLAWRY.

1. A writ to certify an outlawry in London, shall, by the custom there, be directed to the sheriffs. 3 Dy. 317. pl. 6.

2. Yet, though their certificate is good for the king, it is not so for a subject; and if the *exigent* itself be not returned, the outlawry is not pleadable in disability. 3 Dy. 317. pl. 6.

XIV. RESPECTING THE PREFERENCE OF AN OUTLAWRY AS AGAINST A JUDGMENT.

A, indebted to B on a judgment, and to C on bond, is outlawed at the suit of C, and his lands seized; the outlawry shall be preferred before the judgment (except fraud be shown). *Attorney-General v. Baden*, Salk. 495.

XV. RESPECTING THE ESCAPE OF AN OUTLAW.

1. On an outlawry after judgment, if the person be taken by a *capias utlagatum*, and then escape, though the *capias* is at the suit of the king, yet the prisoner shall be in execution at the suit of the party, and not at the suit of the king for contempt of his laws. *Wolfe v. Davison*, 5 Mod. 200.

2. An action lies for an escape of a prisoner outlawed. *Cooke q. t. v. Champneys*, 2 Stra. 901.

XVI. OF THE REMEDY AGAINST THE SHERIFF FOR NOT EXTENDING THE OUTLAW'S GOODS.

An action on the case will not lie for the party who has an outlawry against a sheriff who neglects to extend the goods of the outlaw upon the writ of *capias utlagatum*, for

that is the king's loss. *Dawson v. Sheriffs of London*, 2 Vent. 90.

OVERSEER.* [*1010]

1. A clergyman is exempted from serving the office of overseer; and by 1 W. & M. c. 18., dissenting ministers; and by 31 G. 3. c. 32., Roman Catholic priests are, under certain conditions, exempted from serving the office of overseer. *Anon.* 6 Mod. 140. Id. note.

2. A citizen of London, who has a country house at H, but lives most part of his time in London, cannot be chosen overseer of the poor at H. *Rex v. Moor*, Carth. 161.

3. An order appointing overseers must state them to be substantial householders of the parish, pursuant to the words 45 Eliz. c. 2. *Rex v. St. Andrew's*, 6 Mod. 77. Case of *Overseers of Woolly*, 4 Stra. 1261.

4. An order of justices appointing five overseers for the same place is bad. *Rex v. Harman*, 7 Mod. 402.

5. A *mandamus* lies to appoint overseers in an extra-parochial place. *Rex v. Inhabitants of Rufford*, Stra. 512. 1004. 1071. 1143.

6. Where overseers of the poor are appointed by two justices, there lies no appeal to the sessions. *Rex v. Moor*, Carth. 160.

7. A *certiorari* lies to remove an appointment of overseers before appeal. *Rex v. Harman*, 7 Mod. 287.

8. Overseers may be appointed at any time of the year. *Rex v. Sparrow*, 2 Stra. 1123.

9. They may be appointed after the time mentioned in the 43 Eliz. c. 2. is expired. *Rex v. Spencer*, 7 Mod. 393.

10. If a person be duly elected overseer, and refuse to execute the office, he may be indicted. *Rex v. Jones*, 7 Mod. 410.

11. Overseers are not obliged to lay out their own money for the use of the parish, and if they do, they can only be reimbursed out of the money arising from a poor's rate made during their continuance in office. *Rex v. Littleport Parish*, 6 Mod. 97.

12. For a *mandamus* will not be granted to the new overseers to make a rate to reimburse the old ones. S. C. 3 Salk. 232.

13. Overseers of the poor can distrain and justify for a rate imposed upon one in the parish by the 43 Eliz. c. 2. *Anon.* 2 Ro. 112.

14. The sessions cannot meddle with overseers' accounts till allowed by two justices. *Rex v. Bartlett*, 2 Stra. 963.

15. In a *mandamus* to make overseers account, it must appear that they could not have the ordinary remedy. *Rex v. Shepton Mallet*, 5 Mod. 421.

16. Overseers may be indicted at sessions for not accounting. *Rex v. Commings*, 5 Mod. 179. *Rex v. Hemmings*, 3 Salk. 187.

17. A vestry cannot order the sessions to

retain the balance of their accounts. *Res v. Justices of Somersetshire*, Stra. 992.

18. If an overseer deliver an account to two justices pursuant to 43 Eliz. c. 2, they cannot commit him because the account is not sufficiently particular. *Res v. Carrocks*, 1 Show. 395.

19. On an indictment of overseers for neglect, the appointment must be produced; parol evidence is not sufficient. *Res v. Arnold*, Stra. 101.

OXFORD.

1. The privilege of the University is not allowed to townsmen, so as to excuse one from office who keeps a shop and follows a trade, though he be matriculated and servant to a doctor. *City of Oxford's case*, 2 Vent. 106.

2. Privilege is not allowed to a member of this University in a suit in Chancery. *Sir T. Draper v. Dr. Crowther*, 2 Vent. 362.

OYER.

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X. CONSEQUENCES OF NOT GRANTING IT, p. 1013.

I. OF WHAT OYER MAY BE DEMANDED.

1. Where a prior recovery in the same court is pleaded, oyer must be given. *Hunter v. Wiseman*, Stra. 823.

2. On plea of another action depending in the same court, oyer may be prayed of the record. *Theobald v. Long*, 1 Ld. Raym. 347.

3. Where the deed is in the hands of a third person, the court will oblige him to give oyer and produce it. *White v. Earl of Montgomery*, 2 Stra. 1198.

4. Oyer cannot be dispensed with, though the deed be lost. *Soresty v. Sparrow*, Stra. 1186.

5. If the defendant swears that he never had one part of the indenture, or that he has lost it, the court will sometimes compel the plaintiff to give a copy of it, but it is *ex gratia curie*, and notes *debito justitia*. *Jevens v. Harridge*, 1 Saund. 9.

II. OF WHAT OYER CANNOT BE DEMANDED.

1. Defendant cannot demand oyer of the condition in an action of debt upon a recog-

nizance acknowledged in another court. *Chamber's case*, Poph. 202. Prac. Ca. K. B. 170.

2. Oyer of an original will not be granted. *Ford v. Burnham*, 1 Barnes, 250.

3. Oyer of the baron's fiat for an extent cannot be had; but when appearing upon the writ, the court are bound to take notice of it. *Res v. Mann*, Stra. 749.

4. Where the deed or writing is only produced as evidence, and the action is not founded on it, the defendant cannot have a copy. *Hill v. Aland*, Salk. 215.

5. When the deed is not in court, and no profit is made, no oyer can be had. *Jevens v. Harridge*, 1 Saund. 9. 2 Saund. 405.

6. Oyer need not be given of a writing unnecessarily brought into court. *Green v. Waller*, 2 Ld. Raym. 892. *Morris's case*, Salk. 497. 1 Saund. 9 a. n. [d].

7. But it is otherwise where the profit, though necessary, might have been excused. 1 Saund. 9 a. n. (1).

III. WHEN IT IS NECESSARY TO DEMAND OYER.

1. Variance between the writ and the count cannot be pleaded without craving oyer; for though it be in court, it is on a distinct roll from the count. *Bragg v. Digby*, 12 Mod. 189. 2 Salk. 658. S. C.

2. In covenant on an indenture of apprenticeship, the defendant cannot, without first praying oyer of the indenture, plead that the covenants therein are performed. *Foxen v. Mosely*, 6 Mod. 153.

3. If a party declaring on a deed, with a profit, misrecite it, or omit any part, the defendant should crave oyer and set out the deed, and then demur; he cannot say "that it was further agreed, &c." (without demanding oyer). *Stibbs v. Clough*, Stra. 227. 1 Saund. 9 b. Id. 317. n. (2). 2 Saund. 367.

4. If the omission or variance be material, the defendant shall have judgment thereon, but not if the variance be immaterial to the action, though it would be fatal on *non est factum*. 2 Saund. 367. n. [a].

IV. WHEN NOT.

1. Oyer of a bond need not be prayed, if the condition alone be material. 1 Saund. 9 c. n. (1).

2. If a *scire facias* recite a recognizance incorrectly, advantage may be taken of it without oyer of the writ. *Res v. Ewer*, 7 Mod. 9.

3. If a deed be set out on the declaration so much at length that nothing farther will appear on oyer, the defendant may demur without it. 2 Saund. 367. [*1012]

V. WHAT SHOULD BE DEMANDED.

Oyer of part of a deed cannot be had without the other. 1 Saund. 9 c. n. (1).

VI. AT WHAT TIME OYER SHOULD BE DEMANDED.

1. Oyer of letters patent cannot be demanded after the expiration of the term in which

the profit of them is made. *Anon.* 1 Mod. 69.

2. Oyer is not grantable after imparlance to another term. *Mayor of London v. Gorney*, 2 Lev. 142. *Longueville v. Thistleworth*, 2 Ld. Raym. 970., *semb. contra.*

3. After a plea in abatement, there cannot be oyer of the original, though demanded in the same term. *Longueville v. Hundred of Thistleworth*, 2 Ld. Raym. 970. 6 Mod. 28. S. C.

4. Oyer must be demanded before time for pleading expires. *Duke of Leeds v. Vevers*, 2 Barnes, 208. *Hartley v. Varney*, Ca. Prac. C. P. 96. 1b. 73. *Down v. Rowell*, 7 Mod. 295.

5. The defendant has one day after the rule to plead is out. *Littlehales v. Smith*, Ca. Prac. C. P. 73.

6. Where oyer was demanded after rule to plead was out, the court would not grant a stay of judgment, though there was an affidavit not for delay. *Farrance v. Brignall*, 1 Barnes, 163. 234.

VII. BY WHOM GRANTED.

1. Oyer is craved of the court, and not of the adverse party. *Holt*. 211.

2. Formerly all demands of oyer were made in open court, as they must now be in case of appeals; but now it is demanded and granted between the attorneys. *Longvill v. Thistleworth*, 6 Mod. 28.

3. The entry on the will of an indenture of which oyer has been prayed supposes the indenture to be brought into court by the defendant. *Jevens v. Harridge*, 1 Saund. 9.

VIII. WHAT A PARTY IS ENTITLED TO ON OYER GRANTED.

1. The party craving oyer undertakes to set out the whole. 1 Saund. 9 b. n. (1.); but see p. 317. n. (2). *Longman v. Rogers*, 2 Barnes, 200.

2. Oyer of a bond does not entitle a party to oyer of the condition. 1 Saund. 9 b. n. (1). 289. n. (2).

3. *Secus* of a deed and its indorsement. 1 Saund. 9 c. n. (1).

4. A defendant, who prays oyer of a deed, is entitled to a copy of the attestation and the names of the witnesses, as well as of every other part of the deed. *Langman v. Rogers*, Willes, 288.

5. When prayed of a bond, the bond regularly ought to be entered at large. 1 Saund. 9 b. n. (1). 317. n. (2).

6. In debt upon bond for performance of covenants in an indenture, after oyer of the condition, the defendant ought by law to show the indenture, and not the plaintiff. 1 Saund. 9. 12.

IX. EFFECT OF OYER BEING DEMANDED AND GRANTED.

1. The demand of oyer is a kind of plea, and it is always intended that the deed is in court when oyer is demanded. *Anon.* 3 Salk. 119.

2. A deed remains in court all the term it

is produced; *aliter* of letters testamentary, or administrations. *Roberts v. Arthur*, 2 Salk. 497. 12 Mod. 598, 599.

3. A defendant who has oyer is not bound to insert it in his plea. *Weavers' Company*, q. t. v. *Forrest*, 2 Stra. 1241.

4. Where defendant craves oyer, and has it, but makes it no part of his plea, yet the plaintiff may make up the issue with oyer. *Weavers' Company v. Ware*, 2 Barnes, 266.

5. Where defendant demands oyer of a deed indented which he himself ought to set forth and the plaintiff gives oyer, but imperfectly, it is at the defendant's peril. *Cook v. Remington*, 2 Salk. 498.

6. Matter set out on oyer becomes part of the preceding plea. *Smith v. Yeomans*, 1 Saund. 317. Id. n. (2). *Hob.* 217. 233.

7.* Where upon craving oyer of a bond and condition, it is entered [*1013] *in hæc verba*, the condition is parcel of the declaration, and not of the defendant's plea. *Gage v. Acton*, Carth. 513.

8. The defendant is entitled to a reasonable time to plead after oyer given. *Hammond v. Horner*, Ca. Prac. C. P. 72.

9. He has the same time to plead after oyer given as he had at the time that oyer was demanded. *Theedham v. Jackson*, Ca. Prac. C. P. 81. 1 Barnes, 158. *Simpson v. Duffield*, Ca. Prac. C. P. 143. 1 Barnes, 185. S. C. *Powell v. Gay*, Stra. 705.

10. If, upon oyer of an indenture, the conclusion appears to be that both parties have put their hands and seals thereto, it shall be intended that the truth was so until the contrary is shown. *Pordage v. Cole*, 1 Saund. 320.

11. Where in an action of covenant the declaration does not import that the instrument for which it is brought is a deed, if it is set out upon oyer, and concludes with "in witness whereof I have hereunto set my hand and seal," this will not help the declaration, for sealing is a fact which ought positively to be averred, or something set forth in the declaration which necessarily imports it. *Moore v. Jones* 3 Stra. 814. 2 Ld. Raym. 1536. S. C.

12. The entry on the roll was that the defendants pray oyer of an indenture for performance of covenants which was not brought into court; upon a general demurrer, it shall be intended to be the true indenture, and that it is in court, although it does not appear so by the record. 1 Saund. 9.

13. If oyer is given when it need not, advantage may be taken of it. 1 Saund. 9 a. n. [d]. 316. a. n. (2). *Cook v. Reinagle*, 6 Mod. 237.

X. CONSEQUENCES OF NOT GRANTING IT.

1. Where oyer ought to be granted, the defendant is not bound to plead without it. *Longvill v. Hundred of Thistleworth*, 6 Mod. 28.

2. An imperfect oyer if received is suffi-

cient. *Ball v. Bail of Russel*, 2 Ld. Raym. 1176. Salk. 602.

3. Where the defendant pleads a record of the same court in abatement, and the plaintiff craves oyer thereof, if it is not given in convenient time, viz. the next day, the plaintiff may sign judgment. *Theobald v. Long*, Carth. 453. 517. 1 Ld. Raym. 347. Keilw. 95. *Blaxand v. Burges*, 1 Barnes, 168, 169.

4. Denial of oyer where it ought to be granted is error. *Longavil v. Hundred of Isleworth*, 2 Salk. 498. Holt, 518. 1 Saund. 9. c. n. (1). 2 Saund. 46 b.

5. But not so, if granted where it ought not. Id. ibid. 2 Saund. 46 b. n. (7).

6. To bring error, the party insisting on oyer must enter his prayer on record. 1 Saund. 9 c. n. (1). Holt, 518.

7. The other party may either counter-plead or demur. 1 Saund. 9 c. n. (1).

PAPIST.

1. A papist who has not taken the oaths, &c. (though under an incapacity to hold by stat. 11 & 12 W. 3.) may devise lands to a protestant. *Mallon d. Marsh v. Bringloe*, Willes, 75.

2. He may sell to a protestant by statute 3 G. 1. c. 18. Willes, 75.

3. He may charge lands by a bond, &c. *Semb. Willes*, 75.

4. A papist may devise his estate to be sold in order to pay money which he owes to protestants or to other papists, notwithstanding the statute 11 & 12 W. 3. c. 4. *Mattim v. Binglee*, Com. 570. Willes, 75. 82. n. (a).

5. A mortgage by a popish heir may be redeemed by the next protestant kin. *Jones v. Meredith*, Com. 661.

6. A conviction is not necessary to disable a papist from devising lands in Ireland. *Rice v. Outfield*, 2 Stra. 1096.

7. A devise of a term in trust for a papist held void. *Winter v. Birmingham*, 9 Mod. 146, 147.

8. A devise to a papist could not be made before the statute 18. G. 3. 1 Saund. 279 b.

PARCENER.

[See ante, tit. JOINT-TENANT, p. 824.]

PARDON.*

[*1014] I. IN WHOM THE POWER OF PARDONING RESIDES, p. 1014.

II. WHAT MAY BE PARDONED, p. 1014.

III. WHAT CANNOT BE PARDONED, p. 1014.

IV. RESPECTING THE FORM OF A PARDON: WHETHER IT SHOULD BE GENERAL, OR SPECIAL, p. 1014.

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VI. RELATIVE TO THE AMENDMENT OF A PARDON, p. 1015.

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VOL. II.

IX. RELATIVE TO THE ALLOWANCE OF A PARDON; AND WHEN AND HOW IT SHOULD BE PLEADED, p. 1017.

I. IN WHOM THE POWER OF PARDONING RESIDES.

1. The power of pardoning all offences is an inseparable incident to the crown and its royal power, *Rez v. Parsons*, 1 Show. 284.

2. If the king grant away his fines, that does not extinguish his power of pardoning, for that is inseparably annexed to him. 12 Mod. 119. 1 Ld. Raym. 214.

II. WHAT MAY BE PARDONED.

1. The king at common law had power to pardon all offences; and if murder be named, there needs *non obstante*; but by Will. & Mary, c. 2, no dispensation by *non obstante* shall be allowed. *Rez v. Parsons*, 1 Show. 284. Ib. 283 *notis*.

2. The king may pardon the burning of the hand in an appeal, and this discharges the imprisonment. *Shugborough v. Biggins*, 5 Co. 50 a. Mo. 571. Cro. Eliz. 632. 682. S. C. *Searle v. Williams*, Hob. 293. *Smith v. Bowen*, 11 Mod. 254. *Contra*, T. Raym. 370. *Rez v. Eelie*, Mo. 571.

3. Forestalling the market, engrossing, or the like, may be pardoned like other offences, so as the persons shall not be impleaded otherwise than by the persons who have received particular damage which the king cannot remit. *Thomas v. Sorrel*, Vaugh. 333.

4. The king may pardon a transient nuisance, but a continued nuisance cannot be pardoned so as to acquit the nuisance-maker for committing it, but the fine or punishment imposed for the doing thereof may be pardoned. *Thomas v. Sorrel*, Vaugh. 333.

5. All proceedings in the ecclesiastical court *ex officio* are for the king, and therefore the king may pardon them. *Cook v. Hall*, 5 Co. 51 a.

6. He may pardon a suit there, even after sentence. Hob. 82.

7. Suits in the ecclesiastical court *pro salute animæ*, or for reformation of manners between party and party, may be pardoned by the king, but not suits where the plaintiff has an interest and property in the thing in demand. *Cooke v. Hall*, 5 Co. 51 a.

III. WHAT CANNOT BE PARDONED.

1. Although the suit be for the king, yet when sentence is given and the costs taxed, the king cannot pardon them, notwithstanding an appeal from the sentence. *Cook v. Hall*, 5 Co. 51 a.

2. Although in an action popular the king shall have the suit solely in his own name, yet he cannot by his pardon discharge the offender. *Case of Pardons*, 12 Co. 30.

3. If one be bound to the king in a recognizance to keep the peace, the king cannot, before the peace is broken, pardon or release the recognizance. Id. ibid.

IV. RESPECTING THE FORM OF A PARDON WHETHER IT SHOULD BE GENERAL OR SPECIAL.

1. For felony, a pardon by implication will suffice, but not for treason, for there must be express words. *Sir W. Rauleigh's case*, 2 Ro. 50.

2. The king has power to pardon murder by general words. *Rez v. Coney*, 3 Mod. 37. 2 Show. 334. *Skin*. 157. *Sed vide Rez v. Parsons*, Salk. 499.

3.* A pardon of murder by the [*1015] words *feloniam intfectionem* was allowed. *Rez v. Davies*, Comb. 39. Mo. 752.

4. A pardon of killing and felony, &c., is no pardon of murder. *Rez v. Howard*, T. Raym. 13.

5. A pardon of manslaughter does not extend to murder. *Anon. J. Kely*. 24.

6. A pardon for felony with a clause for transportation was allowed. *Anon.* Comb. 16.

7. A pardon is good without recital of the indictment, if supplied by other words. *Clerk's case*, T. Jones, 56. 1 Sid. 211. *Contra, Reg. v. Foxworthy*, Holt, 521. 1 Sid. 366.

8. But a pardon by patent of all robberies, where there is a conviction by verdict of a robbery in particular, is not good. *Rez v. Maddocks*, 1 Sid. 430.

9. A pardon was held void, because no mention was made that the party had abjured. *Anon. J. Kely*. 28.

10. By the statute 13 Rich. 2. the king could not pardon by general words; the 16 Rich. 2. repealed part of the 13th as a grievance to the people. *Rez v. Parsons*, 1 Show. 283. Salk. 499. S. C.

11. A pardon of all offences, except offences in collecting of the king's revenue, means of the stated revenue, and not what arises by any forfeiture. 3 Mod. 242.

12. By a general pardon of treason, &c., and all that the king can pardon, simony is not pardoned. *Phillips's case*, 1 Sid. 170.

13. Solicitation of chastity was held to be excepted out of an act of pardon under the words "adultery and other enormous crimes." *Oswald v. Sir H. Everard*, 1 Ld. Raym. 637.

14. A suit commenced for dilapidation, which is to have satisfaction for damages sustained, is not pardoned by these general words, viz. "offences, contempts, and penalties." *Pool v. Trumbull*, 3 Mod. 56.

V. OF CONDITIONAL PARDONS.

Pardon of murder on condition; the condition must be performed, and the court will not suffer a third person to prevent it. *Reg. v. Foxworthy*, Holt, 521.

VI. RELATIVE TO THE AMENDMENT OF A PARDON.

A pardon of murder may be amended by inserting the word "*attincturas*." *Reg. v. Foxworthy*, 7 Mod. 153.

VII. EFFECT OF A PARDON.

1. Where a crime is pardoned, all the consequences thereof are discharged. *Rez v. Groenvelt*, 12 Mod. 119.

2. A pardon frees a man from the punishment due for a thing unlawfully done. *Thomas v. Sorrell*, Vaugh. 333. *Hall v. Vaughan*, 5 Co. 49 a.

3. The king's pardon restores a person to his credit and competency, who is convicted or has judgment against him for a crime which makes him incapable of being a witness. *Rez v. Crosby*, *Skin*. 578, 579. 5 Mod. 16. S. C.

4. A pardon of judgments and executions pardons a judgment come to the king by assignment. *Tombs v. Ethrington*, 1 Lev. 121.

5. Pardon of the burning the hand discharges the punishment, and pardon before conviction prevents the forfeiture. *Foxley's case*, 5 Co. 109 a.

6. A false plea being pleaded before pardon, judgment for an amercement for it after the pardon is pardoned. Mo. 599.

7. If the king pardon the breach of prison, the prisoner shall be restored to his battail, which before was lost. Hob. 67. 62.

8. The first entry in trespass being pardoned, all that depends upon it is pardoned. *Strickland v. Thorpe*, Yelv. 126.

9. The king pardons a recusant convict; this tolls the disability. *Lord Petre v. University of Cambridge*, 3 Lev. 332.

10. A suit by a successor against the executor for dilapidations, is not pardoned by the general pardon; otherwise of suits *ex officio* against the dilapidator. *Anon.* 2 Vent. 216.

11. A pardon does not discharge offences against the statutes of a college. *Bentley v. Bishop of Ely*, 2 Stra. 912.

12. A pardon cannot restore the blood to its former purity. *Walsingham's case*, Plow. 558. Co. Lit. 391 b.

13.* An act of grace does not discharge penalties in which the [*1016] crown has no interest. *Hovel v. James*, Stra. 1272.

14. If the principal be attainted of burglary, the accessory must answer, though the principal be pardoned. *Johnson's case*, T. Raym. 477.

15. Though the fine for a nuisance is pardoned by general pardon, yet the abatement is not excused. *Rez v. Wilcox*, 2 Salk. 458.

16. If a man ought to repair a bridge, and the bridge is in decay, if the king pardon it, still the offence remains, but the pardon may discharge the fine for the time past; the same law in case of depopulation. *Case of Pardons*, 12 Co. 3 a.

17. If the king pardons the usury, yet the bond is void. *Winchcombe v. Bishop of Winchester*, Hob. 168.

18. If the king pardon simony, yet the presentation remains void; the simonist is

deprivable by the ordinary, for the pardon does not enable him to retain it, and a pardon will not divest the king of an interest accruing to him by the offence pardoned; if the patron of a church be guilty of simony, and the king presents, his presentee shall not be removed on the simony being pardoned after the presentation. *Rex v. Turvil*, 2 Mod. 52. *Smith v. Shelburn*, Cro. Eliz. 686. Hob. 167.

19. To arrest a felon after pardon is not penal, because it is an act of justice. Hob. 67. 82.

20. A fact pardoned by the act of grace may be a ground for articles of the peace. *Rex v. Monday*, Stra. 473.

21. A convict may be charged with a civil action, if it will not frustrate the effect of a pardon. *Rex v. Foxworthy*, 7 Mod. 153.

22. By a mere pardon of the crime and "all forfeitures," the thing forfeited, being an interest vested in the king, is not restored, and there must be special words of restitution. *Thomas v. Etherington*, 1 Saund. 362, 363. 1 Sid. 167. 1 Lev. 120. 2 Mod. 53. *Rex v. Salency*, 3 Mod. 101.

23. If a debt be due to a *felo de se*, and all forfeitures and sums of money are afterwards pardoned and released by an act of parliament, the debt is released and pardoned to the debtor, and not re-vested in the administrator of the *felo de se*, unless there are in the act special words of restitution. *Thomas v. Etherington*, 1 Saund. 362, 363.

24. But when nothing vests before office found, a pardon before the inquisition extinguishes all forfeitures. 2 Mod. 54.

25. A general pardon will not stay a suit in the court Christian *ad instantiam partis*; otherwise, if sued there *ex officio judicis*. Cro. Eliz. 684.

26. A pardon stays the trial on an indictment. Jenk. 312.

27. A pardon of all contempts, &c., discharges a person from excommunication and imprisonment. *Trotter's case*, 8 Co. 68 a. W. Jo. 227. 2 Ld. Raym. 818. Cro. Jac. 212. 8. C.

28. But not from the costs. *Reg. v. Dr. Watson*, W. Jo. 227. 229. 2 Ld. Raym. 818.

29. But if the pardon be before sentence, the costs are pardoned, or if pending an appeal. *Harrie v. White*, Palm. 412. Cro. Jac. 336.

30. If the person outlawed dies after the pardon, his executors may satisfy and have benefit of it. *Phitton's case*, 6 Co. 79 b.

VIII. RELATIVE TO EXCEPTIONS IN A PARDON.

1. An exception in a pardon ought to be taken as largely as the pardon itself. *Rex v. Johnston*, 3 Mod. 242.

2. A general pardon pardoned all felonies, &c., but excepted burglary; held, one attained of burglary is within the exception. *Morrice's case*, 6 Co. 12 b.

3. By an exception out of a general pardon of all penalties and forfeitures now due, or

which shall or may become due, &c., by reason of any offence or misdemeanor, &c., the fine to the queen on a prosecution for a riot is excepted, and also the party's costs, but the imprisonment and all the corporal punishment are pardoned. *Downing v. Franklin*, 5 Co. 46 b.

4. A general pardon except debts due to the queen, and also except all debts, &c., forfeited by reason of outlawry, and whereof any grant, &c., had been made to any person; by these exceptions, a debt originally due to a subject,* as where the co- [*1017] nusee in a statute-staple is outlawed, is not excepted. *Wyrall's case*, 5 Co. 49 b.

5. A general pardon contained a proviso, that it should not extend to any person outlawed upon any writ of *capias ad satisfaciendum*, until such time as the person outlawed should satisfy or otherwise agree with the party: one outlawed after judgment at the suit of a party, is a person able by the pardon as against the king, but not as to the party plaintiff. *Phitton's case*, 6 Co. 79 b.

6. An exception was of all offences, &c. for which any suit, &c. should have been commenced before, and be depending at, a certain time therein mentioned: what shall be said to be a suit depending within the meaning of this exception, see *Littleton v. Dudley*, 5 Co. 47 a.

7. When the offence itself is excepted, all incidents or appendants thereon, as well corporal as pecuniary, are excepted. *Downing v. Franklin*, 5 Co. 46 b. 1 And. 131. S. C.

IX. RELATIVE TO THE ALLOWANCE OF A PARDON; AND WHEN AND HOW IT SHOULD BE PLEADED.

1. A pardon may be allowable in treason without a writ of allowance; otherwise in felony. *Sir H. Linley's case*, Cro. Eliz. 814.

2. A pardon of murder cannot be pleaded without a writ of allowance directed to the judges. *Cooke's case*, Carth. 120. T. Raym. 13.

3. A pardon of murder may be allowed without a writ of allowance, where it has been before allowed at the Old Bailey. Comb. 230.

4. A pardon of murder, reciting the verdict, may, after allowance, be pleaded in bar of the judgment, although the offence be pardoned by the express name of murder, and there is no *non obstante* of the statute of 13 Rich. 2. c. 1. *Rex v. Anon.*, 4 Mod. 61.

5. A pardon obtained after judgment may be pleaded, for there can be no *audita querela* against the king. *Webb's case*, Palm. 40.

6. A pardon cannot in general be allowed without appearing in person. *Rex v. Sir A. Mildmay*, 1 Ro. 190.

7. A pardon for a misdemeanor may be pleaded without going to the bar. *Rex v. Hales*, Stra. 816.

8. A pardon is to be allowed notwithstanding

standing any mistakes or omissions in it. *Rex v. Norris*, 1 Ro. 298.

9. It is also to be allowed though there be a variance between the pardon and indictment, for it may be aided by an averment in pleading the pardon. *Rex v. Trowe*, 1 Ro. 368.

10. An act of pardon, though it may be given in evidence upon the general issue, is not to be taken notice of by the court in collateral cases, unless the act directs it. *Ingram v. Foot*, 1 Ld. Raym. 709.

11. A general pardon must be pleaded with a special averment, to make the defendant within the act. *Cuddington v. Wilkins*, Hob. 67. 81. Carth. 132.

12. In pleading a general pardon where some are excepted generally, a defendant ought to aver that he is not one of them. 1 And. 251. Mo. 619.

13. General pardon was allowed to a person outlawed upon a *sci. fa.* where the plaintiff was returned dead, without averring that the defendant was not one of the persons excepted. Mo. 303.

14. Held, that a pardon for murder ought not to be allowed without writ of allowance, certifying sureties taken for the peace. *Rex v. Parsons*, Salk. 499.

15. It is in the discretion of the court as to whether bail or security shall be required on pleading a pardon. *Rex v. Chetwynd*, 2 Stra. 1203.

16. A pardon pleaded confesses the fact, and is waived by pleading not guilty afterwards. *Anon.* J. Kely. 25.

17. Gloves are due to the judges on allowance of a pardon. *Id.* *ibid.*

18. To plead not guilty, and then to rejoin with a general pardon, is a departure. Hob. 271.

PARENT AND CHILD.

1. A father has no right to the custody of his bastard within the age of nurture. 2 Saund. 84. n. [a]. *Rex v. Soper*, 5 T. R. 278.

2. *Secus* of his legitimate child. [*1018] *Rex v. De Manneville*, 5 East, 221. 2 Saund. 84. n. [a].

3. J S having a son and two daughters, by will devised the custody, &c. of them to his wife's father and mother, and died; the wife married a second husband, and the grandfather died; the grandmother devised her socage lands to the son in tail, remainder to the daughters and the heirs of their two bodies begotten, equally to be divided, remainder to the mother, (the daughter and heir-apparent of the testatrix,) and died; the son died, and the youngest daughter, being under sixteen, but above fourteen, and living with the second husband, went by his consent voluntarily to H, where she married the plaintiff: Held, 1st, that the mother had the guardianship of her daughter within the 4

& 5 P. & M. c. 8., notwithstanding her subsequent marriage; that she had the custody of her person, though the daughter voluntarily left her several hours before the contract of marriage, and that the consent of the stepfather was immaterial. *Ratcliffe's case*, 3 Co. 37 a.

PARISH.

- I. WHAT CONSTITUTES A PARISH, p. 1018.
- II. RELATIVE TO THE PROOF OF THE BOUNDARIES OF A PARISH, p. 1018.
- III. RELATIVE TO THE UNION OF PARISHES, p. 1018.
- IV. WHO ARE CONSIDERED AS PARISHIONERS, p. 1018.
- V. RIGHTS OF THE PARISHIONERS AT LARGE, p. 1019.
- VI. POWER OF THE MAJORITY TO BIND THE WHOLE PARISH, p. 1019.

I. WHAT CONSTITUTES A PARISH.

1. A parish *prima facie* intends a vill; and so if a place be named generally. *Rudd v. Morton*, Salk. 501. Hob. 6 S. P.

2. A parish is an ecclesiastical division, it is constituted by ecclesiastical power, and may be altered by the king and ordinary of the place, but a vill is a civil division. *Addison v. Otway*, 2 Mod. 237.

3. A parish is under the superintendancy of the parson; a vill is under the care of the constable. 2 Mod. 237.

4. A chapel of ease is part of the parish, and *de communi jure* liable to reparations of the parish church. *Parish of Aston v. Castle Birmidghe Chapel*, Hob. 67.

5. A chapel's having sacramentals only will not make it independent of the parish. *Anon.* 12 Mod. 504.

6. A parish in reputation, if it have churchwardens and overseers of the poor, is within statute 43 Eliz., though in truth it be no parish. Between *Inhabitants of the Forest of Dean and the Parish of Linton*, Holt. 575.

II. RELATIVE TO THE PROOF OF THE BOUNDARIES OF A PARISH.

The parson is not a competent witness to prove the parish boundaries. 7 Mod. 63.

III. RELATIVE TO THE UNION OF PARISHES.

1. The union of parishes is by statute, and not at common law. *Vide stat. 22 Car. 2 c. 11, &c.* 1 Salk. 165.

2. Though by an union both parishes are made one, yet, as to taxes and repairs, they are still several. 3 Salk. 382.

3. The parish of St. Mary being united to the parish of St. Swithin by act of parliament, and the church of St. Swithin remaining the only parish church, a parish rate shall charge the inhabitants of the parish of St. Mary to contribute to the repair of the church of St. Swithin. *Parish of St. Swithin v. St. Mary Bothaw*, Skin. 588. 616.

4. If two parish churches are united, the reparations shall be several as before. *Parish of Aston v. Castle-Birmidge Chapel*, Hob. 67.

IV. WHO ARE CONSIDERED AS PARISHIONERS.

The occupier of lands, though living out of the parish, is, in judgment of [*1019] law, a parishioner and inhabitant, and may come to the assemblies of the parishioners. *Jeffrey v. Kenshley*, 5 Co. 66 b.

V. RIGHTS OF THE PARISHIONERS AT LARGE.

1. Parishioners, as well as the particular persons appointed, may appeal against an appointment of overseers. *Rex v. Forrest*, 11 Mod. 280.

2. Parishioners have a right to inspect the parish books. *Love v. Bently*, 11 Mod. 134.

VI. POWER OF THE MAJORITY TO BIND THE WHOLE PARISH.

1. A parish may tax themselves to carry on a suit for the good of the parish, but in such rate, the majority will not bind the rest, as in case of other rates. *Rex v. Everard*, 12 Mod. 440.

2. The majority of parishioners at a vestry may bind the whole parish, as to removing the communion table. *Newson v. Bawdry*, 7 Mod. 70.

PARISH-CLERK.

1. The office of parish-clerk is merely temporal; and where by custom he is elected by the parishioners, if the parson proceed in the ecclesiastical court to deprive him, a prohibition will be granted. 13 Co. 70. 6 Mod. 253. 7 Mod. 254. 1 Mod. 168 *notis*. 8 P. *Contra*, *Turnsund v. Thrope*, Stra. 776.

2. He cannot sue in the spiritual court for his fees. 1 Mod. 168 *notis*. 6 Mod. 253. *Pitts v. Evans*, Stra. 1108.

3. A parish-clerk has a freehold in his office. *Pitts v. Evans*, 7 Mod. 254.

4. He is not removable without cause. *Rex v. Wall*, 11 Mod. 261.

5. A *wadimus* was granted to restore a parish-clerk who had been elected by the parishioners, and displaced by the parson. *Kid v. Walkinson*, 11 Mod. 221.

6. A parish-clerk may execute the office without license of the ordinary. *Peak v. Bourne*, Stra. 942.

7. He may make a deputy, &c. without license. *Semb. Id. ibid.*

PARISH-BOOKS.

Parish-books are of a public nature, and conclusive evidence as to the matter of which they are the proper registers. *Stainer v. Dreivich*, 11 Mod. 134. n.

PARLIAMENT.

I. RELATIVE TO THE ELECTION OF MEMBERS, p. 1019.

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I. RELATIVE TO THE ELECTION OF MEMBERS.

1. A grant to choose members of parliament can only be to a corporation. *Ashby v. White*, 2 Ld. Raym. 951.

2. The electors may agree to choose one member first, and then another. *Hales v. Owen*, 2 Ld. Raym. 907.

3. The check-polls, as well as the original book, must be lodged with the clerk of the peace. *Rex v. Davis*, Stra. 1048.

II.* RELATIVE TO THE ELIGIBILITY OF MEMBERS TO SERVE. [*1020]

1. An outlaw ought not to be a member. *Anon.* 1 And. 293. pl. 301.

2. A clergyman cannot be of the house of commons, nor a layman of a convocation. *Bird v. Smith*, Mo. 781.

3. If a sheriff be returned a member of parliament, he ought to serve, notwithstanding the clause in the writ. *Norris v. Mowditt*, Comb. 432.

4. The queen's solicitor was first commanded by writ to attend in the upper house, and then was elected a Burgess of the lower house; still he shall serve in the upper: otherwise, if he be first elected a Burgess of the lower house. *Egerton's case*, Mo. 551.

III. RESPECTING THE SESSIONS OF PARLIAMENT.

1. Every session is a new parliament. *Pritchard's case*, T. Raym. 120.

2. It is not a session of parliament unless the royal assent be given to a bill. *Anon.* 1 Ro. 29. pl. 1.

IV. OF THE DISSOLUTION AND PROROGATION.

1. Prorogations first began in the time of Edward 4th. *Birt v. Rothwell*, 1 Ld. Raym. 210.

2. All their orders are determined by a prorogation. *Pritchard's case*, 1 Lev. 165.

3. On an adjournment of a parliament, the session continues; but after a prorogation, all must begin *de novo*. 2 Mod. 242.

4. In general, an adjournment is made by the house of lords or the house of commons

themselves; but the chancellor has adjourned the house of peers *ex mandato domini regis*; and queen Elizabeth adjourned the house of commons by commission under the great seal. 2 Mod. 242.

5. The dissolution of a parliament does not alter the state of the impeachments brought up by the commons in a preceding parliament. *Ld. Stafford's case*, T. Raym. 384.

V. RELATIVE TO THE POWER AND JURISDICTION OF PARLIAMENT.

1. The house of peers has a double authority, but no original jurisdiction. *Rez v. Knollys*, Salk. 510.

2. The authority of the house of commons is circumscribed by law. *Reg. v. Paty*, 2 Salk. 504.

3. In regard to all civil acceptations, an act of parliament can do any thing. *Crow v. Ramsey*, T. Jones, 12.

4. They cannot deprive of peerage, and their judgment must be formal, &c. *Rez v. Knollys*, 2 Salk. 510, 511.

5. The judicial power of parliament is in the peers; but the judgment is virtually the king's. S. C. Salk. 510.

6. The court of parliament has not only power to reverse or affirm, but it may give a new judgment. *Philips v. Bury*, 4 Mod. 125. 127.

VI. OF THE USAGES AND PRIVILEGES OF PARLIAMENT.

1. The ancient usage of parliament and the law of parliament are the same thing. *Benyon v. Evelyn*, Orl. Bridg. 334.

2. Liberty of speech (not reporting nor questioning out of parliament what is said in parliament) is of the essence of the parliament. Orl. Bridg. 334.

3. The parliament is a court of the greatest honour and justice, of which none can imagine any thing dishonourable. Plow. 398.

4. In ancient times, all the parliament sat together; but afterwards they separated by desire of the commons; but still they make now only one house. *Codsol v. Heydon*, 1 Ro. 18.

5. Seditious acts and conspiracies plotted in parliament may be punished out of parliament in the King's Bench. *Rez v. Eliot*, Cro. Car. 181, 189, 209, 210.

6. It does not belong to the judges to judge of any law, custom, or privilege of parliament, where the questions arise within the parliament. *Benyon v. Evelyn*, Orl. Bridg. 329.

7. But where a question upon the privileges of parliament arises upon an action at common law out of parliament, nothing has been more frequent than for the judges to deliver their opinions concerning it. *Benyon v. Evelyn*, Orl. Bridg. 330. *Rez v. Knollys*, 1 Ld. Raym. 18.

8. The king's courts may judge of parliamentary* matters incidentally. *Prideaux v. Morris*, 2 Salk. 503. [*1021]

9. The courts at Westminster take judicial notice of the order of the proceedings of parliament, and of their committees. *Lake v. King*, 1 Saund. 133. 1b. 131 a. n. (1).

10. They are bound *ex officio* to take notice of the commencement, prorogation, and end of every parliament. *Rez v. Wilde*, 1 Lev. 296.

11. The house of lords and house of commons can alone determine and decide upon their own privileges, orders, and customs. 13 Co. 63.

VII. RELATIVE TO THE PRIVILEGES OF THE PARTICULAR MEMBERS AND THEIR SERVANTS.

1. It is a breach of privilege to detain a horse or goods of a member of parliament, which he has with him for his use whilst he attends by command. *Benyon v. Evelyn*, Orl. Bridg. 350.

2. This extends not to prevent a distress for rent or other duty in the county. *Benyon v. Evelyn*, Orl. Bridg. 352.

3. Filing and continuing an original during a session against a member of parliament is no breach of privilege. *Skin. 527*. 1 Ld. Raym. 18. *Reg. v. Paty*, Salk. 504.

4. By 12 & 13 W. c. 3, the Common Pleas may hold plea by bill against a member of parliament. *Dawson v. Burridge*, 2 Ld. Raym. 1442. 2 Stra. 734.

5. So, if a member of parliament sues any one at law, he may be sued by such person in equity for a discovery, &c., without breach of privilege. *Anon.* 12 Mod. 343.

6. A member of the lords' house or house of commons cannot be arrested at the suit of the party upon *meane process* whilst parliament is sitting. *Benyon v. Evelyn*, Orl. Bridg. 335. 1 Dy. 59. pl. 17. S. P. Case of *Muscovite Ambassador*, 10 Mod. 4.

7. But after the session he may be taken again; and although he were not privileged, the sheriff is not liable for an escape in giving him his liberty upon the writ of privilege directed to him for that purpose. 1 Dy. 59. pl. 17.

8. The privilege from arrest continues to those who have been members of the house of commons for a *reasonable time* after a dissolution of parliament. *Barnard v. Col. Mordaunt*, Keny. 125.

9. And therefore he cannot be arrested within two days after dissolution of parliament; for members of parliament after its dissolution have privilege *redeunda*. *Holiday v. Pitt*, C. T. Hardw. 28. 7 Mod. 225. Fort. 160. 2 Stra. 985. S. C.

10. If one condemned in debt or trespass is afterwards elected a burgess of parliament, he shall not have his privilege. Mo. 57.

11. One being chosen burgess of parlia-

ment, and having a trial at bar to be had before the sitting of the parliament, moved to have his privilege allowed; but it was denied, because the parliament was not sitting, nor to sit till after the trial. *Sir R. Temple's case*, T. Raym. 12.

12. The speaker of the house of commons was arrested after a prorogation, and held not to be entitled to his privilege after the house was reassembled. *Mo.* 340.

13. A Scotch peer, though not in parliament, was discharged from an arrest on motion. *Pitt's case*, Fort. 165.

14. The privilege of parliament does not protect a man in the case of a breach of the peace; and therefore security for the peace may be obtained. *Res v. Culpepper*, 12 Mod. 108. *Res v. Earl of Devonshire*, Comb. 49. *Res v. Marquis of Carmarthen*, Fort. 359.

15. So, a member of parliament is liable to a prosecution if he publish his speech, containing libellous matter. 1 Saund. 131. n. [e].

16. The king's servants, or the servants of peers of parliament, are privileged from arrest. *Kilgrew's case*, 2 Show. 84.

17. It was ordered by the upper house of parliament, 16 Car. 1., that only menial servants, or such as attend upon the person of a knight or Burgess, should be privileged from arrest. March, 92. pl. 157.

18. An attorney or steward to a peer has no privilege of parliament. *Wick- [*1022] Aem^s v. Hobart*, C. T. Hardw. 348. Stra. 1065.

19. A writ of privilege was the ancient way to get a discharge. *Pitt's case*, Fort. 160.

20. But now, if a member be arrested either during the session, or within a reasonable time after its prorogation, he may be discharged on motion, without filing common bail. *Holliday v. Pitt*, 7 Mod. 225. 2 Stra. 985. S. C. C. T. Hardw. 28. 37. Fort. 160.

21. But that is no discharge to the suit. *Pitt's case*, Fort. 164.

22. As to granting a writ of privilege out of Chancery for the discharge of a member of parliament arrested *redevando*, see *Holliday v. Pitt*, C. T. Hardw. 37.

23. The court of B. R. cannot compel a member to waive it by putting difficulties upon him. *Holt*, 264.

24. Privilege of parliament cannot be had after imparlance. *Barnes v. Ld. Ward*, 1 Sid. 29.

25. Bail may surrender a peer of parliament in court, though the party come in of himself; but as the recognizance was not in K. B., the court said it could not be done, but that the bail might put him into custody in the interim. *Pitt's case*, Fort. 359.

VIII. RESPECTING ORDERS OF PARLIAMENT.

An order of the house of peers that one

has no right to an earldom, shall not conclude him, for it is no judgment. *Res v. Knollys*, Comb. 273. 1 Ld. Raym. 15.

IX. OF COMMITMENTS BY PARLIAMENT.

1. The house of lords or the house of commons may commit for a contempt during the sitting of parliament. *Lord Shaftesbury's case*, 1 Mod. 144.

2. On commitments by the house of commons for privilege, no court can deliver on a *habeas corpus*. *Reg. v. Paty*, Salk. 503. and note.

3. A peer of the realm, committed by the house of lords on an impeachment carried up against him by the commons, may, on the session being prorogued, or the parliament dissolved, be bailed by the court of King's Bench, to appear at the bar of the house of lords on the first day of the ensuing session or meeting of parliament. *Res v. Earl of Danby*, 2 Show. 336.

4. One taken by order of parliament after the prorogation may be discharged by *habeas corpus*. *Pritchard's case*, T. Raym. 120. 1 Sid. 245.

5. If proceedings are pending on an impeachment, and then the parliament is dissolved, it may be proceeded with in another parliament. *Peters v. Benning*, 12 Mod. 605.

6. One committed by the house of peers shall not be admitted to bail notwithstanding a dissolution, for a commitment is not made void either by a prorogation or dissolution. *Earl of Salisbury's case*, Carth. 132. *Ld. Stafford's case*, T. Raym. 381.

X. ERROR IN PARLIAMENT.

1. In all cases of appeals and writs of error in parliament, they continue and are to be proceeded on *in statu quo* as they stood at the dissolution of the last parliament, without beginning *de novo*. *Ld. Stafford's case*, T. Raym. 383. 12 Mod. 605. *Contra*, Carth. 237. Cro. Jac. 341.

2. Upon a long prorogation of parliament, writs of error in parliament are no *superse-deas*. *Ld. Danby's case*, Skin. 163.

3. If a term only intervene between a prorogation, execution may be had. *Semb.* 12 Mod. 605.

4. The King's Bench may proceed to execution without a *remittitur*. *Howard v. Bell*, Carth. 237. Cro. Jac. 341.

5. Upon a writ of error returnable in parliament, the transcript of the record only is removed. 4 Mod. 125.

6. If judgment be given in B. R., and reversed by writ of error in parliament, the new judgment must be given there. *Phillips v. Bury*, Carth. 180, 181. 319, 320.

7. Judgment given in parliament may be executed by the lord chancellor. *Pritchard's case*, T. Raym. 120.

PAROL DEMURRER.

1. The parol shall not demur for nonage,

unless the tenant be in by descent. *Waller v. Lambe*, 1 And. 21.

2.* When nonage would take [*1023] away the title of the plaintiff, then age is not grantable. *Harbert v. Binnion*, 1 Ro. 251.

3. In error, to reverse a fine, if defendant be terre-tenant in by descent, he shall have his age. *Herbret v. Bingham*, Moore, 847.

4. Where the heir is within age and terre-tenant, the parol ought to demur. *Harbert v. Binnion*, 1 Ro. 251.

[See also ante, tit. INFANT, div. XIX. Vol. I. p. 794.]

PARSON.

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I. WHAT IS NECESSARY TO COMPLETE A PARSON.

Presentation, admission, institution, and induction, are requisite to complete a parson. *Bishop of St. David's v. Lucy*, 1 Salk. 137.

II. RESPECTING EXCHANGES MADE BETWEEN TWO PARSONS.

On an exchange by two parsons, if one be instituted and inducted, and the other die before induction, it is void. *Cromwell's case*, 2 Co. 69 b.

III. WHEN PARSON AND VICAR ARE BOTH INSTITUTED.

Where parson and vicar are both instituted to the same church, both can have the cure. *Clarke v. Pryn*, 1 Sid. 496.

IV. RELATIVE TO THE POWER WHICH A PARSON POSSESSES.

1. The freehold of the church is in the parson, and no one can preach in it without the leave of the parson or ordinary. *Turton v. Reignolds*, 12 Mod. 433.

2. He ought *ex debito justitiæ* to grant such license to one who is fit, but if he will not do it, the remedy is by appeal, not *mandamus*. *Id. ibid.*

3. A curate is removable at the will of the parson. *Birch v. Wood*, Salk. 506.

4. A parson cannot charge the parsonage. *Jenk. 52.*

5. The parson cannot prescribe against the composition of the vicar. *Mo. 761.*

V. REMEDY FOR NOT PERFORMING HIS DUTY.

1. No action on the case lies against a parson, bound to celebrate divine service, &c. in a chapel (within a manor) to the lord *hominibus tenentibus et servantibus suis*, for a breach of his duty. *Williams v. Jones*, 5 Co. 72 b.

2. The proper remedy is to sue in the spiritual court; but if a chapel is private only for the lord his servants and his family, within a manor, there the lord only can have an action on the case. *Id. ibid.*

VI. HOW A PARSON AVOIDS HIS BENEFICES.

1. If a parson is chosen bishop, his benefices are all void, and the king shall present. *Edes v. Bp. of Oxford*, Vaugh. 19, 20, 21.

2. But he may hold the parsonage of one place (as commendatory) by a faculty or confirmation, while he remains bishop of another. *Wilson v. Bp. of Carlisle*, Hob. 107. 287.

3. Where the parson does not read the articles according to the statute, he stands deprived *ipso facto*. *Shute v. Higden*, Vaugh. 131.

4. Where he does not subscribe the articles,* there he is not incumbent, although he keeps in possession. *S. C. Vaugh. 133.*

VII. RESPECTING NON-RESIDENCE, AND ITS CONSEQUENCES.

1. On the statute of 21 H. 8. of non-residency, it was resolved, that the parson ought to reside in the parsonage-house, and not in another house, although within the same parish. *Bulter v. Goodale*, 6 Co. 21 b.

2. A parson gave a bond with condition to resign upon request, and then made a lease, and afterwards was absent above eighty days; the bond and lease both became void. *Web v. Hargrave*, Mo. 641.

3. An information lies for non-residence; lawful imprisonment without covin, or the non-existence of the parsonage-house in the parish, or sickness without fraud, are good excuses for non-residence. *Bulter v. Goodale*, 6 Co. 21 b. *Cro. Eliz. 590. Moore, 540. Goldab. 169. S. C.*

VIII. RELATIVE TO LEASES MADE BY PARSONS, &c.

1. A churchman cannot make a lease of the possessions of his church without deed. *Holden v. Smallbrooke*, Vaugh. 197.

2. A prebendary cannot make a lease without the consent of the bishop, dean and chapter. 2 And. 167, 168.

3. A parson's lease is avoidable. *Jenk. 200.*

4. A parson made a lease for forty years before the statute of 13 EL., which was confirmed after the statute; the lease is good. *Mo. 459.*

5. The confirmation of the patron and ordinary extends to possibilities; and if they

confirm *dismissionem predictam et omnia in eadem contenta*, this goes to all conditions remainders and possibilities in the deed. *Mo. 479.*

6. A lease by a parson to begin after his death, and confirmed in his life, binds the successor. *Hob. 70.*

7. A parson makes a lease for years, which is confirmed; this does not determine by his death, or in case of non-residency. *Bayly v. Munday, 2 Lev. 61.*

8. Parson patron and ordinary, before the 13 El., made a lease for ninety-nine years, there being a former grant of the next avoidance; the parson dies; the grantee presents an incumbent, who avoids the lease; it is thereby totally avoided as to his successors. *Plowden v. Oldford, Cro. Car. 582.*

9. A lease by a parson defeated by one successor shall never be revived against another, *Hob. 70.*

[See also ante, tit. ECCLESIASTICAL LEASES, Vol. I. p. 558; and tit. LEASE, div. IX. (d). Vol. II. p. 879., &c.]

PARTIES TO ACTIONS.

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III. RELATIVE TO THE JOINDER OF PARTIES PLAINTIFFS;—

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[*1025]

I. WHO IS THE PROPER PARTY TO BRING AN ACTION;—

- (a) *In assumpsit*.

1. Assumpsit lies, though the promise be

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made to another person, and not to the plaintiff, if it be made at the plaintiff's request. *Sadler v. Paine, Sav. 24.*

2. Assumpsit lies by him who is to have the advantage of a promise, although the promise was made to another; thus, if a promise be to pay money to the attorney of A, the action may be brought by A or his attorney. *Dutton v. Pool, T. Raym. 303. T. Jones, 103. 3 Keb. 786.*

3. Upon a consideration of marriage between the defendant's son and the plaintiff's daughter, and the promise made to the father, he may bring the action. *Levet v. Hawes, Cro. Eliz. 619. 652. Rippon v. Norton, Cro. EL. 849. 881.*

4. In consideration that the son's father would assure lands, &c., the daughter's father promised the son's father to pay the son £200 upon marrying his daughter; held that the son might bring the action. *Lever v. Heys, Moore, 550.*

5. A stranger to the consideration can maintain no action. *Crow v. Rogers, Stra. 592.*

6. It cannot be brought by C upon a promise to pay him for goods sold by B to A; but by B; *contra*, if B owed so much to C. *De la Bar v. Gold, 1 Keb. 44. pl. 117.*

7. An action of *indebitatus assumpsit* lies not by C against B for money ordered by A to be paid by B to C. *Crifford v. Berry, 11 Mod. 241.*

(b) *In covenant and debt*.

1. In covenant, if there are several parties named in the deed, but it is only signed, sealed, and delivered by some of them, those who did not execute it must be excluded as parties by proper averments in the declaration. *Vernon v. Jefferies, 7 Mod. 358.*

2. In the case of deeds between parties, whether indebted or not, none shall sue or be sued but the parties; otherwise, of deeds not between parties. *Gilby v. Copley, 3 Lev. 138. 1 Saund. 154. n. [a].*

(c) *In case*.

If a carrier to whom goods are delivered to be carried put them in a common inn and they are stolen, the owner and not the carrier should bring an action for them; for the carrier is not liable, being by law compellable to carry them. *Browne v. Portman, Dall. 8.*

II. AGAINST WHOM THE ACTION SHOULD BE BROUGHT;—

In debt and covenant.

Where two are named in a deed as grantors, but only one seals, it is not necessary to mention the other in the declaration. *Newdigate v. Capell, 2 Dy. 227. pl. 43.*

III. RELATIVE TO THE JOINDER OF PARTIES PLAINTIFFS;—

- (a) *Who must join in the action*.

1. Joint contractors, and all who have a joint interest, must join if alive, and if any be

dead, the fact must be stated. *Dockeray v. Dickenson*, Skin. 640. 1 Saund. 291 h. 2 Saund. 121 c. n. (1). 116, 116 b.

2. Covenantors or obligors must join if alive, and if any be dead, the fact must be averred. 36 H. 6. c. 16. Yelv. 177. *Gaulton v. Chaliner*, 1 Saund. 291 g. *Anon.* 2 Leon. 47. *Beckwith's case*, 3 Leon. 161.

3. A covenantor may be a plaintiff, though he never sealed; and therefore all must be joined, unless excluded by express averment. *Vernon v. Jefferys*, Stra. 1146.

4. Two covenantors must join where one of them has no beneficial interest whatever. 1 Saund. 154. n. [a].

5. Executors plaintiffs must all join, though some be within seventeen, or have not proved the will. 1 Saund. 291 i.

6. As long as the privity of contract continues, tenants in common ought to join in an action for the rent. *Baker v. Berisford*, 2 Sid. 10.

7.* If two joint-tenants of goods [*1026] lose them, they should join in an action; but if one of them deliver the goods, he alone can bring the action. 43 E. 3. c. 21. *Isack v. Clarke*, 1 Ro. 129.

8. Joint and several partners of a ship ought to join against the master for neglects and torts. 3 Lev. 268.

9. The defendants in the original action must join in a writ of error; but it seems otherwise where the plaintiffs bring error. *Hacket v. Herne*, 3 Mod. 134, 135.

10. Upon a verdict on 8 H. 6. c. 9. that all the defendants forcibly entered disseised and expelled, and one of them only held out, they may all join in attaint upon the three first points, and the other may have his attaint sole upon the detainer. 2 Dy. 141. pl. 45.

(b) *Who cannot join in one action.*

1. In *assumpsit* upon a promise, two cannot join where the consideration is not joint; thus, where A delivers to B the goods of C, and B thereupon promises, in consideration of a sum of money given him by A, to deliver them to the owner, the deliverer or the owner may have an action against him, but they cannot join. *Bell v. Chaplain*, Hard. 321.

2. If two covenant to sell lands, and the purchaser agree to pay the money to one of them, he alone ought to bring the action. *Tippet v. Hawkey*, 3 Mod. 263.

3. Three covenant with two severally; they cannot join in an action. March, 103, pl. 176.

4. Upon a grant of an annuity of £100 to five persons, viz. to each of them £20 a piece, they cannot join, because this is a several rent. *Ward v. Everard*, Carth. 340. 1 Ld. Raym. 422. 5 Mod. 25. 1 Salk. 390. S. C.

5. If one named in the indenture does not seal, he must be excluded by averment. *Vernon v. Jefferys*, Stra. 1146.

6. Tenants in common cannot join in an action. 5 Mod. 72.

7. Two infants, joint tenants, cannot join in a *dum fuit infra aetatem*. *The Serjeant's case*, 3 Leon. 255.

8. A surviving partner and an executor of a deceased one cannot join. 2 Saund. 117.

9. An action will not lie by two jointly against a defendant, for calling them two false thieves. 1 Dy. 19. pl. 112.

10. Two cannot join in an action for entering the house of one of them, and taking the goods of both. *Maddox v. Taylor*, 2 Ld. Raym. 1381.

(c) *Who may elect to sue jointly or separately.*

1. Where two or more are jointly entitled, or have a joint interest or damage, they may join in the same action. 3 Salk. 202. 2 Saund. 116, 116 a, b.

2. If a promise be made to the husband and wife, it is in the election of the husband to bring the action in his own name, or to join his wife. *Hilliard v. Hambridge*, Aleyn, 36; cites 43 E. 3. c. 10.

3. In covenant, if the interest be several, each covenantor may bring a separate action, though the words of the covenant be joint. *Windham's case*, 5 Co. 8 a. Dy. 337 b. 3 Mod. 263. 1 Saund. 154, 155. *Withers v. Moore*, 3 B. & C. 254.

4. If there are two covenantors, and a duty under the covenant rests in one, he alone can sue. 2 Saund. 117.

5. If A covenant that he will not agree for the taking the farm of the excise of beer and ale for the county of York, without the consent of B and C, it is not necessary that B and C should join in an action for a breach of this covenant, but each of them may maintain a several action for his respective damages. *Wilkinson v. Lloyd*, 2 Mod. 82.

6. A dormant partner may be joined. 1 Saund. 291. n. [h].

7. Two or more partners may join in an action for slander for words spoken of them in the way of their trade; and joint-tenants and coparceners for slander of title. 2 Saund. 116 b. 117.

8. Two are jointly sued in the spiritual court for tithes or for defamation; they may join in attachment upon the prohibition. *Green v. Pope*, 1 Ld. Raym. 127. *Bartue's case*, Ow. 13.

9. Upon a joint suit in the Admiralty (contrary to the statute), against the ship, to stay its voyage, each party may* have his several action on the case for [*1027:] the tort done him, and recover his damages; but the king can have but one fine. *Sands q. t. v. Child*, 3 Lev. 353.

10. Tenants in comon may join in an action of debt for rent, or in an action of covenant. *Midgley v. Lovelace*, Carth. 290.

11. A number of persons who join in prosecuting a *mandamus* to register the certificate of a dissenting meeting-house, may

join in an action for a false return. *Green v. Pope*, 1 Ld. Raym. 127.

12. Churchwardens may join in an action for a false return of a *mandamus* to swear them. *Id. ibid.*

13. Two being robbed of a joint sum of money, may join in an action upon the statute of Winton; *secus*, if the property were several. 3 Dy. 370. pl. 59. 1 Leon. 12.

(d) *How the non-joinder of parties plaintiffs may be taken advantage of.*

1. In actions *ex delicto*, if one of several plaintiffs who ought to join bring the action, the non-joinder can only be taken advantage of by a plea in abatement, even though plaintiff himself show it; but it is a ground of nonsuit in actions *ex contractu*. 1 Saund. 291 A. 291 i. n. [A]. 291 k. 1 Show. 105. 2 Stra. 820. *Skin*. 640.

2. The non-joinder of a plaintiff executor can in no case be taken advantage of, but by plea in abatement. 1 Saund. 291 i.

IV. RELATIVE TO THE JOINDER OF PARTIES DEFENDANTS:—

(a) *When the action should be against several jointly.*

1. In actions *ex contractu*, all the contracting parties must be joined, though one be personally discharged. 1 Saund. 207 a.n. [i]. 291 d. n. [d]. 3 Mod. 323.

2. Though the promise is one created by law. 3 Mod. 321.

3. Debt upon a judgment against three cannot be brought against one only. *Anon.* 2 Leon. 220. pl. 277.

4. Where there are several proprietors of a vessel for carriage of goods, which are damaged by carrying, the action must be brought against all or against the master alone. *Boson v. Sandford*, 3 Mod. 321, 322.

(b) *When it cannot be brought against several jointly.*

1. If one of two partners buy goods and then dies, the other is chargeable in *indebitatus assumpsit*. *Hyat v. Hare*, Comb. 383.

2. Generally, if one of several joint-contractors die, the survivors may be sued without any mention of the deceased. 1 Saund. 291 d. n. [d]. 2 Saund. 121 c. n. [g].

3. In the case of joint-contractors, the plaintiff may, in the same writ, recover against one defendant as survivor, and another as an individual. 1 Saund. 291 d. n. [d].

4. Upon a joint bond if one is dead, the declaration against the other is good, because it is his several deed; but if the other party be living, he may plead it in abatement, because the lien is joint. *Boulton v. Sandford*, *Skin*. 280.

5. A joint action cannot lie against one for assault and battery, and another for trespass *de bonis asportatis*. *Cutworth's case*, Sty. 153. 2 Saund. 117 a.

6. Two cannot be joined in slander for speaking the same words. *Stroud v. Roper*, 1 Bulstr. 15. Palm. 13. 2 Saund. 117 a.

7. Two cannot be joined in trover for several conversions. 2 Saund. 117 a. n. [e]. cites *Nicoll v. Glennie*, 1 M. & S. 588.

(c) *When several may be jointly or separately sued.*

1. In covenant, though the interest be joint, the covenanters may be sued separately, if the words be joint and several. 1 Saund. 154.

2. If a lease for years be made to two, and one of the lessees assigns his interest to another, one action of debt for the rent may be brought against the lessee and assignee. *Waldron v. Symonds*, Palm. 284.

3. Several persons may be joined in one action of debt for not setting out tithes. 2 Saund. 117.

4. Two or more may be joined in an action* on the case for conspiracy to indict maliciously, or in maintenance, or trespass. 2 Saund. 117. *Pencavie v. Trapping*, Latch. 262.

5. Several persons may be joined in debt to recover one penalty under the game laws. 2 Saund. 117. 2 East, 573. n. (a).

(d) *How the non-joinder of parties defendants may be taken advantage of.*

1. If two are bound jointly, and one is sued, he may plead in abatement that he was bound with another, but cannot plead *non est factum*. Cited *Boson v. Sandford*, 3 Mod. 323.

2. No advantage can be taken in any case, of the non-joinder of a defendant but by plea in abatement. *Gilbert v. Bath*, Stra. 503. 1 Saund. 154 a. 291 a. b, c, d.

3. Though the plaintiff himself show that there are other joint contractors or tortfeasors. 1 Saund. 291 f. 2 lb. 396.

4. If one of the plaintiffs be liable as a co-contractor with defendant, this may be pleaded in bar. 1 Saund. 291 g. n. [g].

5. The non-joinder of defendants in actions *ex delicto* cannot, in general, be taken advantage of in any way. 1 Saund. 291 e. *Boson v. Sandford*, Carth. 62.

6. Except in the case of one tenant in common who is sued alone in tort for some thing respecting the land, in which case he may plead in abatement. 1 Saund. 291 f. 7 H. 5. 8. 6. *Mitchell v. Turbut*, 5 T. R. 651.

7. And when the cause is in fact founded on contract, though the action be shaped in tort, yet if any defendant be omitted, who ought to be joined, this may be pleaded in abatement. *Boson v. Sandford*, Carth. 62. 1 Saund. 219 d. c. 12 East. 452.

8. If an executor or administrator plead in abatement that there is a co-executor or co-administrator not joined, he must aver the life of the co-executor. 1 Saund. 291 k.

(e) *Consequence of joining too many defendants.*

In actions *ex contractu*, or *ex quasi contractu*, if too many are made defendants,

the plaintiff will be nonsuit. 1 Saund. 291 e. n. [c]. 291 k. 2 Marsh. 485.

(f) *How to proceed where several are sued, and one will not appear.*

Where the process is against two on a joint cause of action, and one only appears, the other must be outlawed. *Edwards v. Carter*, Stra. 473.

PARTITION.

[See ante, tit. JOINT-TENANT, p. 830.]

PARTNER.

I. RELATIVE TO THE LIABILITY OF A PARTNER, p. 1028.

II. RESPECTING SUITS BROUGHT BY PARTNERS, p. 1028.

III. RESPECTING SUITS AGAINST THEM, p. 1029.

I. RELATIVE TO THE LIABILITY OF A PARTNER.

1. A note of hand signed "for self and partner" binds the partner. *Smith v. Bailey*, 11 Mod. 401.

2. If one or two partners become a bankrupt or die, the solvent or surviving partner is liable to the debt. 1 Mod. 46.

3. A and B (when breaking up partnership) agree that their joint bonds shall be discharged by A, to whom an allowance is made for this purpose; H, an obligee of such a bond, knowing of this, agrees with A that the bond shall bear an increased interest of 11. per cent.; many years after A fails, and H brings his bill against the executors of B to compel them to redeem the bond, and held that he shall recover. *Heath v. Percival*, 291 1 Stra. 403.

4. Where money is received by one of several bankers, who are partners, it charges them all, unless they show an express dissent. — *v. Layfield*, Holt, 434.

II. RESPECTING SUITS BROUGHT BY PARTNERS.

1. Partners ought to join as [*1029] plaintiffs. *Booen v. Sandford*, 3 Lev. 354. *Ib. notis.* 1 Saund.

i. n. [A].

2. A surviving partner may sue alone, and cannot join with the executor of the deceased in an action, and he must describe himself as such in the declaration. 1 Saund. 291 i. n. [A]. 2 Saund. 117.

III. RESPECTING SUITS AGAINST THEM.

1. Partners must all be sued jointly. *Boson v. Sandford*, 3 Lev. 258.

2. But if they are not all joined, it is only matter of abatement. S. C. 3 Lev. 259. *in notis.*

PARTOWNER.

1. The majority of the partowners of a ship may send her out without the consent of the rest, and if they do, the majority must run the hazard, and they must partake of the profit. *Knight v. Perry*, 1 Show. 13. 30. Holt, 470, 471.

2. An action will lie as well against the partowners of a ship for the loss or spoiling of goods delivered to the master, as against the master, but the action must be against all the partowners, or the defendant may take advantage of it by a plea in abatement. *Boson v. Sandford*, 1 Show. 30. 105.

PARTY-WALL.

An action of debt lies for the expenses of a party-wall; an exception, that it was not alleged in the declaration that the defendant had built upon the party-wall, was disallowed; but the plaintiff setting forth the statute of 19 Car. 2. for rebuilding the city of London, and omitting to say the party-wall was within London, that was held ill upon demurrer. *Clerk v. Serle*, Skin. 67.

PATENT.

1. If letters patent pass by bill signed without privy seal, the patent is subscribed *per ipsum regem*, and then remains with the chancellor for his warrant; when it passes by privy seal also, the privy seal remains with the chancellor, and the bill signed remains with the clerks of the signet. *The Prince's case*, 8 Co. 18 b.

2. The patentees themselves of lands, &c. granted to the crown, as well as purchasers of parcels from them, are entitled to a *constat* of their letters patent under statute 3 & 4 E. 6. c. 4. 2 Dy. 167. pl. 13.

3. A *constat* cannot be had without an affidavit; an *insuperimus* may. *Queen v. Page*, 5 Co. 52 a.

4. Though a patent be surrendered, a *constat* is grantable if no *vacatur* be entered on the roll, but not after *vacatur* entered. 2 Dy. 167. *marg.*

5. An exemplification and an *insuperimus* are the same thing. *Queen v. Page*, 5 Co. 52.

6. It is a rule in the construction of patents, that if the king makes a grant at the suggestion of the party, and the suggestion be false, the grant is void. *Attorney-General v. May*, Sav. 38.

7. Letters patent may be avoided when the king is deceived in his grant. *Rex v. Kemp*, Holt, 419, 420.

8. If the consideration, be it executory or executed, or be it on record or not on record, be not truly performed, or if prejudice may accrue to the queen by reason of non-performance, the letters patent are void. *Barwick's case*, 5 Co. 93 b.

9. When a patent is capable of two constructions, one of which will make it good, and the other bad, the former shall be adopted. *Case of Alton Woods*, 1 Co. 40 b.

10. General words in a patent will not pass things which belong to the king by virtue of his prerogative. *Id. ibid.*

11. In a patent of king H. 7., the four

letters H. R. A. and F. being part of the king's stile, were left out, to be afterwards limned with gold; yet this patent in C. B. was held good. *Digby v. Mountford*, 3 Dy. 342. pl. 53.

12. The statute 34 H. 8. c. 21. of misnomer in the king's letters patent does not aid non-nomer. 3 Dy. 331. pl. 22.

13. If the last patent be of fairs and markets holden at different times [*1030] from those* under the first, it is no cause of repeal. 3 Dy. 276. pl. 52.

14. The patent appointing a receiver of the court of augmentations, with condition, may be repealed without an office found of the breach of the condition; but it is not therefore merely void; there must be a *scire facias* to repeal it. 2 Dy. 210. pl. 28.

15. Surrender of the patent to the master of the rolls, without its being recorded in his life, or the patent cancelled, or a *vacatur* entered on the enrolment, is void. 3 Dy. 195. pl. 35.

16. Surrender of a former patent after the date of a second, which was to commence from that date, will not make the second patent good. 2 Dy. 195. pl. 35.

17. Neither an exemplification nor a *constat* was pleadable at common law. *Queen v. Page*, 5 Co. 52 a.

18. The statute 13 Eliz. extends to all patents whatsoever, and by force of it the patentee may plead the exemplification or *constat* of the enrolment of his own letters patent. *Id. ibid.*

19. The assignee of the king's patentee cannot plead the letters patent without a *profert*. 1 Dy. 54. pl. 17.

20. Oyer cannot be demanded of letters patent after the expiration of the term in which a *profert* of them is made. *Anon.* 1 Mod. 69.

21. An action on the case lies by a patentee against any one that infringes the patent. Comb. 32. *Calthorp v. Waymans*, 3 Keb. 710. pl. 47.

[See also *ante*, tit. GRANT, div. (A.) *per totum*, Vol. I. p. 731, &c.]

PAUPER.

I. OF SUING IN FORMA PAUPERIS, p. 1030.

II. OF DEFENDING IN FORMA PAUPERIS, p. 1030.

III. OF DISPAUPERING, p. 1030.

IV. WITH RESPECT TO COSTS, p. 1030.

I. OF SUING IN FORMA PAUPERIS.

1. A pauper may be admitted to sue in *forma pauperis*, or to continue a suit, though he has proceeded as far as a rejoinder. *Langley v. Blackerby*, Andr. 306. See the 11 H. 7. c. 12., and 23 H. 8. c. 15.

2. Although a plaintiff upon an issue di-

rected out of Chancery shall appear to have been regularly admitted to sue in *forma pauperis* there, he must also be regularly admitted to enable him to try such issue, and such admission may be made during the trial. *Gibson v. M'Carty*, C. T. Hardw. 311.

3. A person suing in *forma pauperis* cannot have a new trial, or remove his cause from an inferior court. *Anon.* 1 Mod. 263, 269.

II. OF DEFENDING IN FORMA PAUPERIS.

1. A defendant in a civil suit cannot be admitted to defend in *forma pauperis*, the statute 11 H. 7. c. 12. extending only to plaintiffs, and not to defendants. *Anon.* 1 Barnes, 231.

2. But on an indictment, the party may be admitted to defend in *forma pauperis*. *Rex v. Wright*, C. T. Hardw. 211. 250. 2 Stra. 1041. S. C.

3. A pardon may be pleaded in *forma pauperis*. *Rex v. Morgan*, 2 Stra. 1215.

III. OF DISPAUPERING.

1. A pauper, if vexatious, may be dispaupered. *Nokes v. Watts*, Fort. 319.

2. As, if he gives notice of trial, and does not proceed. *Anon.* Salk. 506. *Taylor v. Lowe*, 2 Stra. 983. 3 Wils. 24.

3. One suing in *forma pauperis* cannot be dispaupered on an affidavit that he has an income of 40*l. per annum*, if he swears that his estate is mortgaged for more than its value. *Semb. Anon.* Salk. 507.

IV. WITH RESPECT TO COSTS.

1. A pauper shall pay no costs, though dispaupered. *Sloman v. Aynel*, Fort. 320. 1 Ro. 81.

2. If a pauper is nonsuited, and afterwards recovers in a second action, the costs of the first action shall not be set off. *Butler v. Inneys*, Stra. 891.

3. A pauper shall not pay costs on a nonsuit, though an estate fall to him afterwards. *Ancell v. Sloman*, 8 Mod. 344.

4.* A pauper shall pay costs of nonsuit, or be whipped. *Per* [*1031] Holt, C. J. *Anon.* Salk. 506. 7 Mod. 114. *sed quare*.

5. He shall not be obliged to pay costs of a former nonsuit, without circumstances of vexation. *Winter v. Slow*, 2 Stra. 878.

6. The court refused to make a rule to tax costs on pauper's bringing a second ejectment, where he did not appear to be acting vexatiously. *Bushan v. Greenville*, Stra. 1121.

7. A pauper does not pay costs for not going on to trial, as other plaintiffs do; but if the costs are taxed, the court may (if he acts vexatiously) compel him to pay the costs before he tries the cause. *Nokes v. Watts*, 1 Stra. 420. Fort. 319. S. C.

[See also *ante*, tit. COSTS, div. V. (g). Vol. I. p. 390.]

PAWN.

1. A factor cannot pawn. *Paterson v. Tash*, Stra. 1178.
2. The pawnee has a property in the goods pawned. *Coggs v. Bernard*, Holt. 528.
3. In trover, the defendant cannot justify detaining goods till money laid out on them is paid. *Stone v. Longwood*, Stra. 651.
4. Pawning does not vest a property as a sale in open market does. *Jenk*. 83.
5. Where money is lent on a pledge, the borrower is personally liable without an agreement to the contrary. *South Sea Co. v. Duncomb*, 2. Stra. 919.
6. A man may have an action of debt for money due to him, notwithstanding his having a pawn, or though the thing pawned perishes. *Anon.* 12 Mod. 564. Holt. 461. 528. 1 Vent. 179.
7. Goods pawned are not liable to an execution until the pawnee is paid. *Coggs v. Bernard*, Holt, 528, 529.
8. The death of the pawnee does not prevent the redemption. *Ratcliff v. Davis*, Yelv. 178.
9. But the executor of him who pawned cannot redeem. *S. C.* Yelv. 178.
10. Upon a pledge of personal things, if the pledger does not redeem them on the day, the pawnee may sell them, without a decree to foreclose. *Lockwood v. Ever*, 9 Mod. 278.
11. A gives B a mortgage to receive the money due upon it, B pawns it, and A brings his bill; and held to be a proper remedy, though it was urged that an action of trover would lie as in the case of plate pawned by a servant. *Jackson v. Butler*, 9 Mod. 297.

PAYMENT.

- I. WHAT IS TO BE CONSIDERED A GOOD PAYMENT, p. 1031.
- II. RELATIVE TO THE APPLICATION BY A CREDITOR OF MONEY PAID ON ACCOUNT, p. 1032.
- III. RESPECTING THE FLEA OF PAYMENT, p. 1032.

I. WHAT IS TO BE CONSIDERED A GOOD PAYMENT.

1. Payment before the day is as good as payment at the day. *Holms v. Broket*, Cro. Jac. 434.
2. But payment of rent before the day by the obligee does not discharge him. *Fuller's case*, 4 Leon. 4.
3. Payment after the day is no discharge of a bond at common law. 1 Ld. Raym. 383.
4. Payment of the treasurer of a society is payment to the society. *Rez v. Bishop of Chester*, 1 Ld. Raym. 290.
5. Payment to assigns is payment to the party, and therefore the not paying to assigns need not be particularly averred. *Anon.* 2 Ld. Raym. 268.

6. Payment to the gaoler on a judgment and execution is no discharge; but payment to the sheriff on a *fierti facias* is. *Taylor v. Bekon*, 2 Lev. 203.

7. Payment by the bail to the plaintiff is a discharge, but not if it be a less sum than the whole debt. *Holmes v. Bail of Browne*, 2 Lev. 212.

8. Payment to a stranger by command of the principal is the same as if it had been to the party himself. 1 Ro. 296.

9.* Where a man sells goods, and at the same time takes a cash [*1032] note for the value, it is good payment, though the note prove bad. *Ward v. Evans*, 2 Ld. Raym. 929.

10. Paper is no payment where there was an original and precedent debt, for it is intended to be taken upon this condition, viz. that the money be paid in a convenient time. *S. Com.* 138. *notia*.

11. By 3 & 4 Ann. c. 9. s. 7., if any person accept a bill of exchange in satisfaction of a former debt, it shall be deemed complete payment if he do not take due course to get it paid: what shall be considered *due course*, see 6 Mod. 148. n.

12. A receives money of B by the hands of C; it is A's money, and he must bear the loss by C. *Carter v. Sheppard*, Salk. 507, 503.

13. So if A receive part of a sum and put it into a bag, and, while counting the residue, the bag is stolen, &c. *S. C.* Salk. 507, 508. 1 Ld. Raym. 330. *S. C.*

II. RELATIVE TO THE APPLICATION BY A CREDITOR OF MONEY PAID ON ACCOUNT.

1. When there are several debts, and money is paid in generally, the creditor has a right to apply the money towards payment of whichever debt he pleases. *Stracy v. Saunders*, 7 Mod. 123. 2 Stra. 1194. 2 Saund. 415. n. [b]. *Anon.* 8 Mod. 236. *Sed vide Anon.* 12 Mod. 559.

2. Where money is paid in part on a bond, though expressed as paid for principal, it shall be applied towards the interest due. *Bostock v. Bostock*, 8 Mod. 242.

3. The creditor cannot apply the money paid to an uncertain demand; as, to a debt from a testator. *Goddard v. Cox*, 2 Stra. 1194.

4. He must exercise the right at the time of payment. 2 Saund. 415. n. [b].

III. RESPECTING THE FLEA OF PAYMENT.

1. Payment in debt on a bond pleaded as having been made at the day, will be supported by evidence of payment before the day; that is the proper way of pleading such payment. *Owen*, 46. Cro. Jac. 434.

2. Debt on a bond of thirty-five years' standing; on *solvit ad diem* pleaded, payment shall be presumed. *Searle v. Barrington*, 8 Mod. 278.

3. Payment of a bond with condition in-

doresd in a good plea before breach. *Marle v. Mark*, Salk. 508.

4. But not after breach; for the benefit of the condition is lost by the breach. *S. C.* Salk. 507, 508.

5. Payment of a part and acquittance pleaded *puis darrein continuance*, is in bar. *Peirce v. Paxton*, Salk. 519.

6. Money paid on a void award may be pleaded as accord and satisfaction. Salk. 71.

7. Acceptance in satisfaction is not sufficient, unless it be likewise pleaded to have been given in satisfaction. *Timber v. Gardiner*, 10 Mod. 224.

8. If a different sum be pleaded to have been paid in satisfaction of a bond from what appears upon trial to have been received in satisfaction, this is a variation of the accord; otherwise, if the difference is only as to the time. *Weddall v. Jocar*, 10 Mod. 306, 307.

9. To debt on a single bill, the defendant pleaded payment without acquittance, and on issue joined it was found for the plaintiff, and held that it was helped by statute 32 H. 8. and 18 Eliz. *Chamberlain v. Nichols*, 5 Co. 43a. Cro. Bliz. 455. Moore, 692. Jenk. Cent. 257. S. C.

10. An averment of payment or of non-payment, need not be by disjunctive words, such as "paid or caused to be paid," "or either of them," and the like. 1 Saund. 234 c. n. (5).

PEACE.

1. To meet tumultuously at a place of religious worship, in such a manner as may be affronting to the people, is a breach of the peace. *Res v. Blisset*, 1 Mod. 13.

2. A husband may swear the peace against his wife. *Sims's case*, Stra. 1207.

3. If a gentleman visit a young lady as her lover, and, on her parents denying* him access, he intrudes himself rudely into the house, follows the young lady on a journey taken to avoid him, assaults the person under whose protection she is placed, and threatens to force her from him, it is a good cause to demand surety for his good behaviour; and although the surety must be demanded recently after the cause happens, and while the fear it occasions exists, yet if the party, at any distance of time afterwards do any act, though to another person, which shows that the old grudge remains, the court will couple the last act with the antecedent cause of fear, and, on articles exhibited, grant surety of the peace. *Dennis v. Lane*, 6 Mod. 131.

4. A fact committed before the act of grace may be a ground for articles of the peace. *Res v. Mendes*, Stra. 473.

5. The court will not require one pardoned on an indictment for murder previous to conviction to find securities for his good

behaviour, unless he appears to be a person of ill fame. *Res v. Cheseynd*, Stra. 1203.

6. To have surety of peace, an affidavit must be had of the cause of fear, and exhibited in articles, and an affidavit made that you demand it, not out of ill-will or malice, but out of fear of some bodily hurt. *Anon.* 18 Mod. 565.

7. The court may require bail for such a period of time as they shall think necessary for the preservation of the peace. *Res v. Bowes*, 6 Mod. 132. n.

8. The court of K. B. will not award a mandamus to a justice of the peace for taking a recognizance for keeping the peace upon articles of the peace exhibited in that court, unless there are some very particular circumstances in the case. *Res v. Hellier*, and *Res v. Lewis*, Say, 253.

9. The causes of demanding surety of the peace must be set forth in the articles. *Dennis v. Lane*, 6 Mod. 132.

10. The court will not inquire into the truth of articles of the peace, but they will review them after security has been ordered upon them, and hear any objection that appears upon their face. *Ld. Vane's case*, Stra. 1202.

11. The recognizance for keeping the peace, entered into upon the exhibition of articles of the peace, is forfeited by an assault upon any person. *Res v. Stanley*, Say, 140.

12. A commitment for want of sureties for good behaviour for words spoken of a magistrate must be made presently. *Reg. v. Langley*, 2 Ld. Raym. 1030.

13. Sureties to keep the peace cannot be discharged until the condition of the recognizance is performed. *Res v. Howard*, 11 Mod. 109.

14. The king cannot discharge a recognizance taken for the surety of the peace, but after it is broken he may. *Shipley v. Craister*, 2 Vent. 131.

15. A breach of the peace destroys a pardon, although it has been allowed. *Res v. Farworthy*, 7 Mod. 153.

PEER.

RELATIVE TO PROCEEDINGS AGAINST A PEER.

1. A *capias* did not lie against peers at common law in trespass *vi et armis*. *Foster v. Jackson*, Hob. 61.

2. It lies not against them at this day, notwithstanding the statute of 25 E. 3., though they are not especially exempted. S. C. Hob. 61.

3. A *capias* will lie against them in a *hominem replegiando*. S. C. Hob. 61.

4. A peer if excommunicated forty days may be apprehended on an *excommunicato capiendo*. 7 Mod. 57.

5. Every baron of parliament ought to have a knight returned of his jury. *Countess*

of *Rutland's case*, 6 Co. 53 b. 54 a. *Countess of Conway's case*, Skin. 229.

6. A peer may waive his privilege of being tried by his peers; and if he pleads not guilty generally, and puts himself upon the country, he cannot afterwards claim his privilege. *Marquis of Dorset's case*, Dall. 16. *Contra, Ld. Dacre's case*, J. Kely. 56. Skin. 229.

7. The court will not on motion supersede process against one arrested by the name of a commoner who claims peerage where he has never been admitted in parliament. *Ld. Banbury's case*, 2 Ld. Raym. 1247. 2 Salk. 512. S. C.

8. In civil actions, the recognizance is* entered into by the bail only, and so no estoppel to a defendant's peerage. *Roberts v. Villars*, 12 Mod. 217, 218.

9. If the claimant of a peerage be arrested by the addition of gentleman, the court will allow him to give bail without joining in the recognizance. *Smith v. Villars*, 7 Mod. 38.

10. Indictment for murder by the name of C. K.; he pleads in abatement misnomer, and that he was Earl of Banbury, and held a good plea. *Rex v. Knowles*, 12 Mod. 55.

11. Those peers before whom the indictment is found may try. *Lord Dacre's case*, J. Kely. 58.

12. The verdict of the greater number is good, if twelve agree. S. C. J. Kely. 58.

13. The high steward ought not to speak with the peers in absence of the prisoner. S. C. J. Kely. 57.

14. A peer convicted of manslaughter may be discharged without reading. *Bromwich's case*, 1 Lev. 180.

PEERAGE.

1. A peerage is well created though the name of it be not from any real place. *Rex and Reg. v. Knollys*, Holt, 531. Salk. 509, 510. S. C.

2. Where a barony in fee descends to several daughters, it is in the crown, and the king may *ex gratia* vest it in which daughter, or the inheritable issue of which daughter, he pleases, *ut videtur*; but if a person summoned to parliament by writ, and having sate dies, leaving issue two or more daughters, who all die, one of them only leaving issue, such issue has a right to demand a summons to parliament. *Sir R. Verney's case*, Skin. 441.

3. There cannot be *possessio fratris* of a barony. *Lord Grey's case*, Cro. Car. 601.

4. An earl's title was allowed at law, though it had been disallowed by the lords in parliament. *Rex v. Knollys*, 2 Salk. 509, 512.

5. If a baroness, &c. by marriage marries under the degree of nobility, she loses her name of dignity; but a woman noble by

birth or descent, whomsoever she marries, remains noble. *Countess of Rutland's case*, 6 Co. 53 b.

6. A peer of Ireland being also a peer of England, and residing in England, does not lose his Irish title by long absence alone. *Earl of Shrewsbury's case*, 12 Co. 106.

7. A peer cannot be ousted of his dignity but by attainder, act of parliament, or a judgment in a *scire facias* upon his patent; he cannot by fine. *Rex v. Earl of Banbury*, Skin. 526, 527, 528.

8. The house of lords cannot deprive of peerage by patent. *Rex v. Knollys*, Salk. 509, 510.

PENAL ACTION.

[See post, tit. STATUTE.]

PENALTY.

1. If no indictment is directed by a statute, a penalty to the king must be sued for as a debt. *Rex v. Mallard*, 2 Stra. 828.

2. When a statute gives a penalty to the king and the informer, and the informer does not sue within the year, the king may sue for the whole penalty at any time within two years. *Rex v. Franklin*, 6 Mod. 220.

3. If there be two convictions against one man, and he can pay one fine and not the other, he shall stand in the pillory for that which he cannot pay; but if one conviction only, and he wants 20s. only out of the full penalty, he shall keep his money and stand in the pillory. *Rex v. Wyat*, Fort. 132.

4. After a commitment in default of distress, justices cannot discharge on paying it. *Rex v. Green*, Gilb. 232.

5. The penalty of a bond and costs is the *maximum* recoverable; *secus* in any other instrument, if the action be in *assumpsit* or covenant. 1 Saund. 58 a. Id. n. [c].

6. Equitable costs are not allowed out of the penalty of the recognizance of bail. *Baldwin v. Morgan*, 2 Stra. 826.

7. The penalty is still the debt, notwithstanding* the sta- [*1035] tute 8 & 9 W. 3. c. 2. s. 8.; and therefore defendant is not entitled to costs under 43 G. 3., though plaintiff recover less than he was arrested for, if within the penalty. 1 Saund. 58 c. n. [c].

8. Chancery relieves against penalties where a satisfaction can be settled. *Peady v. D. of Somerset*, Stra. 453.

PENDENCY OF ANOTHER ACTION.

1. If two actions are brought in the same court, or in different courts, upon the same promise, though for different sums, one action may be pleaded in bar of the other.

Aylwood v. Woolley, 10 Mod. 286. *Owen v. Sperry*, 3 Co. 61 a.

2. In writs which comprehend certainty, as debt, detinue, &c. it is a good plea that the writ is brought pending another, but in writs which do not, as assize, trespass, &c., it is no plea until after plaint and declaration made, in which case the writ purchased after such plaint and declaration shall abate. *Owen v. Sperry*, 5 Co. 61 a.

3. In an action of trover in the Exchequer, the defendant pleaded that the plaintiff had another action depending in K. B. for the same trover and conversion of the same goods; and it was held that the bill should abate. *Owen v. Sperry*, 5 Co. 61 a.

4. But an action pending in an inferior court is no plea in bar to action brought in the superior court for the same cause. *Brinsley v. Gold*, 12 Mod. 204. *Owen v. Sperry*, 5 Co. 61 a.

5. So, to *assumpsit* in the King's Bench, the defendant cannot plead in bar another action depending for the same cause in the court of Common Pleas. *Rowston v. Combat*, 6 Mod. 157.

PERFORMANCE.

I. WHEN PERFORMANCE SHOULD BE AVERRED IN A DECLARATION, p. 1035.

II. RELATIVE TO THE PLEA OF PERFORMANCE, p. 1035.

I. WHEN PERFORMANCE SHOULD BE AVERRED IN A DECLARATION.

1. Where the condition precedes the thing demanded, the plaintiff should show in his count the performance of it; otherwise, where the condition is subsequent, and goes in defence of the thing. *Colthirst v. Benjamins*, Plow. 25.

2. The omission is cured by verdict, but not by judgment by default. 1 Saund. 228 a.

II. RELATIVE TO THE PLEA OF PERFORMANCE.

1. If lessee at will is bound to give notice to his lessor of all declarations delivered to him or to any other, &c. with his privity, general performance is a good plea. *Keating v. Irish*, Lutw. (228), 593.

2. In debt on a bond that a stranger shall render a just and true account, the defendant cannot plead performance generally, but ought to show how. *Fitzpatrick v. Robinson*, 1 Show. 1.

3. Formerly it was not allowable to plead performance of covenants generally; but in queen Elizabeth's time general pleadings began to be used, to avoid prolixity. *African Company v. Mason*, 10 Mod. 228.

4. Performance of covenants contained in an indenture cannot be pleaded without first stating the deed. 1 Saund. 9 d.

PERJURY.

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I. WHAT CONSTITUTES THE CRIME OF PERJURY.

1. If a man gives evidence as to the credit of a witness, though this be not the issue, yet as it is a point circumstantially material, it is perjury. *King v. Gripe*, Com. 43, note, 1 Ld. Raym. 258. Comb. 460. 10 Mod. 195.

2. Perjury may be in an answer in Chancery to matter not charged in the bill, but not to an interrogatory when the matter is not in it. *Rex v. Drue*, 1 Sid. 274.

3. If it is in an answer in Chancery, it may be purged by a second answer. *Rex v. Carr*, 1 Sid. 418.

4. The attorney-general can assign perjury upon an oath made even for the queen's advantage; and also perjury, as a misdemeanor, is assignable at an inquest of office not upon the statuto. *Agar's case*, Mo. 627.

5. One gave evidence at a trial, and afterwards made affidavit that he was perjured and suborned, for which affidavit an information was exhibited against him, and he was found guilty of perjury in swearing that he was perjured. *Maynard's case*, 1 Vent. 162.

6. Unless the oath be not only false, but wilful and malicious, it is no perjury; therefore a man shall not be convicted of perjury for a mistake; as when one swore he read such a deed, and the fact was he read the counterpart only, this was ruled to be no perjury. *Reg. v. Muscott*, 10 Mod. 195.

7. Perjury by a jurymen must be with the knowledge that it was false, and in an action within the jurisdiction of the court. *Wild v. Cockman*, Cro. Eliz. 499.

8. Perjury cannot be assigned in that part of the verdict which finds a thing merely out of the issue. *Forster v. Jackson*, Hob. 53.

9. Making an affidavit which was never used, is not sufficient to convict of perjury. *Rex v. Taylor*, Holt, 534.

10. Perjury must be assigned in something material or conducing to the issue, or to the

discovery of the truth. *Rez v. Greep*, Holt, 535. 1 Ld. Raym. 257. S. C.

11. The oath must be before some judge. *Sherington v. Ward*, Cro. Eliz. 725.

12. An oath in a court touching a thing which it has no cognizance of is not perjury. *Paine's case*, Yelv. 111.

II. RELATIVE TO THE PARTIES' REMEDY BY ACTION.

1. An action on the case for making a false oath lies only on the statute of 5 Eliz. *Dampart v. Symson*, 2 And. 47.

2. In an action upon the statute for perjury, the plaintiff must show his damage; otherwise in indictments, &c. *Rez v. Gripe*, 1 Ld. Raym. 258.

3. Perjury may be punished as a misdemeanor, and the party injured may also recover damages in an action on the case. 12 Co. 128.

III. WHEN AN INDICTMENT LIES.

1. Perjury is punishable at common law. *Manney's case*, 19 Co. 101. *Dampart v. Symson*, Cro. Eliz. 521.

2. It may be punished at common law, though the jury give a verdict against the false testimony. *Hamper's case*, 3 Leon. 230. See lb. 170. Cro. El. 521.

3. One that commits perjury (not punishable by 5 Eliz.) may be indicted and punished by fine and imprisonment. *Sydenham v. Keilaway*, Cro. Jac. 8. pl. 9.

4. Though it be in the spiritual court or court baron, which are not of record, it is still punishable by indictment at common law. *Anon.* 1 Sid. 454.

5. There cannot be an indictment for perjury on Stat. 5 Eliz. c. 14. for giving false evidence to the grand jury at sessions on an indictment for riot. *Flower's case*, 5 Co. 99 a.

6. So also of perjury supposed to be committed on an indictment for felony. Id. ibid.

7. Held, that a defendant on an oath on an interrogatory in the Star-Chamber, could not be indicted on the statute of
[*1037] 5 Eliz. *Sir R. Miller's case*, Yelv. 120.

IV. WHEN AN INFORMATION LIES.

1. Perjury is punishable by information at common law. *Rez v. —*, 1 Sid. 106.

2. An information for perjury was denied because the question was not fair. *Rez v. Dummer*, Holt, 364.

V. RELATIVE TO PROCEEDINGS ON A CRIMINAL PROSECUTION;—

(a) *When there should be several indictments.* Two persons cannot be jointly indicted for perjury. *Rez v. Phillips*, Stra. 921.

(b) *In what court the proceedings should be.*

1. Perjury is to be punished in the same court where it is committed. *Aire v. Sedgwick*, 2 Ro. 198.

2. Perjury in Chancery is punishable there. Mo. 656.

3. Perjury committed in a case of spiritual consueance is punishable in the spiritual court.

Bishop of St. Davids v. Lucy, 1 Ld. Raym. 451.

4. But it is punishable in the King's Bench, though not committed there. *Rez v. Whickley*, 2 Ro. 244.

5. A man may be indicted for perjury in a court baron. *Anon.* 1 Mod. 55.

6. An indictment may be found at the sessions for perjury and barratry. 11 Mod. 67. But see ib. 67. n.

(c) *With respect to the form of the indictment on information.*

1. The charge of perjury ought to be equally certain, whether at common law, or on the statute. *Rez v. Greepe*, 2 Salk. 514.

2. An indictment for perjury ought to show the cause of the perjury, but otherwise in an action for words concerning perjury. *Sir R. Snowde, v. —*, Cro. Car. 322.

3. A man ought not to be drawn into a constructive perjury. Salk. 514.

4. An indictment for perjury upon the statute 5 Eliz. must say *voluntarie deposed*. *Hamper's case*, 2 Leon. 211.

5. If an indictment for perjury on an affidavit before a commissioner for taking affidavits, do not say that the perjury was voluntarily or wilfully committed, it is bad on error. *Rez v. Taylor*, Show. 190.

6. If an indictment of perjury assign it to be done at A, and it was done at B, it is sufficient if within the same county. *Rez v. Taylor*, Holt, 534. Skin. 403.

7. In an information for perjury, if the situation of a place is not sufficiently averred, an innuendo will not help it. *Rez v. Gripe*, Com. 43. 1 Ld. Raym. 259. S. C.

8. An indictment for perjury found at the sessions in Norfolk, stating that an act was done at Westminster in the county of Middlesex, and that the defendant did commit perjury at Theed in the county aforesaid, is bad. *Rez v. Gunn*, 11 Mod. 66.

9. "Barney" for "Barnap," and "orientale" for "orientali," are fatal variances between an indictment for perjury, and the record of the trial. *Rez v. Carter* 6 Mod. 168.

10. If an indictment for perjury, in reciting the record of the trial, state a fact as happening between A, B, and C. and it appears from the record produced in evidence, that the fact happened between A and B only, the variance is fatal. Id. ibid.

(d) Evidence.

1. The same evidence is not sufficient to convict of perjury, that might determine a case of property. *Reg. v. Muscot*, 10 Mod. 194.

2. No conviction of perjury on evidence of a single witness. *Rez v. Broughton*, 2 Stra. 1230.

In an information for perjury, the party who has sustained the damage cannot be a witness. *Rez v. Povey*, 1 Sid. 237.

4. On an indictment of perjury in an answer in Chancery, it was held, that if the bill

be dismissed in Chancery, the complainant there is a witness, otherwise he is not; that the bill taken off the file is no evidence, though a copy made whilst the bill was on the file may be read; but there being only oath against oath, the defendant was acquitted. *Fanshawe's case*, Skin. 327.

5. In an information of perjury, [*1038] to^a prove what one (who was since dead) swore upon the first trial, and allowed to be good evidence. *Rez v. Buckworth*, T. Raym. 170.

6 A copy of depositions returned into Chancery, taken under a commission to examine witnesses, is not admissible evidence on an indictment of perjury against the defendant, although sworn to be a true copy, unless it be first found that the defendant was sworn, and that he made the original depositions. *Rez v. Baspole*, 2 Show. 486.

7. Neither the recital of a deed nor the letter of the party is evidence to prove perjury. *Rez v. Da. Ma. Carr*, 1 Sid. 419.

8. In perjury, if the record of the trial be not entered up, it cannot be proved by the minutes. *Rez v. Carter*, 6 Mod. 168.

(e) Trial.

1. If perjury be committed at the assizes, and the indictment state the *venire facias* as returnable before the justices aforesaid, yet the subsequent justices of assize may try the indictment. *Rez v. Serjeant*, 1 Mod. 81.

2. If there be two indictments against a defendant for perjury, and he takes the records down to trial, he may bring on which of them he pleases first; but the attorney-general may enter a *nolle prosequi*, and enforce him to bring on the other. *Rez v. Carter*, 6 Mod. 168.

(f) When a new trial will be granted.

1. Where the party is acquitted, no new trial is allowed in case of perjury. *Rez v. Fenwick*, 1 Sid. 153.

2. The court will grant a new trial on an indictment of perjury, after a verdict for the king, if it appear that it was not wilful and corrupt. *Rez v. Smith*, 2 Show. 165.

(g) Error.

One convicted of perjury cannot take advantage of errors in the first record on which he was convicted. *Rez v. Wright*, 1 Sid. 148. T. Raym. 74.

(h) Punishment.

In perjury upon the statute, disability is a part of the punishment; at common law, it is a consequence only, and pardonable. *Rez v. Griepke*, 1 Ld. Raym. 25. Salk. 514.

IV. RELATIVE TO SUBORNATION OF PERJURY.

1. Agreeing to give a person a sum of money to prove a deed to be forged, for the purpose of obtaining a verdict, is a criminal offence. *Rez v. Johnson*, 2 Show. 1.

2. An information for attempting to suborn a person to prove a deed false, is good, without alleging that the deed was true. Id. *ibid.*

3. An indictment for agreeing to suborn a

man to commit perjury, is good, without averring the agreement specially. 2 Show. 2 S. C.

4. In an indictment for subornation of perjury, it must appear that the party suborned committed the perjury. *Rez v. Darby*, 7 Mod. 101.

5. An indictment that one man gave another divers sums of money to prove a deed to be forged, is sufficiently certain. *Rez v. Johnson*, 2 Show. 2.

6. In an information for subornation of perjury, if one of the assignments is good, and the defendant is found guilty, he shall be punished. *Rez v. Rhodes*, 2 Ld. Raym. 887.

7. An attorney convicted of a misdemeanor may be fined and imprisoned, and ordered to find sureties for his good behaviour, and be struck off the roll; for the penalty of subornation of perjury (inflicted by 5 Eliz. c. 9.) is no guide as to the punishment at common law. *Rez v. Johnson*, 2 Show. 4.

PETITION.

1. Where an estate might be divested out of a common person, and vested in another without action, entry or claim, it shall be divested out of the king without petition or *monstrans de droit*; and *e converso*. *Cholmley's case*, 2 Co. 50 a.

2. A petition lies to the king, though he has parted with the freehold. *Sadler's case*, 4 Co. 54 b. 1 And. 180. S. C.

3. When one common person against another* common person [*1039] is put to his real action, in such case he shall be put to his petition, which is in lieu of his real action against the king. Id. *ibid.*

[See also ante, tit. MONSTRANS DE DROIT, p. 955.]

PEW.

1. Uninterrupted enjoyment of a pew for more than twenty years, is not evidence to presume a title in plaintiff, unless the pew be laid as appurtenant to a messuage in the parish. 2 Saund. 175 c.

2. A faculty will not entitle to an action at law for disturbance of a pew, unless it annex the pew to messuage. 2 Saund. 175 c. n. [b]. [See also ante, tit. CHURCH, Vol. I. p. 283.]

PHYSICIAN.

1. No one may practise physic in London, or within seven miles of the town, without a license from the college of physicians. *College of Physicians v. West*, 10 Mod. 354. Cro. Jac. 121. S. P.

2. Nor may any, besides graduates of one of the universities, practise in the country without a license from the president and three elects. *The College of Physicians v. West*, 10 Mod. 354.

3. A graduate physician of Oxford cannot

practise in London without license of the college. *College of Physicians v. Lovett*, 1 Ld. Raym. 472.

4. The charter of incorporation, in which these privileges are granted, is confirmed by statute 14 & 15 Hen. 8. 10 Mod. 353.

5. An apothecary visiting a patient, judging of his disease, and sending in medicines for his cure, is not a practising of physic contrary to the 14 and 15 H. 8. c. 5., provided he only charge for the medicines. *Physicians' College v. Rolfe*, 6 Mod. 44.

6. By 32 H. 8. c. 48., members of the college of physicians are exempted from serving the office of constable in London; but this will not exempt a physician, though a member of the college, from serving the office in the country where he occasionally resides. *Dr. Perdage's case*, 1 Mod. 22.

7. If a statute enact that the lord lieutenants of the several counties shall charge "any person with horse and arms in the county where his estate shall lie," towards the maintenance of the militia, the college of physicians are not exonerated from this charge by a charter exempting all the members thereof from "bearing or providing arms to serve in the militia in London or Westminster." *Sir Hans Sloane v. Pawlett*, 8 Mod. 11.

8. The college or the president may sue for the penalty for practising without license. *College of Physicians v. Tailbois*, 1 Ld. Raym. 153. 680.

9. The college of physicians may bring an action on the 34 H. 8. c. 5. in the name of the president and fellows. *President and College of Physicians v. —*, 2 Show. 167.

10. In debt on the 14 H. 8. c. 5. for practising without license, the printed statute-book is evidence of the charter of the college. S. C. 2 Show. 166.

11. In an action for false imprisonment brought against the president and censors of the college of physicians and others, the defendants justified under the charter for the incorporation of the college, and the statute 14 & 15 H. 8. c. 5. by which the charter is confirmed, and the statute 1 Mary c. 9. enlarging the power of the censors, and set forth, that the plaintiff practised physic, not being admitted, &c.; that being examined, he was found insufficient, and forbidden to practise; but that notwithstanding he afterwards did practise for a month, whereupon they amerced him £5., to be paid at their next assembly, &c., and likewise enjoined him to forbear practising any more until he was found sufficient, &c., upon pain of imprisonment; that he continuing still to practise, was further fined, and ordered to be committed; that being questioned if he would submit to the said college, he replied that he had practised, and would practise without leave of the college, and denied that by the statute they had any authority over him; he

[*1040] having regularly taken his de-

gree of doctor of physic within the university; whereupon the censors ordered him to prison, which was executed accordingly; the plaintiff replied, by showing the clause in the act upon which he relied, and averred that he had taken the degree of D. M. in the university of Cambridge, and practised physic in the city of London as he well might; upon demurrer, the replication was held to be good, and that the censors had no power to commit the plaintiff for any of the causes mentioned in the plea. *Dr. Bonham's case*, 8 Co. 114 a.

12. It was also resolved in the above case, that, supposing the censors had power, yet they had not pursued it, for these reasons; 1st, because the censors alone have power to fine and imprison, whereas the fine was imposed by the president and censors; 2dly, the plaintiff was summoned to appear before the president and censors, whereas the president had no authority; 3dly, the fines imposed by them by virtue of the act belong to the king, and yet the fine was limited to themselves; 4thly, they ought to have committed the plaintiff immediately, though no time is limited by the act; 5thly, their proceedings ought not to have been by parol, but put upon record, inasmuch as their authority was by patent and act of parliament, particularly as it was to fine and imprison; 6thly, the act was to be construed strictly, otherwise the liberty of the subject was at their pleasure. *Id. Ibid.*

PIEPOWDER COURT.

1. This court must be holden before the steward, and not the mayor, unless by custom. *Anon. Skin. 33.*

2. This court may be attached to a market as well as to a fair, but it can only meddle with what happens in the market the same day, and actions for words or concerning land are not proper for that court, but only matters of contracts and batteries, and words there, during the market, and by occasion thereof. *Howel v. Johns*, Cro. Eliz. 774.

3. A plea in justification of an arrest, stating that the contract was made within the fair, to entitle the piepowder court to jurisdiction, but without specifying that it was for something bought or sold, or arising within the fair, was held bad. *Anon. Skin. 33.*

[See also *ante*, tit. COURT, div. II. (n.) Vol. I. p. 401.]

PIRACY.

1. Piracy was held to be within the words of a policy, viz. danger of the seas. *Barton v. Wolliford*, Comb. 56, 57.

2. A thing which is not felony if done upon the land, is not piracy within the statute 28 H. 8. if done upon the sea. *Palachie's case*, 1 Ro. 175.

3. The vessel is not forfeited by the piracy of those who are in it. *Hildebrand's case*, 1 Ro. 285.

4. A pardon for all felonies in or out of the realm does not pardon a piracy upon the high sea; but it pardons piracy in a creek or port. *Anon.* Mo. 756. pl. 1044.

5. The knowingly receiving and abetting within the body of a county one who has committed piracy upon the sea, is not an offence cognizable by the common law; for where the common law cannot punish the principal, it cannot punish any one as accessory to such principal; *quere*, whether the admiralty has jurisdiction in such case. *Admiralty case*, 13 Co. 51.

6. By the letters patent granted to the lord admiral of England, the goods which pirates take from others by robbery and piracy do not pass. *Case of Piracy*, 12 Co. 73.

7. Until proof of property be made, the king may seize goods so taken, and may sell them if they are *bona peritura*. *Id.* *ibid.*

8. The statute does not limit the owner, in case of depredation, to any certain time to prove the property of the goods, as in case of wreck. *Id.* *ibid.*

[*1041] PLACE.

RELATIVE TO THE STATEMENT OF THE PLACE IN PLEADING.

1. A declaration in *assumpsit* that the defendant, in consideration the plaintiff would do such an act, promised to pay, averring that he did the act, without alleging a place, is bad on demurrer. *Jackson v. Miles*, 1 Show. 50.

2. It is not sufficient to show where a spiritual court was held at the commencement of the suit, without alleging at what place it was held when sentence was pronounced. *Luicke v. Luicke*, Lutw. [110, 111]. 302.

3. If a contract be laid in London, and a collateral matter, or the thing contracted for, be done beyond the seas, it need not be alleged "to be done in the ward of Cheap." *Mudge v. Homer*, 1 Show. 348.

4. If a man pleads a conveyance made of land according to promise, he need not show where it was made, for it shall be intended to be made upon the land; so in case of performance of covenants. *March*, 22. pl. 51.

5. In pleading the statute 32 H. 8. c. 16. of alien artificers, a place need not be alleged where he was an alien and artificer. *Jevens v. Hertridge*, 1 Saund. 8.

6. If the count omit to state the place, yet if the defendant plead a collateral matter whereby the matter of fact is confessed by implication, the fault in the count is thereby cured. *Pope v. St. Leger*, Lutw. [175].

7. So, after a writ of inquiry of damage, the want of a place is not material. *Lutw.* [85].

8. The place laid in the declaration ought, in general, where the matter is transitory,

to be followed in the plea. *Bridgewater v. Bythway*, 3 Lev. 113. 1 Saund. 8. 85. 2 Saund. 5 b.

9. Where the justification is local, the place must be traversed. 1 Saund. 81 a. 2 Saund. 56.

PLANTATION.

1. Though a plantation be an inheritance, yet if it is in a foreign country, it is looked upon as a chattel to pay debts, and a testamentary thing. *Noel v. Robinson*, 2 Vent. 358.

2. On an appeal, the appellant must procure the proceedings to be transmitted, and proceed within a year after the appeal allowed, or appeal will be dismissed with costs, without notice. *Gordon v. Louthers*, 2 Ld. Raym. 1447.

3. The foreign courts cannot transmit a matter for difficulty to the king in council, but must determine it. 8 C. 2 Ld. Raym. 1448.

PLEAS AND PLEADING.

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(A) RESPECTING PLEADING IN GENERAL.

- I. GENERAL RULES IN PLEADING.
 1. Every thing shall be taken most strongly against the pleader. *Hob. 222. 234. 1 Saund. 258 a.*
 2. Whatever is materially alleged and not denied is admitted. *Nicholson v. Simpson, Stra. 297. 1 Saund. 22 a. n. (3).*
 3. The day of the week, where material, ought to be set forth in pleading, for the court are not obliged to consult the almanack. *Major v. Clarke, 2 Vent. 248.*
 4. In reciting statutes in pleading, it is sufficient for any one to recite so much as is for his case. *Lord Shaftsbury v. Digby, T. Jones, 50.*
 5. Surplusage in a count or declaration hurts not. *Roll v. Osborn, Hob. 23.*
- II. RELATIVE TO THE CONSTRUCTION OF PLEADING.
 1. In pleading, words shall be tied to a strict construction, according to the rules of grammar. *Jackson v. Laveright, 10 Mod. 185.*
 2. Words are to be taken exclusively or inclusively according to the subject-matter. *Rex v. City of Norwich, Stra. 181.*

III. RELATIVE TO THE DEGREE OF CERTAINTY NECESSARY IN PLEADING.

1. In bars which are to defend the party and excuse himself, certainty to a common intent is sufficient; in indictments, counts, replications, &c., certainty to a certain intent in general is required; but certainty to a certain intent in every particular is rejected by the law. *Lang's case*, 5 Co. 120 a. 1 Leon. 321. *Stone v. Twener*, 10 Mod. 330. Comb. 64.

2. Duplicity or uncertainty is not allowed in any pleading. *Bishop of Exeter v. Heal*, Comb. 239, 240.

3. Pleas which go to the disability of a person ought to be very certain. *Hele v. Bishop of Exeter*, 4 Mod. 136.

4. Where bars are to be good to a common intent, it shall not be such an intent as stands indifferent, but such as has a more vehement presumption than any other intent. *Colkirst v. Bejushin*, Plow. 30.

5. Want of the word *alio* or *aliis* in a declaration, where several mention is made of things of the same nature, hurts not after verdict. *Chamberlain v. Cooke*, 2 Vent. 78.

IV. RELATIVE TO THE USE OF A SCILICET.

1. What comes under a scilicet shall not vitiate. *Webb v. Turner*, Stra. 1095.

2. When time or other circumstance is ascertained by a videlicet or scilicet, if it is not material it is void. *Harvey v. Sir G. Reynold*, Lat. 200. 209.

3. Where payment is pleaded to a bond, scilicet such a day, the day is not material. *Browne v. Barry*, Stra. 954.

4. An inconsistent *postea* under a scilicet may be rejected. *Hayman v. Rogers*, Stra. 222.

5.* A scilicet repugnant to the [*1044] matter precedent is void, as well upon demurrer as after verdict. *Cutler v. Southern*, 1 Lev. 195.

V. WHEN A DEED SHOULD BE SHOWN IN PLEADING, AND HOW IT SHOULD BE PLEADED.

1. Upon pleading a grant of a reversion, the deed must be shown. *Maidwell v. Andrews*, 1 Leon. 310.

So, upon pleading an estate in a hundred. *Lawson v. Hare*, 2 Leon. 74.

3. A tinner claiming the privilege of the stannaries court under a patent made by Edw. 1., must show the patent. Mo. 849.

4. A justification under process out of the palace court ought to show the letters patent for the erection of it. *Rogers v. Marscal*, 1 Sid. 259.

5. Performance of covenants cannot be pleaded without showing the deed. *Anon.* 1 Sid. 50. 97.

6. Where an acceptance of rent, lease for life, or an entry for a forfeiture, is pleaded to be made by a corporation aggregate, or a feoffment to them, it need not be shown that such acceptance was by deed, or that there was a warrant to make or receive livery, or

to enter, under their common seal. *Doin and Chapter of Windsor v. Gazer*, 2 Saund. 305.

7. The lord of a manor avows upon his tenant for rent and services, and avows upon the land according to the statute; the tenant pleads a lease of the manor to a stranger by the lord; he need not show the deed, though it be the deed of a corporation, because in his defence. Mo. 870.

8. In pleading a lease by husband and wife, the lessee need not allege that it was by deed. *Boraston's case*, 3 Co. 19 a.

9. He who comes in by act of law need not show the deeds of his estate. *Gray v. Fielder*, Cro. Car. 209.

10. One possessed of a lease makes an under lease; under lessee makes a lease, and his tenant covenants to repair; in an action of covenant upon the breach he need not set out the original lease or mesne assignments. *Gold v. Barnely*, Carter, 31.

11. On a general demurrer, no advantage shall be taken for not producing a lease under the duchy seal. Lutw. [568].

12. Want of showing a deed is aided after verdict by the 18 Eliz. c. 14. *Lawson v. Hare*, 2 Leon. 740. 3 Leon. 195.

13. Deeds are to be pleaded according to their legal operation. Holt, 177. 211. *Netherthorpe v. Jessop*, Holt, 413.

14. None need plead more of a deed than what makes for him. *Elliot v. Blake*, 1 Lev. 88.

VI. RELATIVE TO AVERMENTS IN PLEADING;—

(a) *When an averment is necessary;—*

1. In a declaration.

1. In case, it is necessary to aver the performance of a condition precedent. *Atkinson v. Morrice*, Holt, 148.

2. Debt lies on an agreement by a parishioner to pay his share of the charge of a suit, against an individual of the parish, averring that his share came to so much. *Sanders v. Marke*, 3 Lev. 429.

3. The consideration of a duty ought to be precisely alleged; as, in an action on the case for a duty to be paid for weighing goods, it must be averred that the goods were such which are usually sold by weight. *Jeffries v. Watkins*, 3 Mod. 162.

4. In *assumpsit ad damnum* 400l., defendant pleads the statute of limitations; plaintiff replies he sued out a *latuit* two years before for 150l., but not averring it to be for the same cause, held ill. *Holloway v. Thurston*, 8 Mod. 109.

5. Where promises are mutual, performance or tender, &c. must be averred. *Colonel v. Briggs*, Salk. 112. 172.

6. So, where one thing is to be done as the consideration of the other in contracts, &c. S. C. 1 Salk. 112, 113. 171.

7. Where an administrator brings an action during the absence of the executor, he must aver that the executor is absent. *Slater v.*

May, 3 Salk. 23. 2 Ld. Raym. 1071. 6 Mod. 304. Salk. 42. S. C.

[*1045] 2.* In a plea.

1. Where a recovery is pleaded with a different name, either of the party or land, there ought to be an averment that the land in demand, and the land mentioned in the recovery, are the same. *Stonehouse v. Beade*, 2 Ro. 377.

2. Where joint-tenancy is pleaded in abatement, the life of the other joint-tenant not named must be averred. *Sir Josiah Child v. Sands*, Salk. 32.

3. Where a deed giving power to appoint is pleaded, if no appointment be made, it must be so averred; *secus*, if the deed be not pleaded. 2 Dy. 136. pl. 17.

(b) Where an averment need not be made;—

1. Generally.

1. It is a rule in pleading, that nothing need be averred which appears sufficiently plain without. *Child v. Pierce*, 10 Mod. 331. *Rez v. Knollys*, 1 Ld. Raym. 13.

2. There needs no averment of that in a plea or declaration which will come more properly on the other side. *St. John v. St. John*, Hob. 78. 124.

3. No man shall be compelled to disclose matter which makes against him, but it shall come on the contrary side. *Plow. 16. 32.*

4. Delivery of a writ or warrant need not be averred, but the contrary must come from the other side. *Britton v. Cole*, 1 Ld. Raym. 310.

5. The suing of a *latitat* need not to be averred to be out of B. R., because it is a peculiar writ. *Odes v. Clerk*, 1 Ld. Raym. 397.

2. In a declaration.

1. There needs no averment in a declaration, where it appears there are reciprocal remedies. *Nichols v. Reynbred*, Hob. 68. 106.

2. In an action upon the case against an executor upon a promise made by the testator to pay 20*l.* at his death, the plaintiff need not aver that he did not pay it in his lifetime. *Greenway v. Hornblow*, Hard. 221.

3. An averment of notice of a fact of which defendant must be consant, is unnecessary; and although it might be necessary the defect is aided by pleading over. *Dodd v. Atkinson*, C. T. Hardw. 349.

4. The plaintiff is not obliged to show an act done between a stranger and the defendant to which he is not privy. *Cress v. Waldenke*, Yelv. 25. 123.

5. Things apparent need not be averred; as in an action for these words, "as sure as God governs the world, or king J. this kingdom," &c.; it is not necessary to aver that God governs the world, &c. *Dacy v. Chinch*, 1 Sid. 53.

6. For saying that he has killed J N, an

action lies without averring J N to be dead. Id. *ibid.*

7. Declaration upon an *assumpsit* in consideration of a cure, good after verdict without averring the cure. *Lee v. Edwards*, 1 Sid. 423.

8. There is no occasion to aver that payment was not made to the plaintiff's order. *Mitchell v. Broughton*, 1 Ld. Raym. 673.

9. In debt upon two bonds, there is no need to aver that no part is paid. *Watson v. Hudleston*, 1 Ld. Raym. 704.

10. A man buys wood growing, and covenants to pay for it upon tale; there is no need to aver that he had the wood, or that the plaintiff told it. *Ingledeu v. Cripps*, 2 Ld. Raym. 815.

11. In an action against an administrator, there is no need to aver that administration was committed. *Holliday v. Fletcher*, 2 Ld. Raym. 1510.

12. Averment of entry, in debt on a demise for years is unnecessary, though in debt on a lease at will, it is necessary; such averment is well made by "*virtute ejus intravit.*" *Salmon v. Smith*, 1 Saund. 202 a. 203.

13. If the defendant has covenanted with the plaintiff, that after the ascertainment of the profits of land, the defendant shall have one moiety of the profits and the plaintiff the other, it is not necessary to aver the ascertainment, but only that the defendant has received so much of the profits of the land. *Barker v. Thorold*, 1 Saund. 48, 49, 50.

3. In an indictment.

1. An indictment for not returning a warrant on a conviction, need not aver the conviction by the record, because it is but inducement. *Reg. v. Wyatt*, 2 Ld. Raym. 1192, 1193.

2. An indictment for conspiring to charge a man with being the father of a child, with which E E spinster pretended* to be pregnant, is good, [*1046] without an averment that he was not the father. *Reg. v. Best*, 2 Ld. Raym. 1167.

4. In a plea.

In a plea of a release of errors, there is no need to aver that the judgment is the same. *Dawson v. Rafter*, 2 Ld. Raym. 1054.

(c) How an averment should be made.

1. The nature of an averment is, to reduce a thing to a certainty which was uncertain before. *Anon.* 3 Mod. 216.

2. An averment may be made by a participle as well as a verb, or by any words which imply such matter to be so. 2 Saund. 61 g. n. (9).

3. A plea alleging that A, having been lawfully possessed, &c. as tenant at will to B, is a sufficient averment that A was a tenant at will to B. *Easton v. Southby*, Willes, 131.

4. In an information on the 4 & 5 Philip & Mary, c. 8, which inflicts two years imprisonment on any person above the age of fourteen who shall take away an heiress being within the age of sixteen years, a charge that the defendant, being above fourteen, &c., is a sufficient averment that he was above that age. *Rex v. Moor*, 2 Mod. 130.

5. An averment is good by the words "*pro ea quod*," "*quasi*," or "*licet*." 1 Saund. 117 a, b.

6. In B. R., calling the defendant administrator in the declaration, is sufficient without a special averment. *Holiday v. Fletcher*, Stra. 781.

7. Averment of the continuance of a life need not be express; it is sufficient if it appears by implication. *Scamler v. Johnson*, T. Jo. 227. 1 Saund. 235 a.

8. Where an agreement is to deliver goods on or before a day to a barge to be brought by the plaintiff; averment that they were not delivered on the day is sufficient, because the plaintiff was to concur. *Harman v. Ouden*, 1 Ld. Raym. 621.

9. In an action on a promissory note, the plaintiff set forth, that he demanded the money *de eodem* C (the drawer), but did not set forth that C drew the note; yet on demurrer held a good averment. *Elliot v. Cowper*, 8 Mod. 307.

10. An averment need not be made by disjunctive words, such as "paid, or caused to be paid." 1 Saund. 234 c. n. (6).

11. A material averment may be well made under a *scilicet*. 1 Saund. 170. n. (2).

12. An averment without time and place is bad on special demurrer only. 1 Saund. 33 a. n. [b].

13. The want of an express averment may be supplied by words which imply it. *Harlow v. Bradnox*, 2 Lev. 88. *Vide ib.* 23. 210.

VII. WHERE THE CONCLUSION OF PROUT PATET PER RECORDUM IS PROPER.

1. In *scire facias* against the bail, if they plead a surrender, they must conclude with a prout patet per recordum. *Delues v. Fenshaw*, 3 Lev. 152.

2. Prout patet per recordum is not necessary in debt for an escape. *Wale v. Briggs*, 1 Ld. Raym. 35.

3. When a general act is pleaded, the averment prout patet per recordum need not be made. *Attorney-General v. Tooke*, Hard. 334.

4. When outlawry is pleaded in abatement, a *capias* or some such thing must appear, and not conclude prout patet per recordum, as when it is pleaded in bar. *Anon.* 12 Mod. 132.

5. A *committitur* is to be pleaded with prout patet per recordum, but not so of a writ. *Alenon v. Butler*, 1 Lev. 211.

6. If an executor pleads in bar several

judgments against him, he may conclude *prout per separalia recorda inde*, &c., without concluding every one prout per recordum. *Palmer v. Lawson*, 1 Sid. 332, 333.

VIII. RELATIVE TO MISTAKES IN PLEADING;—

(a) *In the case of a mere clerical mistake.*

1. The mistake of the plaintiff's name in a bar, viz. *præd. Henric.* for *Christoph.* will not hurt. *Lovelace v. Bickham*, Lutw. [150]. 428.

2. A mere clerical error will not vitiate pleadings. *Morgan v. Griffith*, 7 Mod. 381.

(b) *Where there are two contradictory statements.*

Where it was pleaded that lands were delivered a day before the *liberate* awarded,* *virtute brevis*, the [*1047] words that imported the contradiction, were held void. *Butler v. Wallis*, Cro. Eliz. 464.

(c) *What is held to be matter of substance.*

1. An action against husband and wife, on the bond of the wife, made by the wife before marriage, must be in the *debet* and *detinet*; if it be brought in the *detinet* only, the error is matter of substance, and not merely of form, and is therefore not remedied by stat. 18 Eliz. c. 14. *Lloyd v. Walcott*, 5 Co. 36 a. 3 Leon. 206.

2. The omitting *profert* in *curia* of a deed, is substance. *Felshaw v. Cudworth*, 2 Ld. Raym. 762.

3. The omission of *contra pacem* in trespass is substance, but aided by verdict. *Day v. Markett*, 2 Ld. Raym. 985.

4. Want of traverse is sometimes matter of substance, and sometimes only form. 1 And. 166. 1 Leon. 44.

5. Want of showing a place is substance. *Estiggs v. Oule*, 3 Leon. 200.

6. In trespass for taking fish, the omission of the nature and number of fish is matter of substance, and not of form, to be remedied by stat. 18 Eliz. *Playter v. Warne*, 5 Co. 34 b.

(d) *What is only form.*

1. Pleading to a condition performance of covenants generally, is but form. *Bond v. Richardson*, 1 Leon. 311.

2. Pleading that he was seised by force of the statute of uses, where the conveyance is at common law, is merely form. *Shortridge v. Lamplugh*, 2 Ld. Raym. 802.

IX. GENERAL RULES RESPECTING JOINING ISSUE.

1. No issue can be joined after a traverse with a *hoc petit*, &c. *Read v. Dawson*, 2 Mod. 140.

2. A man cannot be driven to take issue on a matter that he confesses. *Ashton v. Sherman*, 1 Ld. Raym. 263.

3. To debt on bond against an executor, if issue be joined, whether he had assets on a particular day, it is bad. *Read v. Dawson*, 2 Mod. 139.

[See also *ante*, tit. *Issue*, Vol. I. p. 618.]

(B) RESPECTING PLEAS IN GENERAL.

I. GENERAL RULES.

1. The word "*placitum*" is *nomen collectivum*. Comb. 239. 1 Saund. 338.

2. Pleading is setting forth properly and in due form that fact which in law is a good discharge. *Weddal v. Jocar*, 10 Mod. 304.

3. Every man's plea shall be taken strongest against himself. *Muston v. Yateman*, 10 Mod. 229.

4. All necessary circumstances implied by law in a plea need not be expressed. 2 Saund. 305 a.

5. Where several pleas are requisite, as in *assumpsit* and *trover*, the causes of action are badly joined. *Saracini v. Kilner*, Holt, 367.

6. It is a rule in pleading, that every plea must answer the matter which is charged upon the defendant in the declaration. *Samways v. Eldesley*, 2 Mod. 75.

7. The bar must be good to a common intent, and must confess and avoid, or traverse, or conclude the defendant by estoppel. *Zouch v. Bamfields*, 1 Leon. 77. 1 Saund. 14. n. (3). 27. n. (1). *Anon.* Sav. 86.

8. A plea in bar must answer the whole declaration or count. 1 Saund. 28. n. (3). n. [c].

9. Pleading to part, and omitting part, will discontinue the whole, if judgment is not entered up for the part unanswered. 2 Ld. Raym. 841.

10. Pleas are in their own nature entire, and cannot be good as to one part, and bad as to another; therefore, if a plea be pleaded to the whole that goes to but part of the action, the plea is bad for the whole. *Baldwin v. Church*, 10 Mod. 322, 323. 1 Saund. 27. n. (2). 28. *Hancocke v. Proude*, 1 Saund. 337. *Pell v. Garrick*, Lutw. [629]. 1492.

11. A plea by an executor of several judgment is entire; and if one of them fails judgment shall be given for the king. *Rex v. Dickenson*, Park. 262.

12. If a party do not avail himself of an opportunity of pleading matter in bar, he cannot afterwards plead it, either in another action founded on the first, or in *sci. fa.* 1 Saund. 219 c. *Rock v. Layton*, Com. 88. *notis*.

13.* The facts pleaded in one [*1048] plea can neither assist nor invalidate another plea on the same record. Willes, 380.

II. WHERE SEVERAL DEFENDANTS SHOULD JOIN OR SEVER IN THEIR PLEAS.

1. Each party should plead that only which belongs properly to himself. 2 Ro. 37.

2. If two or more join in a defence, which is a sufficient justification for some, but not others, the plea is bad as to all. 1 Saund. 27. n. (2). *Philip v. Byron*, Stra. 509. 994. 1184. *Rowe v. Tuttle*, Willes, 15.

3. Joint defendants may sever in their pleas in abatement, or in bar. Hob. 250. *Essington v. Bourcher*, Hob. 244, 245.

4. But in an action against baron and feme, the feme cannot have leave to plead separately from her husband. *Gordon v. Halpen and Wife*, C. T. Hardw. 101.

5. The principal and bail cannot join a plea. *Addison v. Patterson*, 8 Mod. 289.

6. Where an action is brought against three defendants, who plead jointly, the jury may sever the damages, and the plaintiff may take execution *de milioribus damnis*, as well as where their pleas are several, and trials at several times. *Rodney v. Strode*, 3 Mod. 101, 102.

7. Though there be several executors, yet the plea of any one of them shall bind the estate of the testator. *Baldwin v. Church*, 19 Mod. 324.

III. WHERE AND HOW DEFENCE SHOULD BE MADE IN A PLEA, AND BY WHAT ATTORNEY.

1. In all dilatory pleas, except such as go to the jurisdiction of the court, a full defence must be made. *Gawen v. Surby*, 2 Show. 445. *notis*.

2. Excommunication is not pleadable without defence. *Hampson v. Bill*, 3 Lev. 240.

3. Ancient domesne is pleadable without defence. *Smith v. Thampton*, 3 Lev. 405.

4. But it is only good if accepted, else not. *Semb. Ferrers v. Miller*, 12 Mod. 21, 22.

5. The words "*venit et defendit vim et injuriam quando*," &c., make a full defence; and after such defence a defendant cannot plead outlawry in disability of the plaintiff, although a special imparlance has been given to him. *Gawen v. Surby*, 2 Show. 444.

6. But in debt upon an escape after execution, the defendant appeared "*et defendit vim et injuriam quando*," &c.; the court held this was not a full defence. 2 Show. 445. *notis*. But see *Trundal v. Trowell*, *contra*, 2 Show. 445. *notis*.

7. A defence without the words "*defendit vim et injuriam*" held good on a special demurrer. *Walsford v. Savile*, Lutw. [4. 452].

2. The want of it but form. *Bellasyce v. Hextie*, Lutw. [675].

9. A plea without defence may be refused, but it is made good by acceptance. *Ferrers v. Miller*, Salk. 217. Holt, 219. S. C.

10. A plea by an attorney of another court is a nullity. 1 Barnes, 194.

IV. RELATIVE TO THE STATEMENT OF THE PLACE.

1. A plea to a *scire facias* against bail, that the principal had paid, must state the place where. *Birrell v. Shaw*, 1 Mod. 24.

2. Where a submission is pleaded, and no place is shown, it is bad. *Barker v. Palmer*, Com. 141.

3. If a feoffment be pleaded in satisfac-

tion of a bond, the acceptance must be laid in the county where the seoffment was made. *Williams v. Farrow*, 6 Mod. 82.

4. It is not necessary for the defendant to answer to a certain place in a town, in trespass; otherwise in replevin, where the place is material. *Specot v. Carpenter*, T. Jones, 207.

5. A venue need not be laid in a plea in abatement, when pleaded in disability of the plaintiff. 6 Mod. 106.

V. RELATIVE TO THE STATEMENT OF THE TIME.

1. If the defendant pleads a thing as done *ante exhibitionem billæ*, instead of *ante impetrationem, brevis, &c.*, the action being by original, it is ill. Lutw. [241, 242, 701.]

2.* A plea of payment on the [*1049] day, mistaking the day, is bad. *Jernegan v. Harrison*, Stra. 317.

3. The defendant is not bound to the time mentioned in a plea in bar, either in pleading, or evidence. 2 Saund. 5 a, b.

VI. OF GIVING COLOUR TO THE PLAINTIFF.

1. In trespass for taking and carrying away hay and corn, the defendant pleaded, that queen Elizabeth, by letters patent, demised the rectory of C to A for his life, who demised to B for years, and that as servant to B he took the corn, &c. as tithes; but the defendant in his plea made no profit of the letters patent; upon demurrer, assigning for cause the want of colour, it was held to be unnecessary. *Leyfield's case*, 10 Co. 88 a.

2. When the special matter of the plea bars the plaintiff, although he had right before, colour need not be given. Id. ibid. See also lb. 90 a. 90 b. & 92 a. note (B.) last ed.

VII. WHEN THE MEANS BY WHICH A THING IS DONE SHOULD BE PARTICULARLY STATED.

1. A plea that letters patent became void, without showing how, is ill. *Lewis v. Preston*, 1 Show. 290. Skin. 303. S. C.

2. If one is bound to save harmless against a particular thing, defendant should show how he has done it; but if it be to save harmless generally, *non damnificatus* will do. *Anon.* 12 Mod. 406.

3. If a man plead an affirmative plea, as that he has saved the plaintiff harmless, and does not show how, it is bad; otherwise of a negative plea, as *non damnificatus*, &c. March. 121. pl. 200. Cro. Jac. 363. 634.

4. A discharge from a debt cannot be pleaded generally without showing how. *Hiltier v. Phympton*, Stra. 422.

5. A plea that he paid all debts owing by him to J S, ought to show what debts. *Stapleton v. Truelock*, 3 Leon. 3.

6. Plea that it appears, not saying how, is ill. *Wilson v. Done*, 2 Lev. 125. 3 Keb. 183. S. C.

7. On distraining for the penalty of a bye-law, the bailiff must plead the precept, &c. to make the distress. *Lamb v. Mills*, Holt, 554, 555.

8. In trespass, where the defendant justifies the taking by precept of an inferior court, he ought to show all the proceedings at large. *Garret v. Higby*, T. Jones, 129.

9. But in pleading a sentence of deprivation, it is not necessary to show before what judge the sentence was given. 3 Dy. 293. pl. 3.

10. So administration may be pleaded generally without showing who committed it. 3 Dy. 294. pl. 7.

VIII. THE PLEA MUST CORRESPOND WITH THE FORM OF ACTION.

Nil debet to assumptit on a promissory note, is a nullity. *Stafford v. Little*, 1 Barnes, 189.

IX. RELATIVE TO THE CONCLUSION OF A PLEA;

(a) Generally.

1. Every plea ought to have its proper and apt conclusion. 2 Saund. 209 c.

2. The conclusion makes the plea, and not the introduction. 1 Ld. Raym. 337. *Talbot v. Hopwood*, Fort. 335. 1 Show. 4.

3. And therefore, though it begins in bar, if it conclude in abatement, it is a plea in abatement; and so vice versa. *Carneth v. Prior*, 1 Show. 4.

4. A plea concluding in abatement is in bar, and issue peremptory. *Baker v. Berisford*, 1 Keb. 504. pl. 65.

5. Where the condition of an obligation is for payment of three several sums at three several days, and the defendant pleads payment of the two first sums, and that the third day is not come, he shall conclude in bar. *Owen v. Bulkey*, Comb. 483.

6. *Si ad billam respondere debeat*, is an ill conclusion in abatement, but proper to the jurisdiction. *Powers v. Cook*, 1 Ld. Raym. 64.

7. A plea that demands such judgment as the court cannot give upon it is ill. *Davenport v. Rafter*, 2 Ld. Raym. 1053.

8. In debt upon bond, the defendant pleads the statute of 23 H. 6., and that he was in custody, and that the bond was* for his enlargement, and con- [*1050] cludes *non est factum*, which ought to have been judgment *si actio, &c.*; and held naught. *Leech v. Darys*, Aleyn, 58.

9. A plea in bar must conclude to the action. 1 Saund. 325.

10. If a plea commence in bar with good matter, and conclude in abatement to the writ, it is well. 12 Mod. 525.

11. But if a plea begin in abatement and conclude to the action, it is ill, if as a plea in bar it be not sufficient. 12 Mod. 525.

12. Wherever an action is commenced by bill, praying judgment of the count; such is a plea in bar and in case, a plea in abatement of the count must not pray judgment of the count and that the count may be quashed, but that the bill may be quashed. *Leaves v. Bernard*, 12 Mod. 133.

13. If a plea begin with an answer to the whole, and the matter of it is only an answer

to part, the plea is naught. *Weeks v. Peach*, Holt, 561. 568, 569. 1 Sid. 16.

14. So where, in an action upon the case for damages, the inducement in the plea of the defendant goes only to part of the wrong, and yet the traverse goes to the whole, the plea is bad. *Osborne v. Rogers*, 1 Saund. 268, 269.

15. A condemnation by a justice of peace upon the statute of excise, pleaded with a *prout patet per recordum*, is good. *Aylesbury v. Harvey*, 3 Lev. 205.

16. An ill conclusion vitiates a plea. Comb. 86.

(b) *When it should conclude with a verification.*

1. The conclusion must be with an averment after any affirmative matter. 1 Saund. 103 a. 235.

2. Where there is an affirmative to a negative, yet if the matter is new, the party need not conclude to the country. *Loder v. Loder*, 3 Salk. 211.

3. If a party conclude "and this he is ready to certify," instead of "verify," it is no objection. *Willes*, 6.

(c) *When it should conclude to the country.*

1. Where after an absolute affirmative the other party makes a direct negative, he ought to conclude to the country. *Roberts v. Marriott*, 2 Saund. 189, 190.

2. A plea of delivery as an escrow ought to conclude to the country. *Nolby v. Lock*, 2 Ld. Raym. 787. 803.

3. A plea of bankruptcy must conclude to the country, but this plea is an exception to the general rule. *Poole v. Broadfield*, 1 Barnes, 236. 1 Saund. 235. n. [f.] Gilb. 318.

4. In *assumpsit* to perform an award, if the defendant pleads no such award, he ought to conclude his plea to the country. *Cooke v. Whorwood*, 2 Saund. 337.

5. Negative pleas should be averred with *hoc paratus est verificare*. *Mathews v. Carey*, 3 Salk. 52.

6. Where it concludes *et hoc paratus est verificare*, where it ought to conclude to the country, is bad. *Earl v. Andrews*, Comb. 86.

(d) *How a wrong conclusion should be taken advantage of.*

If the conclusion be wrong, it must be specially shown for cause of demurrer. 1 Saund. 99. 103 c. 285. 2 Ib. 190.

X. RELATIVE TO THE DISTINCTION BETWEEN PLEAS IN BAR AND IN ABATEMENT.

1. A plea beginning in bar and concluding in abatement is good. *Leaves v. Barnard*, 5 Mod. 131.

2. If a plea either begins or concludes in bar, it is a plea in bar. *Medina v. Sloughton*, 1 Ld. Raym. 593, 594.

3. A plea commencing with *petit judicium de narratione* is in bar. *Bond v. Barnes*, 2 Ld. Raym. 1205. 1461.

4. Where matter in bar is introduced, and the plea concludes as in abatement, it is a

plea in abatement. *Medina v. Sloughton*, 1 Ld. Raym. 593. 1 Mod. 214. *Contra*, 6 Mod. 103.

5. It seems that in such case the defendant at his election may take it either in bar or in abatement. *Stubbins v. Bird*, 2 Mod. 63.

6. Plea in abatement, demurrer as in bar, and joinder as in bar, held to be a discontinuance. *Carter v. Davis*, 1 Show. 255.

7.* Where a plea concludes in abatement it is not peremptory; [*1051] but if a plea in abatement be pleaded in bar, it is peremptory. *Aleyn*, 63. 65.

XI. RESPECTING TRAVERSES.

1. A traverse ought to be of such a part (or point) as if found for the defendant destroys the plaintiff's action. *Walton v. Spark*, Comb. 321. Holt, 571.

2. If a plea be to an action brought by one as administrator that A made an executor, the defendant ought to traverse that A died intestate. *Landon v. Bessingham*, Com. 156.

3. In *assumpsit* against a person as executor, a plea in abatement that the testator made another person executor, who proved the will, and took upon him the execution thereof, must traverse that the defendant was executor. *Singleton v. Bautree*, 2 Mod. 168.

4. In trespass, the defendant justified under a lease for years made to him by one W, who was seised in fee; the plaintiff in replication made title by descent and traversed the lease; held, on demurrer, the traverse is good; the plaintiff might have traversed the seisin in fee; in many cases, the one or the other is traversable. *Read's case*, 6 Co. 24 a.

5. Where a justification goes to a time and place not alleged by the plaintiff, there must be a traverse of both. *Goodwin v. Butcher*, 2 Mod. 68.

6. Where the date of a bond is material, and differs from the day mentioned in it, there must be a traverse of the delivery on that day. *Pullen v. Benson*, Holt. 558.

7. He who claims a lease for years by an elder grant ought not to traverse a later grant, but the other party ought to traverse the elder grant, or show how the grantor was enabled to make the second grant; otherwise, in the case of a feoffment. *Helyar's case*, 6 Co. 24 b. Moore, 550. Cro. Eliz. 500. S. C.

8. Where I confess and avoid, I ought not to traverse, and it may be passed over, and issue taken upon the avoidance. *Rex v. Archbishop of Armagh*, Stra. 837.

9. The words "*quis est eadem*, &c." in trespass supply a traverse of the time, &c. *Bodle v. Wilkins*, 3 Lev. 227.

XII. WHAT CANNOT BE GIVEN IN EVIDENCE WITHOUT BEING PLEADED SPECIALLY.

1. In an action of trover for a ship and

cargo, it was objected that the cargo was shipped by A B and Company, and B being dead, the action brought by A only is ill, because it appears others have an interest; but ruled that this ought to be proved; and if there are others, this is a matter in abatement, and ought to be pleaded. *Dickuray v. Dickenson*, Skin. 640.

2. Where there is matter in bar to be pleaded and omitted, it shall not be given in evidence. *Rook v. Sheriff of Salisbury*, 12 Mod. 412.

3. He who justifies by a license or liberty in any form of action must plead it specially, and cannot have advantage of it upon the general issue. Hob. 174, 175. *Anon.* 6 Mod. 70. *Leonard v. Stacey*, 6 Mod. 69.

4. A claim of goods as a deadend will not be admitted in evidence on the general issue. *Dyer v. Mills*, Stra. 61.

5. In trespass, if the *locus in quo* was a common highway, the defendant must plead that specially. *Salmon v. Courtney*, 7 Mod. 301.

6. In trespass, matter of right must be specially pleaded. *Dove v. Smith*, 6 Mod. 153.

7. Matter of discharge must always be pleaded specially, and showed to the court how, &c. *Stake v. Drake*, Hob. 296.

8. To an indictment for not repairing a road, matter of discharge must be pleaded. *Rez v. St. Andrews*, 1 Mod. 112, 113.

9. Upon *non est factum* pleaded to a bailbond, the defendant admits all other matters against him, and depends upon that for his defence. *Bishop v. Brooks*, Com. 303.

10. In debt upon a single bill payable with interest on demand, the defendant cannot give want of demand in evidence on *non est factum*, for it must be specially pleaded. *Osborn v. Horier*, 6 Mod. 168.

11. On a special promise, payment or any other legal discharge must be pleaded. *Fitz v. Freestone*, 1 Mod. 210.

[*1052] XIII. WHAT CANNOT BE PLEADED SPECIALLY, OR IF PLEADED, MAKES THE PLEA BAD, AS AMOUNTING TO THE GENERAL ISSUE.

1. In pleading specially, wherever the defendant shows a cause of action in the plaintiff, either express or implied, and confesses and avoids it, it is a good plea; but without allowing a cause of action, it amounts to the general issue. *Hallett v. Birt*, 12 Mod. 121.

2. A plea of performance in *assumpsit* amounts to the general issue. *Sea v. Taylor*, 1 Salk. 394.

3. In case for a false return, the defendant pleads that the return is true; it is ill, because amounting to the general issue. *Green v. Pope*, 1 Ld. Raym. 125.

4. Every special plea in trover and con-

version with colour amounts to the general issue. *Bellamy v. Balthorp*, Lat. 186.

5. In trover for a horse, if defendant pleads that he is an ostler, and the horse was put to him to livery and died there, this is nothing but the general issue. 1 Ro. 22.

6. In trespass, plea that it was the horse of J S, and the plaintiff took and impounded it, and that the defendant took him by replevin, amounts to the general issue. *Holler v. Bush*, Salk. 394.

7. A special plea is bad on special demurrer, if only amounting to the general issue. 1 Saund. 27. n. [c.] 3 Salk. 272. 2 Ro. 350.

8. It is said to be in the discretion of the court to allow a plea amounting to the general issue. Hob. 127.

XIV. WHAT MAY BE PLEADED SPECIALLY, OR GIVEN IN EVIDENCE UNDER THE GENERAL ISSUE.

1. Where the defence consists of matter of law, the defendant may plead specially; but when it is fact, he must plead the general issue. *Newton v. Creswick*, 3 Mod. 166.

2. It is not true as a rule, that where the defendant may plead the general issue and give the special matter in evidence, he shall not plead specially. *Paramour v. Johnston*, 12 Mod. 376, 377. 2 Vent. 295.

3. In many cases a defendant has it in his election to plead a matter specially, or give it in evidence upon the general issue. S. C. Com. 4.

4. In all cases where a person admits the action, were it not for some special matter, that may in general either be specially pleaded or given in evidence. *Hussey v. Jacob*, 12 Mod. 97.

5. In debt, the defendant may plead a release, or give it in evidence on the general issue of *nil debet*. *Hatton v. Moore*, Salk. 394.

6. So in *assumpsit* he may plead payment, or give it in evidence on *non assumpsit*. S. C. Salk. 394. Holt. 561. S. C.

7. Lunacy may be given in evidence on *non est factum*. *Yates v. Boen*, 2 Stra. 1104.

8. Infancy or a release may be either pleaded specially, or given in evidence upon the general issue. *Atherley v. Evans*, Say, 270.

9. Usurious contract is good evidence on *non assumpsit*. *Ld. Bernard v. Saul*, Stra. 498.

12. In replevin, on *non cepit* it is good evidence for the defendant that the goods were taken in another place. *Johnson v. Wol-lyer*, Stra. 507.

11. A sheriff against whom an action is brought for a false return of *cepi corpus*, &c. may plead the statute of 23 H. 6. c. 10. in bar, or give it in evidence on the general issue, because it is a public act. *Parker v. Welby*, 1 Mod. 57. *Simpson v. Ellis*, 2 Mod. 36.

12. In an action founded on an injury, every thing which shows that the defendant

did what he lawfully might do, may be given in evidence upon not guilty pleaded. *Anon.* Com. 273.

13. In case for beating a horse, and not guilty pleaded, defendant may justify in evidence. *Slater v. Swann*, Stra. 872.

14. They who are not chargeable to repair bridges of common right may discharge themselves upon not guilty. *Rez v. Inhabitants of Norwich*, Stra. 180.

15. A matter that admits the cause of action, and avoids it, though amounting to the general issue may be pleaded* be- [*1053] cause it gives colour. 1 Ld. Raym. 566. Skin. 362.

16. Matter of law which amounts to the general issue may be pleaded or given in evidence. *James v. Fox*'s, 12 Mod. 101. 1 Ld. Raym. 393. *Birch v. Wilson*, 2 Mod. 277. *Paramour v. Johnston*, 12 Mod. 377. Hob. 218.

17. Where matter of fact is intermixed with matter of law, it may be pleaded, though it might be evidence upon the general issue. *Hussey v. Jacob*, 1 Ld. Raym. 88.

18. In an action on the case for disturbance of common, a special plea, that A. being seised of such lands with all commons and emoluments to the premises belonging or therewith used, conveyed them to the defendant, and that the tenants and occupiers of the said lands, &c. have used to have common therein, *virtute cuius* he having right did put his cattle in to take common there, and that there was sufficient common both for the plaintiff and himself, is a sufficient statement of a right of common, and although it amount to the general issue, yet, as it also discloses matter of law, it is good. *Birch v. Wilson*, 2 Mod. 274.

XV. RELATIVE TO JUSTIFICATIONS UPON POSSESSION.

1. Where possession is only an inducement to a plea, and not substance, the defendant may justify upon such possession against a wrong-doer. *Langford v. Webber*, 3 Mod. 132.

2. Held, that title must be shown in a justification, but need not in an action against a wrong-doer. *Staples v. Heydon*, 2 Ld. Raym. 925.

XVI. WHEN AND HOW THE PARTY'S ESTATE SHOULD BE SHOWN IN A PLEA.

1. In pleading particular estates, the commencement ought to be shown, unless it be matter of inducement, or the party comes not in privy, or it be collateral. *Gold v. Bransty*, Carter, 30, 31. 2 Ld. Raym. 923. *Robinson v. Smith*, 4 Mod. 346.

2. Where a particular estate is pleaded, the plea must show a seisin in fee. *Staple v. Hayden*, 6 Mod. 4.

3. If one pleads a conveyance of a reversion in fee by lease and release, and it is alleged that he was seised in fee at the time of making the lease, but not at the time of the

release, yet the plea is good, for the estate in fee shall be intended to continue. Lutw. [125].

4. Pleading *plenam potestatem ius, &c. titulum ad premissa dimittitur* without setting forth what estate he had, whether in fee or estate, held bad upon a demurrer. *Woodward v. Fox*, 2 Vent. 271.

5. A term should not be pleaded in a bar by a general *possessionatus*. 1 Ld. Raym. 707.

XVII. RELATIVE TO THE PLEA OF JUDGMENT RECOVERED.

1. In debt against two executors, they pleaded a judgment against one of them as administrator; held to be a good bar. *Parker v. Amys*, 1 Lev. 261.

2. A recovery in a personal action is a bar to an action of the like nature where the same evidence supports both actions. *Putt v. Rostern*, 3 Mod. 2.

3. Where a plea in bar is bad for want of averment of a life, the judgment is no bar in another action where the life is averred. *Ingram v. Bray*, 2 Lev. 210.

4. In pleading a judgment of the court in bar, the defendant must give the plaintiff a note of the term, and number of the roll. *Mainard v. Harvey*, W. Kely. 67.

XVIII. RELATIVE TO DUPLICITY IN A PLEA;—

(a) *What pleas are bad as being double.*

1. To plead a double traverse is bad. 3 Lev. 244.

2. The assignment of error in fact and in law together is double. *Anon.* 1 Sid. 147.

3. If rent be shown to be in arrear at two days, the plea is double. Plow. 139. 142.

4. *Nil debet* as to part, and *nil habuit in tenementis* as to the other part, makes the plea double. *Coombs v. Talbot*, 4 Mod. 254.

(b) *What are not.*

1. Where a man pleads two matters, when* he is compelled to [*1054] show them both, it does not make the plea double. *Browning v. Eeston*, Plow. 140. 193, 194.

2. That two of the plaintiffs are dead is not double, though the death of one will abate the writ. *Dacres v. Dunkin*, 2 Lev. 62.

3. The condition of a bond was to pay the costs of such a suit; breach, that he had not paid them, or discharged the plaintiff, is not double. Lutw. [146, 147.]

4. In debt against an executor, fully administered, and so nothing in his hands, does not make the plea double. Plow. 140.

5. In detinue, the defendant pleaded that after the bailment she had taken a husband, and that during the marriage the plaintiff had released to him all actions, and held not to be double. *Anon.* Dull. 30. pl. 9.

6. Detinue by a wife upon bailment; the defendant pleads the marriage of the wife after the bailment, and a release of the husband; and held good, not double. Mo. 25.

7. If one pleads that another remitz, re-

lassavit et confirmavit to him a reversion, if in the conclusion he relies only on the release, it is not double. *Lampugh v. Shiera*, Lutw. [124, 125. 130.] 351.

8. To an information for a libel, the defendant may plead not guilty, with a *relicta verificatione*. 1 Mod. 18.

9. So, several bars may be pleaded to several parcels of a debt on bond. *Market v. Johnson*, Salk. 180. 2 Ld. Raym. 1121. S. C.

10. A gives B all his trees, and cuts them down, B takes them away; in trespass by A for cutting and taking away, he may plead not guilty to the cutting, and justify the residue. 3 Dy. 305. pl. 7.

11. To debt on bond, with condition reciting a sale of lands, and that the obligor shall warrant A, if he should enjoy it peaceably to him and his heirs, to hold of a manor by services, &c., it is not double to plead that A did enjoy peaceably till his death, when his son entered without admission contrary to the custom, and to state an entry of the lord for forfeiture; but defendant should also plead specially that he did warrant, and that A never was molested. 1 Dy. 42. pl. 9.

(c) *How duplicity should be taken advantage of.*

If the defendant pleads a double plea, and the plaintiff demurs generally, if the plea be sufficient in matter, the plaintiff is entitled to judgment. *Johnson v. Norris*, 2 Ro. 306. Winch, 37.

XIX. RELATIVE TO THE PLEADING SEVERAL PLEAS.

(a) *When a defendant can have leave to plead several pleas.*

1. By statute 4 & 5 Ann. c. 16. for amendment of the law, the defendant in any action or suit may, with leave of the court, plead double, if he shall think it necessary for his defence. *Hulton v. Jefferies*, 10 Mod. 280.

2. In *sci. fa.* against a terre-tenant, the defendant may plead double. *Ellis v. Mortimer*, C. T. Hardw. 152.

3. An executor may plead double. *Hughes v. Pigot*, C. T. Hardw. 243.

4. In a *qui tam* action the defendant cannot plead double. *Morgan q. t. v. Luckup*, C. T. Hardw. 262. Stra. 1044. S. C.

5. A defendant cannot plead several matters to an information of intrusion by the 4 Anne. *Attorney-General v. Allgood*, Park. 1.

6. This statute does not extend to suits where the king is a party, unless for debts immediately owing. *Rex v. Abp. of York*, 2 Barnes, 282.

7. Though at common law a defendant could not plead several matters in a *quo warranto* information, he may by statute 32 G. 3. c. 58. s. 1. Willes, 534. n. a.

8. When the king is plaintiff in a *quare impedit*, the defendant cannot plead several matters under the statute 4 & 5 Ann. c. 16. *Rex v. Abp. of York*, Willes, 533. *Rutter v. Bp. of Hereford*, 2 Barnes 276.

(d) *Of the motion for that purpose.*

1. Leave to plead to several matters must be given by the court; it cannot be done by a judge's order. *Jones v. Davis*, 2 Barnes, 288.

2. A rule to plead double cannot be had before defendant has appealed. *Benn v. Geary*, 1 Barnes, 237.

3.* Defendant may move to plead double after rule to plead is [*1055] out, and before judgment. *King v. Boewell*, 1 Barnes, 233.

4. A motion to plead double was denied after a judgment which had been regularly obtained was set aside, on payment of costs. *Leaver v. Witcher*, Com. 561.

5. Defendant may plead double after order to plead issuable plea. *Leighton v. Leighton*, 1 Barnes, 247.

(c) *What pleas may be pleaded together.*

1. On motion to plead double, unless *prima facie* the pleas appear to be frivolous, the court will not consider whether they are material or not; plaintiff may demur. *Lacy v. Barry*, 2 Barnes, 292.

2. Leave was given to plead ancient demesne, on affidavit that the premises in question were reputed to be such. *Doe dem. Henant v. Thomas*, 2 Barnes, 151.

3. The pleas of general issue and statute of limitations were allowed. *Harrison v. Winchcombe*, Stra. 678.

4. So, *non est factum* and duress. *Merefield v. Hulls*, 2 Barnes, 292.

5. *Non est factum* and a discharge by bankruptcy. *Atkinson v. Atkinson*, Stra. 871.

6. So, *non est factum* and discharge under insolvent act. 1 Barnes, 255.

7. *Non est factum* and no request made. *Duno v. Vacher*, 2 Stra. 908.

8. *Non assumptit* and *non assumptit infra sex annos*. *King v. Boewell*, 1 Barnes, 233.

9. Bankruptcy and *non assumptit*. *Philips v. Wood*, Stra. 1000.

10. Bankruptcy generally and specially. *Ld. Clinton v. Morton*, Stra. 1000.

11. So, *non assumptit* and discharge under the debtors' act. *Jones v. Body*, 1 Barnes, 255.

12. *Non assumptit*, a set-off, and a tender as of last term. *Whaley v. Harrison*, 2 Barnes, 293.

13. A tender of money to the first count, and *non assumptit* to the residue. *Pitfield v. Morey*, 2 Barnes, 296.

14. Tender and eviction allowed. *Cary v. Jenkins*, Stra. 496.

15. So, *solvit ad diem* and a mutual debt. *Baynes v. Lutwidge*, 1 Barnes, 250.

16. An executor was allowed to plead payment and *plene administravit*. *Anon.* C. T. Hardw. 178.

17. So, *non assumptit* and *plene administravit*, without affidavit. *Garnett v. Harrison*, 2 Barnes, 273.

18. *Plene administravit* and a set-off were

allowed without an affidavit. *Cosens v. Etherington*, 2 Barnes, 272.

19. *Ne unques executor and plene administravit*. *Goddard v. Ballard*, 2 Barnes, 275. 286.

20. *Non est factum and ne unques executor*. *Banks v. Bulcock*, 2 Barnes, 279.

21. Not guilty and *liberum tenementum*. *Stibbs v. Neeves*, 1 Barnes, 245.

22. Not guilty and the statute of limitations. *De Costa v. Carteret*, 2 Stra. 889.

23. Not guilty and a justification. 2 Barnes, 285, 286, 287.

24. Not guilty and a general release. *Steele v. Pindar*, 2 Barnes, 272.

25. Not guilty and £4 4s. paid plaintiff in satisfaction of all trespasses to such a time. *Lacy v. Lock*, 2 Barnes, 274.

26. Not guilty and *son assault demesne*, on affidavit. *Bristow v. Trappett*, 2 Barnes, 280.

27. Not guilty, *son assault demesne*, and satisfaction for all trespasses. *Lawrie v. Fieldhouse*, 2 Barnes, 280.

28. Not guilty, *son assault demesne*, and *molliter manus imposuit*. *Taylor v. Wittall*, 2 Barnes, 285. Id. 279.

29. So, in replevin, that plaintiff has no property, and a justification. *Bird v. Spinckes*, 1 Barnes, 247.

30. So, damage-feeasant and under a demise from defendant to plaintiff. *Church v. Fardall*, 1 Barnes, 249.

31. A distress for damage-feeasant, and rent in arrear. *Baynes v. Lutwidge*, 1 Barnes, 250.

32. The court allowed a defendant to plead several statutes, although it appeared that they avoided only certain claims made prior to the time the demand specified in the declaration arose. *Ward v. The Charitable Corporation*, C. T. Hardw. 126.

(d) *What pleas cannot be pleaded together.*

1. Several dilatory pleas cannot [*1056] be pleaded* at the same time. Comb. 68. *Carewell v. Vaughan*, 2 Saund. 41.

2. Yet if after dilatory plea in abatement overruled, the defendant puts in another dilatory plea in abatement, and the court receives it, and awards it to be ill, yet it is not peremptory to the defendant. S. C. 2 Saund. 41.

3. A defendant cannot plead both in bar and in abatement at the same time to the same matter. *Holt v. Maberly*, C. T. Hardw. 135.

4. The pleas of *non assumpsit* and tender were not allowed. *Baker v. Westbrooke*, Stra. 949.

5. *Non assumpsit* and a general release cannot be pleaded jointly. *Gibson v. Cole*, 1 Barnes, 232.

6. *Non assumpsit* and an usurious contract. *Barnard v. Fitzhouse*, 11 Mod. 359.

7. So, *non assumpsit* and *non assumpsit infra sex annos*, after money paid into court. *Buck v. Warren*, 1 Barnes, 248.

8. *Non assumpsit* and several matters of

set-off against plaintiff's demands. *Jerrat v. Robinson*, 1 Barnes, 239.

9. *Non assumpsit* and *plene administravit*, without affidavit of having fully administered. *Heathfield v. Allen*, 1 Barnes, 237.

10. *Nil debet* and *nil habuit in tenementis*. *Marshal v. Lawrence*, 1 Barnes, 239.

11. So, *voluit ad diem* and *riens per descent*, without affidavit. *The Burgesses v. Wisbick*, 1 Barnes, 238.

12. Not guilty and *liberum tenementum* denied, it not being necessary. *Rolle v. Lytton*, 3 Barnes, 277.

13. So, *liberum tenementum*, and a justification of pulling down as for a nuisance. *Halsey v. Feltham*, 1 Barnes, 233.

14. Not guilty and a justification in trespass. *Barrett v. Greaves*, 1 Barnes, 248.

15. Not guilty and accord and satisfaction. *Dursley v. Cole*, 1 Barnes, 234.

16. Not guilty and a license, without affidavit. *Prinnell v. Preston*, 2 Barnes, 278.

17. Not guilty and a release of a particular trespass, are never allowed. Id. ibid.

18. Not guilty and a tender denied. *Aderson v. Dodding*, 2 Barnes, 291.

19. In trover, not guilty, and that plaintiff became a bankrupt, and his effects were assigned, denied. *Herbert v. Flowe*, 2 Barnes, 292, 293.

(e) *How they should be pleaded.*

Where defendant pleads not guilty, and then, "by leave of the court according to the statute," pleads other matter, which he concludes with an averment, and afterwards sets out other matter, the leave of the court extends to the last plea. *Bartholomew v. Ireland*, Andr. 108.

XX. WHEN A PLEA IS TO BE CONSIDERED ISSUABLE WITHIN THE MEANING OF A JUDGE'S ORDER.

1. A fair demurrer is an issuable plea within the meaning of a judge's order. *Gray v. Ashton*, Prac. Ca. K. B. 177.

2. After time given to plead, the defendant demurred generally; the court refused to set the demurrer aside. *Gale v. Mattram*, W. Kely. 113.

3. A demurrer, unless it be for good cause, is not an issuable plea within the meaning of an undertaking to plead an issuable plea. *Stonehouse v. Vowel*, Say. 88.

4. A defendant pleaded the statute against sheriffs for taking bonds *colore officii*, and held to be an issuable plea. *Dearden v. Holden*, Prac. Ca. K. B. 176.

5. In covenant, general performance of covenants is not an issuable plea under judge's order, and it was set aside. *Thompson v. Atkinson*, 2 Barnes, 284.

6. A tender not to be pleaded after an order for time. *Davenport v. Barritt*, 1 Barnes, 246.

7. So, a tender to part, and *non assumpsit* to residue, is a nullity. *Lane v. Smith*, 1 Barnes, 182.

8. And if judgment be signed, and the

benefit of an assize lost, it shall not be set aside on terms. *Lovell v. Dyer*, 1 Barnes, 185.

XXI. WHEN AN AFFIDAVIT IS NECESSARY IN SUPPORT OF A PLEA.

1. A foreign plea must be sworn to. 1 Saund. 98.

2. Pleas to the jurisdiction, &c., are not considered foreign, and therefore [*1057] as* such need not be sworn to. *Cholmondeley v. Broom*, 5 Mod. 335.

3. But now no dilatory plea of any sort will be received without an affidavit of its truth. 2 Saund. 210 d, e.

4. Pleas to the jurisdiction, as well of inferior as superior courts, must be verified on oath, and tendered in person, while the court is sitting. *Sparke v. Wood*, 6 Mod. 146.

XXII. CONSEQUENCE OF THE PLEA BEING BAD.

If a plea in bar be insufficient in matter, and the writ and declaration good, and the replication superfluous, without any matter which impugns or destroys the action, the plaintiff shall have judgment. *Tresham's case*, 9 Co. 108 a. 1 Brownl. 51. Co. Ent. 151. pl. 30. S. C.

XXIII. WHAT DEFECTS IN PLEADING ARE CURED BY THE SUBSEQUENT PLEADINGS;—

(a) *A bad declaration by the plea.*

1. The declaration may be made good by the bar, when it wants time, place, or other circumstance; but when it is bad in substance, no bar, &c. can make it good. *Bonham's case*, 8 Co. 120 b.

2. In a declaration by an administrator, the want of alleging by whom administration was committed is cured by pleading *non est factum*. *Gidley v. Williams*, Salk. 37. 1 Ld. Raym. 634. S. C.

3. Where the Christian name varies in the count and writ, it is cured by defendant's saying "the aforesaid." *Godfrey v. Duberry*, Andr. 76.

4. The want of the words "*prout patet per recordum*" is cured by pleading over. *Knighton v. Merton*, 3 Lev. 311. 393.

5. Want of venue is cured by a plea of collateral matter. *Norden v. Fox*, 3 Lev. 393.

6. In debt for rent, if no place be assigned where the lease was made, the defendant in his plea confessing the lease makes the declaration good. *Gobham v. Thornborough*, Hob. 82.

7. A declaration in replevin should specify the place where the goods were taken; but the defect is cured by the defendant's pleading; he should demur. *Bulkythorpe v. Turner*, Willes, 475. *Read v. Hawke*, Hob. 17.

8. The want of addition is cured by pleading. *Rex v. Hoddock*, Andr. 146. 150.

9. Defect of not averring particularly performance of the consideration, is cured by pleading over. *Thorpe v. Thorpe*, 1 Ld. Raym. 667. Com. 99. S. C.

10. Where it is stated that the defendant

covenanted, it must be inferred that it was by deed, and although the instrument declared upon were not sufficiently shown to be a deed, yet the defect is aided by pleading over. *Dodd v. Atkinson*, C. T. Hardw. 342.

11. A suit depending pleaded, not showing how, or in what court, is ill on demurrer, but cured by pleading over, which admits the suit depending. *Dring v. Respess*, 1 Lev. 195.

12. Doubtless in a declaration is cured by answering. *Humphreys v. Bethily*, 2 Vent. 222.

(b) *The plea by the replication.*

1. An informal plea may be made good by the replication. *Bonham's case*, 8 Co. 120 b.

2. A plea of assignment over by assignee of a term, ought to say "*post assignationem*, &c." but that fault may be aided by pleading over. *Cook v. Harris*, 1 Ld. Raym. 367.

3. Defendant having pleaded a *que estate* of a term, the attorney-general for the king in the exchequer traversing the original lease; after verdict against the king, it is too late to take advantage of the bad plea. 2 Dy. 238. pl. 37.

4. A plea that is bad in substance cannot be cured by the replication. *Bamfield v. Bamfield*, 1 Sid. 336.

(c) *The replication by the rejoinder.*

In debt on bond, if the defendant plead that it was delivered as an escrow upon a condition not performed, and so not his deed, a conclusion to the country is cured by replying a different condition, and traversing the condition stated in the plea. *Bushell v. Pasmore*, 6 Mod. 217.

(d)* *What faults are cured by* [*1058] *demurring.*

1. If a plaintiff sue by the addition of gentleman, and the defendant pleads in abatement, that he is not a gentleman, the plea is good after a demurrer to it; for it is a confession of the fact. *Rattersly v. Marsh*, 6 Mod. 80.

2. Want of defence is aided by general demurrer. *Bellamy v. Hester*, 1 Ld. Raym. 282.

XXIV. RELATIVE TO NOTICES AND RULES TO PLEAD.

1. Notice to plead in four days instead of eight is bad, though plaintiff staid eight. *Brady v. Baldock*, 1 Barnes, 222.

2. In real and mixed actions, except replevin, after the common rule to plead is out, a peremptory rule to plead must be given before judgment can be signed for want of a plea. *Wentworth v. Hustler*, 1 Barnes, 194.

XXV. RELATIVE TO THE TIME OF PLEADING.

1. On declarations delivered in country causes, and where defendant lives above twenty miles from London, eight days' time to plead must be given. 1 Barnes, 167. *Down v. Rowell*, 7 Mod. 295.

2. Four days are allowed after a *respondens ouster*. Comb. 19.

3. There are four days to plead after demurrer. *Parker v. Collins*, 7 Mod. 123.

4. To a declaration delivered against one in custody, he shall have the whole term to plead in abatement. *Pierce v. Blake*, Salk. 515.

5. But upon filing bills against officers and clerks, it is sufficient if there be four days within term to plead. *Pasmore v. Goodwin*, Salk. 517.

6. If one come in on a *cepi corpus* in custody, he must plead *instantly*; *aliter* where he has been bailed, and come in on the *cepi*. *Sed quare*, Anon. 12 Mod. 372.

7. If the declaration be delivered the day before the last day of the term, the defendant has two days in the following term to answer. Anon. 12 Mod. 231.

8. Upon a special *capias* by original, the defendant shall not be obliged to plead sooner than upon a common *latitat*. *Hugwys v. Savage*, Stra. 684.

9. A month's time to plead means a lunar, not a calendar month. *Tullet v. Linfield*, Prac. Ca. K. B. 126. 3 Burr. 1455. S. C.

10. Sundays and holidays are to be reckoned as well as the day of filing the bill. *Pasmore v. Goodwin*, Salk. 517. *Contra*, Lord Coningsby's case, 8 Mod. 46.

11. In rules to plead, Sunday is not reckoned one when it is the last. Anon. Prac. Ca. K. B. 176. 1 Stra. 86.

12. No new rules to plead after an amendment, unless an imparlance be given. Anon. Salk. 517.

13. A plea in abatement must come in within the first four days. *Long v. Miller*, Stra. 1192. 1268. Anon. 11 Mod. 2.

14. A plea in abatement is too late after a general imparlance. 1 Mod. 14. 2 Ro. 239. Salk. 518. 1 Vent. 76. 136. 184. 2 Saund. 2. 11 Mod. 2. *Sed vide* 1 Vent. 236.

15. Nor can the writ in such case be abated by the judges *ex officio* without argument. 2 Ro. 239.

16. But it may be pleaded after a special imparlance. 11 Mod. 2 n.

17. A plea in abatement after the rule is out is a nullity. 1 Barnes, 233.

18. A foreign plea must be pleaded before a general imparlance. 1 Saund. 98.

19. But a plea of outlawry of the plaintiff after imparlance in trover was held good. 3 Leon. 215.

20. Attachment cannot be pleaded after imparlance. *Babington v. Babington*, 3 Leon. 232.

21. Non-tenure of the whole or part is not pleadable after a general imparlance. 3 Lev. 55.

22. *Trut tems prist* cannot be pleaded after imparlance, for it is inconsistent with it. Anon. 2 Mod. 62. 12 Mod. 8 S. P.

23. But on a bond, after imparlance, tender

may be pleaded and *uncore prist*. Anon. 12 Mod. 8.

24. If a defendant is arrested by the name of Clarissa, and puts in bail in that name, she cannot plead a misnomer that her name is Clara. Prac. Ca. K. B. 10.

25. After the bail-bond forfeited, the defendant* cannot plead in [+1059] abatement of the original action. Salk. 519.

26. No exception can be taken to the jurisdiction after a plea in chief. 2 Show. 492.

27. No pleading to the jurisdiction of the court after a general imparlance. 3 Leon. 214, 215. Case of *University of Cambridge*, 10 Mod. 127.

28. But a plea pleaded after imparlance, and issue tendered upon it, is not peremptory upon a demurrer. *Loder v. Hampshire*, Aley, 63. 65.

XXVI. RELATIVE TO THE OBTAINING FURTHER TIME TO PLEAD.

1. After order for time to plead to issue, further time, till a former judgment perfected, was refused. *Jury v. Woodhouse*, 1 Barnes, 240.

2. A summons after time to plead is expired is a nullity. 7 Mod. 296.

3. An executor was denied the enlarging of time to plead (the rules being out,) unless he would enter into a rule not to plead any judgment obtained after the rules were out. Anon. 8 Mod. 308.

4. A defendant, an executor, disabled by palsy from speaking, and also from writing his name, was, upon an undertaking that in the meantime he should prefer no creditor to the plaintiff's prejudice, allowed time to plead; and the disability continuing, such time (upon the defendant's consenting to a rule to try the following term,) was further enlarged. *Jasper v. Grosvenor*, (executor,) C. T. Hardw. 51.

5. The court will never order a man to plead peremptorily till the rules for pleading are out. Salk. 516.

6. Where further time is given to plead, a rule to plead is not necessary. *Shark v. Dilks*, W. Kely. 154.

XXVII. RELATIVE TO THE DELIVERY OR FILING OF PLEAS.

1. A plea with notice of set-off must not be delivered in the country. *Taylor v. Lawson*, 1 Barnes, 179.

2. If the clerk of the office or secondary is the party's attorney, delivery of a plea to him does not make the court possessed of the plea, but it ought to be tendered in the office. *Webb's case*, Palm. 158.

3. If the defendant does not leave his double pleas in the office, the court will not relieve him from the plaintiff's making up the record. *Thompson v. Tiller*, Stra. 1266.

4. Defendant pleaded general issue, but forgot to deliver notice of set-off, court gave

leave to deliver again the same plea with proper notice. *Blackbourn v. Matthias*, Prac. Ca. K. B. 156. 2 Stra. 1267.

XXVIII. OF WITHDRAWING PLEAS;—

(a) *When a defendant will be allowed to withdraw or revive his plea, and plead de novo, or amend.*

1. A man pleads the general issue, and it is not entered; he may waive it, and plead specially within four days, Sunday not being reckoned. *West v. West*, 1 Ld. Raym. 674.

2. Leave to withdraw the general issue, and plead a special justification, was granted upon payment of costs. *Harrison v. Morris*, 2 Barnes, 270.

3. *Nil debet* allowed to be withdrawn, and *non assumptit* pleaded. *Nichols v. Sutcliff*, C. T. Hardw. 56.

4. Leave was given to withdraw the general issue, and pay money into court. *Tarlton v. Wrang*, Stra. 1271.

5. Held that the issue may be withdrawn, and money paid into court, in case of mistake by death of attorney. *Usher v. Edwards*, 1 Barnes, 256.

6. Leave was given to withdraw the general issue, and plead it with a *set-off*. *Blackbourn v. Matthias*, Stra. 1267.

7. General issue waived and allowed to plead double. *Meard v. Phillips*, 2 Stra. 906.

8. A man in high treason may be allowed to withdraw his plea of not guilty, and plead guilty. *Rez v. Knightly*, Holt, 398.

9. A defendant may withdraw a special plea, and plead the general issue the same term before replication, without costs, and though plaintiff afterwards gets a verdict, yet he cannot have those costs. *Horsefall v. Greenwood*, 1 Barnes, 103, 104.

10. A plea of judgment, &c. was withdrawn, and *plene administravit* admitted. *Martindal v. Galloway*, 1 Barnes, 234.

11.* Demurrer withdrawn, [*1060] and general issue pleaded, defendant having offered it before answer. *Sherlock v. Templer*, 1 Barnes, 246.

12. Before joinder in demurrer, the defendant may waive his special plea, and plead the general issue; *contra* where a rule is to plead so as to stand by it, and he pleads specially, and the plaintiff demurs. *Anon.* Salk. 515.

13. The court will, on payment of costs, permit a defendant to withdraw his demurrer, and plead to issue, while the proceedings are in paper. *Godolphin v. Tudor*, 6 Mod. 38.

14. After a special demurrer and joinder, the defendant waives his demurrer, and pleads *nil debet* to a judgment, the court refused to set aside the plea; a plea in bar is never suppressed on motion. *Harcourt v. Seagrave*, W. Kely. 104.

15. Leave was given to withdraw a de-

murrer, and amend, after the demurrer had been argued, and the matter stood for the opinion of the court. *Giddings v. Giddings*, Say. 316.

16. After a demurrer had been argued, and the judges had given their opinion, judgment was suspended for a week, in order to give the defendant time to move for leave to withdraw the demurrer and amend. *Rennell v. Rennell*, Say. 317.

(b) *When not.*

1. In an action against bail, the court refused to give leave to withdraw a demurrer and amend, after the demurrer had been argued, and the opinion of the court was known. *Saxby v. Kirkers*, Say. 117.

2. After demurrer by bail and joinder, *nil tel record* was denied to be pleaded. *Hendaryd v. Wilson*, 1 Barnes, 240.

3. A defendant cannot withdraw a special plea but in order to plead the general issue. *Law v. Law*, Stra. 960. 2 Barnard, 390.

4. A plea of tender cannot be withdrawn, and the general issue pleaded. *Reeves v. Probutt*, 1 Barnes, 235.

5. A plea cannot be waived upon the last continuance-day without the leave of the court. *Griffith v. Williams*, Say. 87.

XXIX. OF ADDING AND AMENDING PLEAS.

1. After *non assumptit infra*, &c. pleaded, defendant cannot add *non assumptit*. *Pierston v. Ives*, 1 Barnes, 238, 248.

2. The substance of a plea is not amendable. *Hawkins v. Moore*, Cro. Jac. 261.

[See ante, tit. AMENDMENT, p. 61.]

XXX. OF THE PLEA-ROLL.

If the plea-roll of one term be put on the file of another term by mistake, the court will order it to be rectified. *Rex v. Warden of the Fleet*, 6 Mod. 18.

PLEDGES.

1. The want of pledges in a declaration was formerly a good ground of demurrer; and the declaration was bad in arrest of judgment, or on error; but it is aided by the 8 H. 6., and held to be amendable after error brought. *Nicholas v. Chapman*, 3 Lev. 345. 1 Ro. 445. 447. *Hardy v. Gilding*, 3 Lev. 39. March, 17. pl. 40. W. Jo. 177. *Blenhane v. Osborne*, T. Jones, 154.

2. Neither the king nor an infant need find pledges. 2 Leon. 4. 185, 186.

3. In a replevin brought in an inferior court, and no pledges *de retorno habendo* taken by the sheriff according to the statute of W. 2. c. 2. upon the plaint removed into the King's Bench, that court may find pledges, and that at any time before judgment. March, 46. pl. 72.

PLURALITY.

1. If a parson is presented, admitted, and instituted to a benefice with cure of above

the value of 8*l.*, and afterwards, and before induction to the first, he accepts another benefice with cure, and is inducted, the first is void by statute 21 Hen. 8. *Digby's case*, 4 Co. 78 b. Moore, 434. Goldsb. 162.

2. If a man have a benefice with cure, whatever the value is, and is admitted and instituted into another benefice with cure, having no qualification or dispensation, the first benefice is void, and the patron may present. *Shute v. Higden*, Vaugh. 131.

3. A dispensation and qualification purchased after institution and before induction to the second benefice, is too late, and the first benefice is void; but not enrolling a dispensation is no prejudice. Mo. 434.

4. Upon taking a second, the first benefice is void at common law without deprivation. Mo. 542.

5. If a baron has three chaplains, and each of them has two benefices, and afterwards the baron dies, yet they shall enjoy the benefices with cures which were lawfully settled in them before. *Acton's case*, 4 Co. 117 a.

6. If a baroness widow retain two chaplains according to the statute, and afterwards marry, they are not discharged, but can take the two benefices. Mo. 678.

POISON.

[*See ante*, tit. MURDER, div. I. pl. 40, 41, 42. p. 960].

An indictment charging that the defendant did put *quoddam venenum*, *Anglice* antimony, into a cup of beer, &c. is good. *Rex v. Pigeonry*, 7 Mod. 149.

POOR.

[*See ante*, tit. ORDER, Vol. II. p. 994, and *post*, tit. REMOVAL AND SETTLEMENT.]

POSSIBILITY.

There cannot be a possibility upon a possibility. *Chedington's case*, 1 Co. 153 a.

POSTMASTER.

*I. RELATIVE TO HIS LIABILITY, p. 1061.

II. REMEDY FOR THE RECOVERY OF HIS CHARGES, p. 1061.

I. RELATIVE TO HIS LIABILITY.

1. An action on the case will not lie against the postmaster for the loss of exchequer bills and letters delivered in at an under office. *Lane v. Cotton*, 11 Mod. 12. 5 Mod. 456. 1 Salk. 17. 1 Ld. Raym. 646. 12 Mod. 472, 473.

2. Nor for a bank note stolen by one of the sorters out of a letter delivered into the post-

office. *Whitfield v. Ld. Deepenser*, 11 Mod. 18 n. 12 Mod. 472 n. S. C.

3. But case lies against him for not delivering a letter on request, though no particular damage accrued; but if the letter had been tendered, and the plaintiff would not first pay postage, he is not bound to deliver it. *Edward v. Dickinson*, 12 Mod. 6.

II. REMEDY FOR THE RECOVERY OF HIS CHARGES.

Assumpsit lies by the postmaster for his fees for the carriage of letters. *Ld. Stanhope v. Ecqueter*, Lat. 87.

POWER.

1. Under a power to lease for three lives, a lease for ninety years determinable on three lives is not good. *Whitlock's case*, 8 Co. 69 b. 1 Brownl. 169. S. C.

2. The most clear and sure way is to reserve rent during the term without any express reservation to any person. Id. *ibid*.

3. A power to dispose of an estate in fee may be executed in tail. *Thomlinson v. Dighton*, 10 Mod. 31. 71.

4. S, in a covenant to stand seised, reserved to himself a power of revocation by writing indented under his hand and seal subscribed in the presence of three witnesses, and of appointing new uses, &c. by the same or any other writing signed, &c. as above; afterwards, by indenture subscribed in the presence of three witnesses, he covenanted to stand seised of the same lands* to other uses: resolved, [*1062] although there is no express declaration of any intention to revoke the former uses, the conveyance shall enure first as a revocation of the former uses, and, secondly, as a declaration of new uses; all circumstances prescribed by the proviso must be observed in the second indenture. *Scrope's case*, 10 Co. 143 b.

5. Collateral powers and common law authorities cannot be barred or extinguished by fines, feoffment, or any other conveyances; but powers relating to the land may be extinguished by a fine or feoffment. *Albany case*, 1 Co. 110 b. 1 Co. 173 a.

6. Where there is a power of revocation by any deed or writing, and of appointing new uses by any such deed or writing, the revocation and appointing new uses may be by the same deed. *Fitzwilliam's case*, 6 Co. 32 a.

7. Powers relating to the land may be destroyed by release to any person having an estate of freehold in possession, remainder, or reversion; but collateral powers cannot be barred by any conveyance. *Digg's case*, 1 Co. 173 a. *Albany case*, 1 Co. 110 b. S. P.

8. The estate defeasible by the power is thereby made absolute. *Grendon v. Albany*, 1 Co. 110 b.

[See also *ante*, tit. *AUTHORITY*, Vol. I. p. 147.; and tit. *LEASE*, div. VI. (c). Vol. II. p. 877.]

PRACTICE.

(A) IN CIVIL PROCEEDINGS.

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- (a) *Of consolidating them*, p. 1062.

II. RESPECTING DECLARATIONS;—

- (a) *Relative to the amendment of a declaration*, p. 1062.

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(B) IN CRIMINAL PROCEEDINGS.

GENERALLY, p. 1066.

(A) IN CIVIL PROCEEDINGS.

I. RESPECTING ACTIONS;—

- (a) *Of consolidating them*.

Where several actions of trespass are brought against several defendants for the same profits of lands recovered by the same ejectment, the court will not direct them to be consolidated; *aliter*, where several are brought for one and the same cause against the same defendant. *Stacy v. Sutton*, C. T. Hardw. 137.

II. RESPECTING DECLARATIONS.

- (a) *Relative to the amendment of a declaration*.

If a declaration be of Michaelmas term generally, and the fact laid is of the 15th of November in the same year, it is bad, for as the declaration relates to the first day of the term, it appears that the action was commenced before the cause of action arose; but if, on examination or reference to the mas-

ter it shall appear that the declaration was in truth filed after [*1063] the 15th of November, as, if the bail was filed, or the bill of Middlesex taken out after the day, it shall be set right by the court, although it could not be amended by any of the statutes of jeofails; for if bail was filed subsequently to the 15th, it would well warrant a special memorandum of the day on which the declaration was really filed, as none are in custody of the marshal until bail is filed. *Wiat q. t. v. Aland*, 6 Mod. 33.

- (b) *Of striking out counts*.

The court will not at the instance of the plaintiff strike out a count in a declaration after time to plead. *Wilkins v. Perry*, C. T. Hardw. 129.

III. RESPECTING OYER.

1. After a plea in abatement, oyer cannot be granted of the original, though prayed in the same time. *Longville v. Hundred of Thistleworth*, 6 Mod. 23.

2. Where the same policy of insurance is repeated in a second count, rule for oyer of two policies denied. *Boisier v. The London Assurance Company*, C. T. Hardw. 243.

3. A defendant who lives above twenty miles from London has eight days to plead, and may demand oyer at any time before they expire. *Dwon v. Rowell*, 7 Mod. 295.

IV. RESPECTING DEMURRERS.

Motion upon statute 4 & 5 Ann. for leave to plead and demur at the same time was refused, because a demurrer is strictly no plea, but an excuse for not pleading. *Hoslon v. Jefferies*, 10 Mod. 280, 281.

V. RESPECTING A RESPONDEAS OUSTER.

If a plea in abatement be over-ruled, and a *respondens ouster* awarded, a copy of the plea in chief need only be delivered and paid for. *Anon.* 7 Mod. 51.

VI. RESPECTING THE DELIVERY OF THE ISSUE.

It is sufficient to insert in the copy of the issue, by way of replication to a plea of *null tiel record, quod habetur tale recordum*, though not under a counsel's hand. *Newberry v. Stradwick*, Com. 553.

VII. RESPECTING THE STAYING OF PROCEEDINGS;—

- (a) *When they will be stayed*.

1. Where the defendant swears that he neither knows nor is indebted to plaintiff, and that his attorney cannot be found, proceedings will be stayed; and sticking up the rule in the office will be deemed good service. *Evans v. Jones*, C. T. Hardw. 179.

2. The court will stay proceedings if execution be taken out contrary to agreement. *Veal v. Warner*, 1 Mod. 20.

3. Proceedings shall be stayed on a cause being referred. 1 Mod. 24.

4. Proceedings in an action of debt upon bond stayed upon payment of principal, interest, and costs. *Buckler v. Ash*, C. T. Hardw. 194.

5. There ought not to be a stay of proceedings on the bail-bond upon bringing principal, interest, and costs into court after notice of trial, without it be brought within such time as the plaintiff may not be delayed of trial. *Butler v. Rolfe*, 6 Mod. 25.

6. Proceedings were stayed, process being served on the return-day to appear that day. *Foot v. Hume*, 2 Barnes, 330.

(b) *When not.*

1. In debt upon a judgment the court will not stay the proceedings on motion, upon payment of principal, interest, and costs, as they will in debt upon bond. *Burridge v. Fortescue*, 6 Mod. 60.

2. Motion to stay proceedings on a judgment, for that part of the money was paid, denied, unless the remainder (with costs, &c.) were brought into court, *Anon.* 8 Mod. 236.

3. Proceedings in an action of debt on bond will not be stayed, although it was agreed that the bond should not be made use of till upon the happening of certain contingencies. *Dollife v. Langley*, C. T. Hardw. 240.

4. In replevin, no stay of proceedings on bringing in what is due for damages. *Anon.* 8 Mod. 397.

5. The court will not make a rule for staying proceedings in a cause, upon an affidavit that the sum of 40s. is not due to the plaintiff, upon the ground of its being below the dignity of the court; but* [*1064] the court, will sometimes upon such affidavit make a rule for referring the matter to the master. *Williams v. Williams*, Say. 219. *Mitchell v. Robinson*, Say. 241.

6. A special original was sued out in Lincolnshire; plaintiff declared in Middlesex; rule to show cause why proceedings in Middlesex should not be stayed was discharged, defendants having taken the declaration out of the office, and thereby waived former proceedings. *Marquand v. Corporation of Boston*, 2 Barnes, 331.

(c) *Of the motion for that purpose.*

1. If a rule be moved for to stay the proceedings in a bail-bond, it must not be entitled in the original cause, but in the action on the bail-bond. *Smithson v. Smith*, Willes, 41.

2. A motion to stay proceedings on payment of principal, and interest, and costs, cannot be made until bail be put in, for till then the parties are not in court. *Anon.* 6 Mod. 11.

VIII. RESPECTING THE BRINGING OF MONEY INTO COURT;

(a) *In what cases it is allowed to be brought in.*

1. Money may be brought into court in *assumpsit*, but not on a *quantum meruit*. *Smith v. Johnson*, 12 Mod. 187. *Sed vide Gregg's case*, Salk. 597.

2. The court will allow it where the da-

mages are certain, and the action in the nature of a debt or contract. *Anon.* 2 Show. 183.

3. On a disjunctive agreement to find lodging, diet, &c., or pay 10l., the 10l. was brought into court. *Savil v. Snell*, 8 Mod. 305.

4. If a *quantum meruit* and *indebitatus* be in the same declaration, money may be brought in on the *indebitatus* which will affect the other. 12 Mod. 614.

5. Money was brought into court in covenant, where the breach was assigned in a sum certain. *Walworth v. Houghton*, 2 Barnes, 229.

6. Any person sued in an action of debt, covenant, or any other action, on any policy of insurance, may bring into court any sum or sums of money, and if the plaintiff shall refuse to accept it, with full costs taxed, in full discharge, and the jury shall not assess above the sum, the plaintiff shall pay the costs. *Anon.* 11 Mod. 270. n.

7. By 4 & 5 Ann. c. 16., "If at any time pending an action on a bond for the payment of money with a penalty, the defendant shall bring into court all the principal and interest and costs, it shall be taken to be in satisfaction of the bond;" by such payment the defendant is relieved from the penalty. 6 Mod. 11. *Player v. Bandy*, 10 Mod. 26. *Ireland's case*, 6 Mod. 101.

8. Money may be paid in debt for rent, and *nil debet* pleaded; so in covenant for non-payment of rent. *Dixon v. Allen*, 1 Barnes, 198. *Contra, Lee v. Irish*, C. T. Hardw. 173.

9. Leave was given to bring in money, and plead *plene administravit*, as well as the general issue to the whole. *Austin v. Ross*, 2 Barnes, 234.

10. So leave was given to plead bankruptcy to the first count, pay in money, &c. on the common rule, and plead the general issue to the other counts. *Hill v. Lane*, 2 Barnes, 276.

11. Leave to pay money, &c. with respect to two counts, and as to the rest to plead the general issue, the statute of limitations, and a set-off. *Hellicr v. Hallett*, 2 Barnes, 232.

(b) *When it is not allowed.*

1. Money cannot be brought into court to have it struck out of the declaration when the plaintiff sues as executor. *Anon.* 6 Mod. 29.

2. On a *quantum meruit* brought by a surgeon for a cure, the court will not give leave to strike so much out of the declaration, and the plaintiff to proceed for the rest at the peril of costs. *Anon.* 2 Show. 183.

3. Money not to be brought in on a *quantum meruit*, but the way is to confess the employment, and that he deserved but so much, and plead a tender, to which plaintiff may reply he deserved more, and so come to issue. *Anon.* 12 Mod. 614.

4. Leave to bring in money was refused

in an action on a bond conditioned for a bailiff's good behaviour, and for his paying money for the sheriff's use. *Atkins v. Taylor*, 2 Barnes, 231.

5.* So in an action for the penalty of a charter-party. *Yeoman v. Ross*, 2 Barnes, 231.

6. Where a bond is conditioned to account for monies to be received, the court will not relieve from the penalty on payment of principal and interest and costs into court, for in such case, damages may be recovered for more than the penalty. *Lonsdale v. Church*, 6 Mod. 102. n. See *Wright v. Bennington*, 2 Barnes, 233. *contra*.

7. When the suit is on a counter bond, or where there is a pretence of a collateral agreement, principal and interest not allowed to be brought into court. *Coke v. Heathcot*, 12 Mod. 598.

8. The defendant cannot pay money into court on one count, and demur to another. *Ca. Prac. C. P. 48. Hellier v. Hallett*, 2 Barnes, 232.

9. Money cannot in general be brought into court in covenant. *Lawley v. Dibble*, 12 Mod. 241.

10. A rule for paying in money was denied in covenant, it appearing defendant was to render to plaintiff the best live beast for a heriot, or 40s., at plaintiff's election. *Davy v. Martin*, Barnes, Supp. 41, 42.

11. In covenant on three distinct covenants, one of which was for non-payment of rent, the court refused to let money be brought into court, for when plaintiff has just cause of action, they will not oblige him to go to trial for the residue on pain of costs. *Paulet v. Heathfield*, 12 Mod. 95.; but see *Hallet v. East India Company*, 12 Mod. 95 *notis*.

12. On an ejectment, motion to bring 100l. into court to answer a fine was denied. *Rocks v. Atease*, *Ca. Prac. C. P. 42*.

13. Money not allowed to be brought into court in trover, because the plaintiff proceeds for general damages. *Burman v. Shepherd*, 12 Mod. 90.

(c) *At what time it should be.*

1. Money may be paid into court at any time before plea. *Anon.* 1 Barnes, 197.

2. It cannot be paid in after plea. *Straphon v. Thompson*, 1 Barnes, 200.

3. Unless with plaintiff's consent. *Salmon v. Aldrich*, 2 Barnes, 275.

4. Money cannot be paid into court after a regular judgment has been set aside on payment of costs or on terms. *Spring v. Bilson*, *Ca. Prac. C. P. 85. Burgess v. Pollamounter*, 1 Barnes, 200. *Tadmarsch v. Smith*, 2 Barnes, 232.

5. In debt on a judgment, the defendant cannot pay money into court before plea pleaded, although the plaintiff is become bankrupt. *Anon.* 6 Mod. 153.

(d) *Effect of it.*

The payment of money into court does not

preclude the defendant from entering a suggestion on the roll under 39 & 40 G. 3. c. 104. s. 12. 1 Saund. 33 e.

(e) *Relative to the increasing of the sum.*

1. After money paid in and issue joined, it cannot be increased. *Swan v. Freeman*, 1 Barnes, 202.

2. Leave to add more money was denied, where defendant had pleaded but brought no money in. *Green v. Beaton*, 2 Barnes, 233.

(f) *Of paying it back.*

1. If the plaintiff be nonsuited after money paid into court, the defendant shall not have it back. *Lane v. Wilkinson*, *Ca. Prac. C. P. 36*.

2. The defendant cannot have the money back, though the plaintiff die before the trial. *Crockhay v. Martyn*, *Ca. Prac. C. P. 129*. 1 Barnes, 199.

3. Neither can it be paid back to executors on defendant's death. *Knaption v. Drew*, 1 Barnes, 197.

4. After verdict in his favour, the defendant cannot be paid back money brought into court by him on a plea of tender, but it belongs to the plaintiff. *Cox v. Robinson*, *C. T. Hardw. 206*.

5. Where plaintiff recovers a less sum than is paid into court, and does not take it out, defendant shall have that money towards his costs. *Anon.* 1 Barnes, 199. *Rathbone v. Stedman*, *Ca. Prac. C. P. 54. 117*. 1 Saund. 33 c, d.

(g) *When and how it may be taken out of court.*

1. Money paid into court may be taken out without plaintiff's admitting a tender. 1 Saund. 33 c.

2. Money brought in by defendant was* ordered to be paid to the [*1066] plaintiff, though judgment was arrested. *Fisher v. Kitchenman*, 2 Barnes, 230.

3. Where plaintiff after refusal applies for leave to take out money, he must pay subsequent costs to defendant. *Vane v. Michells*, 2 Barnes, 230. 235. 289.

4. Though issue be joined, plaintiff may have leave to take money out on payment of subsequent costs. *Savage v. Francklyn*, 1 Barnes, 198. 201.

5. On bringing money into court, the course is to pay costs so far, if plaintiff will take it out; but if it be such an action that defendant may plead a tender in bar of costs, and that the plaintiff, to oust him of that, would reply a special *capias* of a precedent term, all this may be settled on motion. *Anon.* 12 Mod. 633.

IX. RESPECTING THE BRINGING GOODS INTO COURT.

1. Goods when cumbersome cannot be brought into court, but plaintiff must show cause why he will not accept them and costs. *Cooke v. Holgate*, *Ca. Prac. C. P. 130*. 1 Barnes, 200. S. C.

2. In trover for a ring, the court refused leave to bring it into court, but would have granted it if it had been *detinue*. *Huxer v. Gapon*, 8 Mod. 176. Salk. 597.

(B) IN CRIMINAL PROCEEDINGS.

GENERALLY.

1. After an indictment found, a plea cannot be received at the crown office, unless the defendant enter into a recognizance to try it at his own charges. *Rex v. Tracy*, 6 Mod. 114.

2. If, after a motion to quash an indictment for a misdemeanor is overruled, the defendant will not plead until he is served with a peremptory rule, his plea, by the practice of the court of King's Bench, ought not to be received without bail to try the indictment in the same term; but in such case, if the defendant plead voluntarily, he need not go to trial until the next term. *Rex v. Orbel*, 6 Mod. 42.

3. If a person surrender to an information for a misdemeanor, he may, on renewing his recognizance, have time to plead; but if he is brought in upon a *capias*, he must plead *instantly*. *Rex v. Tutchin*, 6 Mod. 165.

4. If a person be bound to appear in the King's Bench, on the first day of a term, to answer to all matters alleged against him, and the attorney-general file an information against him on the same day, he shall have an imparlance until the ensuing term. *Rex v. Rawlins*, 6 Mod. 243.

5. An indictment against several for a misdemeanor may be tried against some of the defendants only, on the others entering into a rule to plead guilty if their co-defendants are convicted. *Rex v. Middlemore*, 6 Mod. 212.

6. Previously to calling a defendant and his bail upon their recognizances, notice is necessary. *Rex v. Adams*, C. T. Hardw. 237.

PRÆCIPLE.

1. No præcipe lies against the king. Plow. 244.

2. A præcipe does not lie *de rivulo seu aqua cursu*; otherwise, *de terra aqua cooperta*, or for a gorge or pool. *Challenor v. Thomas*, Yelv. 143.

3. If one build a house partly upon my land and partly upon another, præcipe shall lie for the entire house. *Haye v. Allen*, 1 And. 265.

4. In such a suit by a corporation, the claim should be as the right and inheritance of him or them, &c., meaning the corporation. *All Souls' College, Oxford v. Tunswoth*, 1 And. 272.

5. There ought to be two summoners. Plow. 393.

PRÆMUNIRE.

1. A præmunire lies against an eccle-

siastical judge. *Case of Præmunire*, 12 Co. 37.

2. It lies for trying a freehold without jurisdiction. *Reg. v. Dean of Christ-Church*, 1 Leon. 292.

3. So, for proceeding in the Admiralty for a matter done upon the land; but it must appear in the libel to be done on the land, else this action lies not.* Sir [*1087] *R. Buckley's case*, 2 Leon. 183.

4. He that procures another to sue to the court of Rome is in the same degree of præmunire as he that sues. Plow. 97.

5. A præmunire lies not for the party if the king's attorney release. 1 Leon. 292.

6. A defendant, against whom judgment has been obtained in the court of King's Bench, cannot be sued upon the statute of præmunire (27 E. 3.), for bringing the English bill in the court of Chancery to be relieved against such judgment. *King v. Stendish*, 1 Mod. 59. 1 Lev. 241. S. C.

7. The commissioners of sewers do not incur a præmunire for the commitment of one who sues at common law against their decrees. Mo. 824.

8. Where a cause originally belongs to the cognizance of the ecclesiastical court, although all circumstances being disclosed the cognizance belongs to the king's temporal court, yet if the suit prosecuted there is of the same nature as that of which the cognizance belongs to them, no præmunire lies, but a prohibition. *Case of Præmunire*, 12 Co. 37.

9. But if in such case the plaintiff sue in the nature of a suit which does not belong to the ecclesiastical court, but to the common law, a præmunire lies. *Id. ibid.*

10. When the case originally belongs to the cognizance of the common law, and not to the ecclesiastical court, a præmunire lies, although it may be libelled for according to the course of the ecclesiastical law. *Id. ibid.*

11. The præmunire clause in the bubble act (6 G. 1. c. 18. s. 19.) leaves power in the court to moderate the judgment; they may give such part as they think fit. *Rex v. Carwood*, 1 Stra. 473. 2 Ld. Raym. 1361. S. C.

12. Formerly it was not felony to kill one attainted in præmunire. Jenk. 199.

PREROGATIVE.

1. By the common law, where no man can claim property in any goods, the king shall have them by his prerogative. *Constable's case*, 5 Co. 106 a.

2. A swan is a royal fowl, and whales and sturgeons are royal fish. The case of *Swans*, 7 Co. 15 b.

3. All white swans not marked, having gained their natural liberty, and swimming in an open and common river, may be seized to the king's use by his prerogative. *Id. ibid.*

4. The king cannot take the trees of the subject growing upon his freehold and in-

heritance, nor gravel in the inheritance of his subject. *Case of Prerogative*, 12 Co. 12.

5. A license to have the sole importation and merchandizing of cards within the realm without any limitation, is against law. *Case of Monopolies, Darcy v. Allein*, 11 Co. 84 b. *Moore*, 671. *Noy*, 173. S. C.

6. The king has not the pre-emption of tin in Cornwall by any prerogative, but as an ancient right and inheritance, due to him, as well of tin in the land of the subject, as in his proper demesnes, &c. *Stannarie's case*, 12 Co. 10.

7. Respecting the king's right to dig for saltpetre, and how it should be exercised, see the case of *Prerogative*, 12 Co. 12.

8. For the benefit of the subject, the king may make an imposition or toll within the realm to repair highways, bridges, and to make walls for defence; but the sum imposed ought to be proportionable to the benefit. 12 Co. 33.

[See also ante, tit. KING, div. VIII. Vol. II. p. 864.]

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I. OF THE DISTINCTION BETWEEN A PRESCRIPTION AND A CUSTOM.

1. There is this difference between a prescription and a custom; the former is personal, and always alleged in the person, as, in a man and his ancestors, or those whose estate he hath; the latter is local, and serves for the inhabitants of a town, &c., or as to insensible things, as to devise lands. *Foston v. Crackroode*, 4 Co. 31 b. See also *Gateward's case*, 6 Co. 60 b. *Poph.* 201.

Where a prescription is pleaded by way of a custom (as sometimes it must), the nature of it is not changed, but it is a prescription still. *Day v. Savadge*, *Hob.* 86.

II. RELATIVE TO THE CONSTRUCTION OF A PRESCRIPTION.

1. A prescription pre-supposes a grant, and must be construed according to the intent of its original creation. *Howel v. King*, 1 *Mod.* 191.

2. If a man be bound by prescription to repair a way, he is not obliged to put it into a better state than it has been time out of mind before. *Rex v. Chisworth*, 6 *Mod.* 163.

III. WHEN A PRESCRIPTION IS NECESSARY.

1. No one can maintain an action for non-feasance of a thing contrary to common right without alleging a prescription. *Wagstaff v. Rider*, *Com.* 341.

2. Where the charge is on the defendants of common right, the plaintiff need not and ought not to prescribe in his declaration. *Thomkins v. Barret*, *Salk.* 22. *Noy*, 20.

3. But where a charge against common right is laid on the owner of the soil, the plaintiff must make a title, and a prescription is sufficient. *Star v. Rookeby*, *Salk.* 335. 538.

4.* *Rent, common, &c.* cannot be claimed by usage, but must be [*1069] prescribed for. *Finch's case*, 6 Co. 65 b.

IV. RESPECTING PRESCRIPTIONS IN GENERAL;—

(a) *What are good*.

1. Waifs, estrays, treasure trove, wreck, &c., which may be gained by usage without

record, may be prescribed for. *Fozley's case*, 5 Co. 109 a.

2. A court of Chancery, as the mayor's court, &c., may be by prescription. *Andrews v. Webb*, Noy, 147.

3. A prescription that all lands within such a vill are devisable is good. 1 And. 152.

4. A prescription by the gentlemen ushers (daily waiters) for a fee of 5*l.* from each person knighted, held good. *Duppa v. Gerard*, Holt, 584.

5. The mayor of a corporation may, by grant or prescription, have a right to give a casting vote, but not of common right. 6 Mod. 152.

6. A prescription that *omnes occupatores* of such a close used to shut the gates, is good. *Gunter's case*, Carter, 32.

(b) *What are bad.*

1. Things forfeited by matter of record, as *bona fugitivorum*, cannot be claimed by prescription. *Fozley's case*, 5 Co. 109 a.

2. A prescription to have all wild swans which are *feræ naturæ*, and not marked, building their nests, breeding, and frequenting, within a particular creek, is not good. The case of *Swans*, 7 Co. 15 b.

3. A prescription to make a nuisance not good. *Fowler v. Sanders*, Cro. Jac. 446.

4. One cannot prescribe for a negative. Carter, 69.

5. A prescription to charge the subject with a duty must import a benefit or recompense to him, or else it is void. *Warrington v. Moseley*, 4 Mod. 323. Holt, 673, 674.

6. No prescription for a thing transitory; it must be permanent. 1 And. 152.

7. It is no prescription, though no memory be to the contrary, if the commencement is known. 1 Leon. 100. 2 Leon. 28.

8. A prescription cannot be for a court baron; but a prescription is good to hold plea above 40*l.* &c., and to distrain for an amercement in any part of the manor; but distress of an under-tenant is not within the prescription. *Pitts v. Twiss*, Cro. Eliz. 792.

9. There must be a certain and permanent interest abiding in some person to maintain a prescription; and therefore it will not lie *ratione commorantia*. *Pain v. Patrick*, 3 Mod. 290.

10. Lessee for years cannot prescribe. *Smith v. Morris*, Fort. 340. 3 Salk. 279.

11. A prescription can be annexed to an estate in fee. *Scoble v. Shelton*, 2 Mod. 318. *Muston v. Yateman*, 10 Mod. 229, 300.

12. A prescription for an interest cannot be laid in the inhabitants, because they are not permanent. Hob. 86.

13. A prescription is void if unreasonable. 1 Leon. 232, 314. 3 Leon. 41, 42, 81, 82.

14. It cannot be against a statute. 2 Leon. 28.

15. A prescription for twenty-four parishioners, &c. to make a rate, and a certain proportion to be levied on such a hamlet, is

bad, because uncertain. *Dent v. Coates*, Stra. 1145.

16. A vicar cannot claim a stipend by prescription, for none but a corporation or body politic can prescribe. *Birch v. Wood*, 12 Mod. 249.

17. A custom that tenant for life may only lease for six years, is bad. 3 Dy. 358. pl. 46.

V. RESPECTING PARTICULAR PRESCRIPTIONS, AND THE PLEADINGS CONNECTED WITH THEM;—

(a) *Of prescriptions for a common or other profit in land;—*

1. What are good.

1. A man may prescribe for common or other profit or easement for himself and his tenants. *Mellor v. Spalden*, 1 Saund. 344.

2. A prescription by a burgess that the mayor and burgesses of the corporation have time out of mind had a right of common for themselves and each [*1070] of them in such a place is good. *Staples v. Mellor*, 2 Show. 44.

3. One commoner may prescribe to have *solam et separatam pasturam* against another commoner. *North v. Coe*, Vaugh. 255.

4. A prescription for *solâ pastura* is good. 2 Saund. 328.

5. For common appurtenant to a messuage *cum pertinentiis* for cattle levant and couchant, is good. *Scamler v. Johnson*, T. Jones, 227. 2 Show. 248. S. C. *Sed vide* Vaugh. 152, 153.

6. A prescription for a profit *a prendre in alieno solo* in the tenants of a manor, by a *que estate*, exclusive of the lord, is good. 3 Mod. 246.

7. A prescription to have common *asse nombre* is good; but *ad libitum suum*, which is almost the same, is void. 3 Mod. 290.

8. A prescription generally to have common in a forest at all times throughout the year is good, without an exception of the fence month. *Trigg v. Turner*, 2 Show. 10. 3 Lev. 98, 197. *Sed vide* *Rex v. Sir John Byron*, J. Bridg. 26.

9. A fold-course may be claimed by prescription to the exclusion of the owner of the soil. *Potter v. North*, 1 Saund. 353.

10. Prescription to have a free-fold through the whole town of H, so that none in the said town ought to have free-fold without agreement made with the party prescribing, is a good prescription. *City of London's case*, 8 Co. 125 b.

11. A prescription for all the tenants of a manor to fowl in a free warren, is good. *Semb. David's case*, 3 Mod. 246.

12. A man may prescribe to have a game of swans within his manor, and may prescribe that his swans may swim within the manor of another. *Reg. v. Lady Young*, 7 Co. 15 b.

13. Prescription to put stakes in another's land to dry nets, &c. is good. *Popham v. Wooler*, 1 Sid. 291.

14. A prescription for all the profits of lands part of the time, and for part of the profits all the year, is good. *Kemp v. Capon*, Fort. 340.

2. What are bad.

1. Occupiers cannot prescribe for an interest, such as common, &c. *Weekly v. Wildman*, 1 Ld. Raym. 406.

2. It is not a good prescription, that every inhabitant in a town shall have common. *Cotard v. Wingfield*, 2 Leon. 44, 45. 3 Leon. 200. 1 And. 151, 152.

3. Inhabitants not corporate cannot prescribe in a common. *Vaugh*. 254.

4. A prescription cannot be to take all the profits, &c., though it may be to have fold-course or the like. *Punsany v. Leader*, 1 Leon. 11. 142.

5. A man cannot prescribe for sole common, though he may for sole pasture. 1 Mod. 74, 75.

6. The owner of the soil can by no prescription or custom be excluded out of his own soil at all times of the year. *Potter v. North*, 1 Vent. 390. J. Bridg. 26. *Thomas v. Serrel*, *Vaugh*. 354, 355, 356.

7. But he may be excluded for a certain time, and as to some kind of profits. 1 Vent. 391.

8. A prescription for common in another vill is not good. *Smith v. Gateswood*, Cro. Jac. 152.

9. A prescription to kill and hunt conies for preservation of common is not good. *Samborn v. Harlo*, Bridg. 11.

3. How to be pleaded.

1. In prescribing for common, it cannot be pleaded generally that "divers freeholders, &c.," but it must be confined to some certain particular tenements, though, by way of custom, this general method of pleading would be good. *Reg. v. Gruelthorpe*, 10 Mod. 158.

2. An avowry by a burgess of a corporation consisting of twelve capital burgesses called freemen, and twelve inferior burgesses called stallings, that every freeman inhabiting a house there, has, by custom, a right of common in the place where, &c., is good, for the custom is not alleged in the inhabitants, but in the freemen of the borough. *Hinkes v. Clarke*, 2 Show. 79.

3. A man having several commons in one place, one appurtenant to one messuage, cannot make a joint prescription for both. 2 Dy. 164. pl. 59.

4. In pleading a prescription for common for a certain number of cattle belonging to a yard, land, &c., it need not be* [*1071] said levant and couchant upon the land; otherwise, if it be common without number. *Stevens v. Austin*, 2 Mod. 185. See Lutw. [569.]

5. In pleading a prescription for sole and separate pasture, it is not necessary to say

for cattle levant and couchant. *Hopkins v. Robinson*, 1 Mod. 74, 75.

6. Where a man prescribes for common appurtenant, and does not say for cattle levant and couchant, it is ill. *Hoskins v. Robins*, 2 Saund. 325, 326, 327.

7. If a copyholder prescribes that all customary tenants *ejusdem tenementi*, instead of *ejusdem manerii*, have common of estovers in another manor, it is bad. 3 Dy. 363. pl. 27.

8. Prescription to have common to his house, and twenty acres; if he has a less parcel only, yet it is good; otherwise, if ten acres were freehold, and the rest copyhold; so if part were copyhold an hundred years since and now is freehold. *Gregory v. Hill*, Cro. Eliz. 531.

9. Prescription to have common for an hundred sheep; the jury find for a hundred sheep and six cows; it is good: otherwise, if for one hundred and twenty or more of the same kind than he had alleged. *Bushwood v. Pond*, Cro. Eliz. 722, 723. 1 Show. 347. S. P.

10. Prescription for common for sheep; the jury found that he had common for all other cattle levant and couchant, as well as sheep; it is good. *Bruges v. Searle*, Carth. 290.

11. On an issue that the freemen and inhabitants of ancient messuages have, by custom, a right of common for so many beasts, a verdict finding a right of common *modo et forma*, &c., and also that the freemen had a right of common for twenty more, is good, for the latter finding shall be rejected as surplusage. *Hinkes v. Clerk*, 2 Show. 78.

(b) Of a prescription for a fair.

A prescription for a fair may be alleged generally, and not in any person. *Comyns v. Bayer*, Cro. Eliz. 485.

(c) Of prescriptions respecting mills.

1. A prescription to grind all the corn that is spent in the houses of the inhabitants is bad and unreasonable. *Coryton v. Lithebye*, 2 Saund. 117.

2. In an action upon the case for not grinding at his mill, where one prescribes for mulcture, the plaintiff must aver that his mill was sufficient to grind all the corn. *Player v. Vere*, T. Raym. 327.

3. If a prescription be annexed to two several mills for grinding the corn, &c., of the inhabitants, and it be alleged that they ought to grind at the said mills or one of them, it is not well laid for both the mills. *Coryton v. Lithebye*, 2 Saund. 116, 117.

4. In pleading such a prescription, it need not be averred that the mills were ancient mills. S. C. 2 Saund. 117.

(d) Of prescriptions respecting seats in churches.

1. A prescription for a seat in a church is good. *Hutton's case*, Lat. 116.

2. No man can prescribe to have a pew or seat within the body of the church, or in an aisle or chapel adjoining to the body, with-

out a special reason, as, prescribing to repair it, &c. *Hob. 69.*

3. In case for disturbance of a seat in a church, one need not prescribe by repairing it. *Brunton v. Bateman*, 1 Lev. 71.

4. A prescription is well pleaded by stating "that time out of mind such a corporation did repair the aisle of the church, *ratione cuius* the mayor and aldermen sat there;" for though the right be in the whole body, the enjoyment may be in a select number. *Jacob v. Dalla*, 6 Mod. 231.

(e) *Of prescriptions respecting tithes* ;—

1. What are good.

1. A prescription for a parson to have land, part of the manor of D, in lieu of all tithe-wood within the parish, is good. *Somerton v. Cotton*, Cro. Eliz. 587. 599.

2. A prescription for the tenth of hay and after grass, is good. *Parrey v. Chauncey*, Noy. 15.

3. A prescription to pay the tenth cheese, between May and August, for all tithe milk, is good; not to pay the tenth quart of milk. *Mo. 909.*

4. To make the hay of the first months into cocks, and to set forth the tenth, to be discharged for the latter months,* [*1072] is good. *Johnson v. Awbery*, Cro. Eliz. 660.

5. The lord of a manor may prescribe to have *decimam garbam et decimum cumulum*, in lieu of 6l. which he himself pays to the parson for all tithe corn and hay. *Mo. 483.*

6. Prescription for a *modus* by the lord for himself and his tenants to have *decimam garbam* is good, but not *decimas garbarum*, for one is temporal and the other spiritual. *Pigot v. Horn*, Cro. Eliz. 599. 763.

7. Spiritual persons may prescribe in *non decimando*. *Belgrave v. Gower*, 1 Leon. 241. 248.

8. For copyholders of a bishop, or for the farmers of the demesnes, to be discharged of tithes, is good. *Semb. Crouch v. Fyer*, Cro. Eliz. 784. 785.

9. A prescription in occupiers for discharge of tithes is good. *Stopp v. Peacocke*, 3 Lev. 386.

2. What are bad.

1. That which is of common right cannot be laid as a prescription; as, to pay tithes duly, is not prescribable. *Wilson v. Bishop of Carlisle*, Hob. 107.

2. No man can prescribe to his own charge, only as to pay so much for tithes, but to pay so much for discharge of tithes, which is a *modus decimandi*. *Sheldon v. Montague*, Hob. 118.

3. That *per legem terræ* he ought to be discharged of the payment of tithes for wood spent in his house for firing, or for fences, is not good. *Norton v. Ferner*, Cro. Car. 113.

3. Relative to the pleadings.

If the prescription be that the parson holds an hundred acres of land in satisfaction of tithes, and proof is only for sixty, it is good; for the substance is proved. *Austin v. Pigot*, Cro. Eliz. 736.

(f) *Of prescriptions respecting tolls* ;—

1. What are good.

1. A prescription for toll on all corn brought into a market, though it be not sold, is good. *Hill v. Hawker*, Mo. 835.

2. Where a prescription is laid in a discharge, as to be exempted from toll, or for an easement, as for a way to a church, not only a particular person, but the inhabitants of a whole vill may prescribe; but where it relates to the profit or interest in the land itself, it is not so. *Pain v. Patrick*, 3 Mod. 292.

3. The inhabitants of a vill may prescribe for a discharge, as to pass over a ferry without toll, &c. *Payne v. Partridge*, 1 Show. 257.

2. What are bad.

A prescription for toll in consideration of maintaining the quay, and keeping a bushel to measure salt, is not good. *Warne v. Pridesux*, 1 Mod. 104. 105.

3. Relative to the pleadings.

1. In pleading a prescription for toll upon the sea, a good consideration must be alleged. 1 Mod. 104. 105. *Pridesux v. Warne*, T. Raym. 232. 233.

2. Toll or any other profit a *prendre* appurtenant to a manor, may be claimed by alleging a *que estate* in the manor. *James v. Johnston*, 2 Mod. 144.

3. Toll may be prescribed for generally. 2 Mod. 144.

4. In pleading a prescription for toll, the particular kind of toll must be stated; for if it be toll thorough, a consideration must be laid; but if it be toll traverse, a consideration is implied. *James v. Johnston*, 2 Mod. 143.

(g) *Of prescriptions respecting ways and watercourses.*

1. In pleading a prescription for a way, the party may set forth his estate without showing how he came by it. *Hebblethwaite v. Palmes*, 3 Mod. 52.

2. In an action for stopping a way, a prescription that a corporation and all those whose estate, &c., have had such a way, held good, without showing a deed. *Sloman v. West*, Palm. 387.

3. In an action on the case for disturbing a watercourse, the plaintiff may prescribe generally to have a watercourse to his mills. *Luttrell's case*, 4 Co. 86 a.

4. A declaration in an action on the case, laying the prescription to be, that a *great part of the water of the said stream* was accustomed to flow, &c., is sufficiently certain. *Luttrell's case*, 4 Co. 86 a.

5* Prescription for a way [*1073] across B acre *usque ad talem campum*, is good, without showing his interest; otherwise if it had been *usque ad talem clausum*. *Parker v. Newsham*, Lat. 160.

6. A prescription by a parson for a way to carry his tithes to the parsonage-house, alleging he was seised in *jure ecclesie*, is good, and he shall be intended to be resident. *Lord Sands v. Pinker*, Cro. Eliz. 898.

VI. RESPECTING THE PLEADING OF PRESCRIPTIONS IN GENERAL;—

(a) *Relative to the statement of the time.*

1. Title by prescription ought to be expressed by time out of mind. *Goodwin v. Brooks*, T. Jones, 226.

2. It is not necessary to allege a prescription for longer than sixty years. *Gilby v. Williams*, Cro. Jac. 666.

3. In a prescription for privilege, "*tempore quo non extat memoria*" is good enough; though the course be to say, *a tempore cujus contrarium memoria hominum non existit*. *Whitaker v. Thoroughgood*, 2 Vent. 130.

(b) *In respect of the place.*

In pleading a prescription in a vill, it must be pleaded that the vill is *antiqua*, &c. *Rymerly v. Cooper*, 2 Leon. 98.

(c) *Relative to the persons prescribing.*

1. Several freeholders cannot join or be joined in a prescription to claim an entire interest in another man's soil. *Potter v. North*, 1 Vent. 384.

2. Nor can freeholders and copyholders join. S. C. 1 Vent. 390.

3. Tenant in fee-simple can prescribe in his own name; tenant for years, for life, by *degrat*, or at will, in the name of him who has the fee; he who has no interest cannot prescribe for common; and therefore, inhabitants cannot as such prescribe for common, for they may have no estate except their places of dwelling. 2 Ro. 288. *Gateward's case*, 6 Co. 60 a.

4. If a manor come into the hands of four tenants in common, and afterwards come into the hands of one, it is only one manor, and he can prescribe generally. *Earl of Devon v. Eyre*, 2 Ro. 309.

5. Those who have no estate in the land can "prescribe for an easement in another soil, but not for a charge or benefit. *Holbette v. Warner*, 2 Ro. 289.

6. If tenants will prescribe, they ought to show their estates, and prescribe in the name of the tenant in fee by a *que estate*. *Hoskins v. Robins*, 2 Saund. 326.

7. They can in no wise prescribe against their lord, nor against any other, but only in the name of their lord. Id. *ibid*.

8. A prescription laid in tenant for life and him in remainder in tail, held good. *Hauswood v. Husband*, 1 Leon. 177.

9. The words "inhabitants and residents"

include tenants in fee-simple, for life, years, &c. *Gateward's case*, 6 Co. 60 a.

10. For a matter of discharge, as for a discharge from tithes, the prescription may be laid in the occupiers, and not in the owners, but not (even by way of custom) for a matter of interest or inheritance. *Shelton v. Montague*, Hob. 118. *Austye v. Fawkener*, Cro. Eliz. 446.

11. A man cannot prescribe as keeper of a park, without stating it to be an ancient park; but whether he may prescribe at all in himself and his predecessors by reason of his office, which is only for life, *quere*. 1 Dy. 70. pl. 37.

12. A prescription that *omnes possessores* ought to maintain a fence is bad; it should be *omnes tenarum tenentes*. *Holbedg v. Warner*, Palm. 331.

13. A prescription laid, that the defendant and all the occupiers, &c., is too general. *Muston v. Yateman*, 10 Mod. 301.

14. A corporation may prescribe by a *que estate* in their borough. *Vinkenuterne v. Edden*, 1 Ld. Raym. 386.

(d) *Relative to the estate and title of the parties prescribing.*

1. If a man have a prescriptive right in respect of one tenement and ten acres, and another in respect of another tenement and ten acres, he must make two several titles in pleading. Willes, 267.

2. In a prescription for a free fishery, a several fishery, or a common fishery, the party must show the foundation of his* claim. *Fiswallter's case*, [*1074] 1 Mod. 105, 106.

3. One prescribed as being seised of a messuage or tenement; it was held not to be an objection that it was in the disjunctive, but that it was bad for not saying how he was seised, for unless he was seised in fee he could not prescribe. *Scobell v. Shelton*, Skin. 36. 2 Mod. 318. S. C. — v. *Fetherston*, 2 Show. 96.

4. A prescriptive right claimed in respect of certain ancient tenements, without saying how many, is bad. *Semb. Willes*, 267.

5. Two men having several interests in several lands prescribe, that as well the one as the other, &c., *omnes ille quor. statum ipsi respective habuer. a toto tempore cujus contrar.* &c.; the prescription is well laid, and the pleading by the word "*respective*" is good enough for avoiding prolixity. *Coryton v. Lithbye*, 2 Saund. 116.

(e) *The prescription should be stated with all qualifications, and not be laid larger than it is.*

1. If one prescribes for common for all sheep, and gives evidence of a right of common for sheep agisting his land, the evidence does not maintain the prescription. *Earl of Devon v. Eyre*, 2 Ro. 309.

2. The prescription being for common

generally, the jury found the prescription *prout, &c.*, paying yearly a penny to the plaintiff; the plea was held good, for the payment of the penny is parcel; otherwise, where one part of the prescription is for the commoner, another for the lord. *Lovelace v. Reynolds*, Cro. Eliz. 546. 593.

3. If a prescription comprise two things, a forfeiture in one destroys the whole. Case of *Prohibition*, Yelv. 55.

4. So, where the prescription was for common of pasture for all cattle levant and couchant at all times in the year, and it was found by the jury that sheep were excepted for some time, this is a failure of prescription. *Res v. Inhabitants of Hermitage*, Carth. 241.

5. But a party does not fail by proving a larger prescription than that put in issue. 1 Saund. 269. n. [h]. *Bridges v. Saer*, 4 Mod. 89.

6. The plaintiff alleged that the land was demisable by copy in fee-tail or for life, &c., and let to him in fee, and so found, but never in tail; judgment was given for the plaintiff, for that is the substance of his title. *Doyle v. Wood*, Cro. Eliz. 431.

(f) *How affected by verdict.*

A prescription that is void at law cannot be cured by verdict; otherwise if it be only defectively set forth. *Muston v. Yateman*, 10 Mod. 300, 301, 302.

(g) *Miscellaneous.*

1. A prescription may be joined with a custom in the same declaration. *Fisher v. Wren*, 3 Mod. 251.

2. If defendant prescribes to take a thing for a particular purpose, he ought to aver the thing applied to that purpose. *Danby v. Hodgson*, 3 Lev. 323.

3. The custom of wares foreign bought and foreign sold within a city, prescribed for as seizable by the *mayor, sheriff, and citizens*, at the same time showing this name to be by incorporation of Rich. 2, where before they were *mayor, bailiffs, and citizens*, is good. 3 Dy. 279. pl. 10.

VII. OF THE PLEA TO AN ACTION FOUND ON A PRESCRIPTION.

To an action upon a prescription for an annuity due from the rector of a church, it is no plea to say that the church is destroyed. *Anon.* 1 Mod. 200.

VIII. OF PRESCRIBING AGAINST A PRESCRIPTION.

A prescription cannot be pleaded against a prescription, without a traverse. *Hickman v. Thorne*, 2 Mod. 105. *Meredith v. Allen*, Carth. 117. *Barnes v. Freeman*, Carter, 199. Cro. Car. 432.

IX. OF THE REPLICATION TO A PLEA OF PRESCRIPTION.

1. A replication denying a plea of prescription, should deny the fact, without a

formal traverse, and conclude to the contrary. 1 Saund. 103 c.

2. If a prescription be pleaded in justification, it must be traversed specially, and not by the general though comprehensive words *de injuria sua* [*1075] *propria abque tali causa*; but it is helped after verdict by the statute of jeofails. *Banks v. Parker*, Hob. 76.

X. WHEN AND HOW A PRESCRIPTION IS DESTROYED OR DETERMINED.

1. Where the original of a way is accounted for, the prescription is destroyed. *Res v. Hudson*, Stra. 909.

2. If lands in the hands of the king, or a spiritual person, come to a lay-man, a prescription *de non decimando* is determined; and so where a spiritual person has a discharge by privilege. *Morant v. Cumming*, Cro. Car. 94. *Sed vide* 1 Leon. 248. *contra*.

3. Prescriptions for interest and profits are extinguished by unity of possession, but not prescriptions for easements. *Reynolds v. Clarke*, 2 Ld. Raym. 1400.

4. If one having a liberty by prescription takes letters patent thereof, the matter of record merges the prescription. *Higgen's case*, 6 Co. 44 b.

5. If a man has estovers by prescription to his house, although he alters the rooms and chambers of it, so as to make a parlour where there was a hall, or a hall where the parlour was, and the like alteration of the qualities, not of the house itself, by which no prejudice accrues to the owner of the wood, it is not any destruction of the prescription; so although he builds new chimnies, or makes an addition to the old house, he will not lose his prescription; but he cannot employ any of his estovers in the new chimnies, or in the part newly added. *Luttrell's case*, 4 Co. 86 a. Cited 4 Mod. 46.

6. If a house to which estovers be appendant fall down, the prescription is not destroyed but revived by re-edifying. Hob 39, 40.

7. A person having two ancient fulling mills, to which was annexed by prescription a right to a watercourse, pulled them down and erected two mills to grind corn; held, the prescription remained. *Luttrell's case*, 4 Co. 86 a.

PRESENTATION.

[See *ante*, tit. CHURCH, div. XV. Vol. I. p. 286.]

1. The king may present to any church which he has in right of his ward, either under the great seal, or under the seal of the court of wards. *Stephens v. Potter*, Cro. Car. 99, 100.

2. An incumbent is elected bishop; and, before consecration, he obtains a dispensation in *commendam retinere*; he is afterwards consecrated and dies; the patron shall pre-

sent, and not the king. *Edes v. Bishop of Oxford*, Vaugh. 18.

3. The same person being patron and incumbent dies; the heir, and not the executor, shall present. *Holt v. Bishop of Winchester*, 3 Lev. 47.

4. Before the statute 21 Hen. 8. c. 13., if one who had a benefice with cure accepted another with cure, the first was void, not by the common law, but by the constitution of the pope, and therefore no lapse incurred without notice, though the patron might take notice and present if he would; but since that statute, if the first benefice be of the value of 8*l.*, the patron at his peril ought to take notice of it and present. *Holland's case*, 4 Co. 75 a. Cro. Eliz. 601. Moore, 542. 8 C.

5. If the queen has title by lapse, yet if the bishop, patron, &c., collate before a presentation by the queen, and the presentee dies incumbent, the queen has lost her presentation. *Reg. v. Bishop of Lincoln*, Lutw. [447]. 1083.

6. The bishop collated after six months, at twenty eight days to the month, and within half a year; and adjudged good. *Cateby v. Bishop of Peterborough*, Cro. Jac. 141. 166.

7. Where a man who has a benefice with cure vacates it by accepting another, without dispensation or qualification, and the patron presents, his clerk, who is admitted, instituted, and inducted, may bring his action of trespass or ejectment. *Shute v. Higden*, Vaugh. 129, 130, 131.

[*1076] PRESENTMENT.*

1. A presentment by a court-leet should not be for other than public nuisances, and there being a custom makes no difference. 1 Saund. 135 c. n. (5).

2. The presentment is but in the nature of an indictment. *Rez v. Inhabitants of Hornsey*, 1 Show. 291.

3. A presentment for a nuisance must state the place where, &c., and where that place is situated. *Rez v. Record*, 2 Show. 216.

4. A presentment certified to be made at a leet held within a month of St. Michael the Archangel, viz. on the 13th day of November *infra mensem post festum Sancto Mich. Archi. scil.* 13th die Novembris, was quashed. *Dakin's case*, 2 Saund. 290, 291.

5. A presentment for refusing to take upon him the office of constable, must state before whom the session was held. *Rez v. Faus*, 1 Mod. 24.

6. A presentment in a court-leet, which concerns the person and not the freehold, may be moved into King's Bench by *certiorari*, and traversed. *Mathews v. Cary*, 3 Mod. 137, 138. 1 Saund. 135 c. n. [f].

7. Presentment of bloodshed in a court-

leet cannot be traversed; *secus* of nuisances, or what touches the freehold. 1 Dy. 13. pl. 64.

8. Presentments taken in an hundred court were quashed, because that is not the king's court, and therefore *coram non judice*. March. 75. pl. 115.

9. Where it is part of the presentment that they ought to repair, it seems they may give it in evidence as a discharge. *Rez v. Inhabitants of Hornsey*, 1 Show. 271.

10. A presentment by a magistrate under the highway act, should conclude "against the form of the statute." 1 Saund. 135. n. [a].

11. A grand juror is indictable for making a presentment without the assent of his fellows. *Rez v. Bynon*, 2 Show. 304.

12. The presentment of the feoffment, &c. at the court may be after the death of the feoffor or feoffee. *Bowyer v. Perryman*, 5 Co. 84 a.

[See also *ante*, tit. *LEET*, Vol. II. p. 890.]

PRESUMPTION.

1. Some presumptions of law are so violent, as though they be false, yet a man cannot aver against them. *Slade v. Drake*, Hob. 297.

2. A lawful grant of the crown shall be presumed in respect of ancient and continual possession. *Bedle v. Bread*, 12 Co. 4.

3. Certain charters prescribed that the mayor, bailiffs, aldermen, &c. should be chosen by the commonalty or burgesses, &c.; but, by ancient usage, the elections had been by a select number of the commonalty, called the common council; held, that such usage was good, and that it should be presumed to have originated in some ancient ordinance or constitution. *Case of Corporations*, 4 Co. 77. Jenk. 273. 8 C.

PRINCE.

If the prince, as prince, has judgment, when king, he shall sue execution. *The Prince's case*, 8 Co. 28 b.

PRINCIPAL AND AGENT.

1. A surgeon who is sent for by the wife or servant of A B to visit his sick child, can recover the bill only upon an express contract by A B, or upon a presumption that A B gave his wife or servant authority to send for the surgeon. *Manby v. Scott*, Ori. Bridg. 256.

2. The agent of a regiment is only the servant of the colonel, and his receipt charges the colonel. *Baument v. Pine*, 1 Ld. Rayn. 101.

3. The law looks on the contract of the wife, which she makes for the husband, as the contract of a servant, and good only as far as the authority goes. Ori. Bridg. 231.

4. Where goods are sold to a factor who

has agreed to take the risk of the debts, the vendee is answerable for the amount to the owner, if he has received notice from him to pay him, and not the factor, [*1077] previous to his having paid the latter. *Serimshire v. Alderton*, 2 Stra. 182.

5. If a common servant take up wares for the family, it is no presumptive evidence of an authority in fact from his master. *Orl. Bridg.* 252.

6. A servant's contract is supposed to be good upon an authority given by the master himself, which may be recalled: if a servant formerly employed to buy wares for the use of a family, buy still, continuing in the family, the master is bound by it; but if an express prohibition be given to the tradesman not to sell to that servant, the power which he had in law ceases. *Manby v. Scot*, *Orl. Bridg.* 267.

7. A letter of attorney ceases to have effect on the death of the party giving it. *Shipman v. Thompson*, *Willes*, 105. *Wynne v. Thomas*, *Willes*, 565.

8. If a contract be made by an agent which binds the principal, whether he consented before it is done or after, yet the declaration in debt, or in an action on the case upon an *assumpsit* against the principal, must be upon a supposal of the contract to have been made by the principal himself. *Orl. Bridg.* 270. *Willes*, 105.

PRINCIPAL AND INTEREST.

In debt on a bond conditioned to pay 500*l.* with lawful interest for the same, a declaration for the principal sum without taking any notice of the interest is good. *Hinton v. Wilmore*, 2 Show. 32.

[See also ante, tit. INTEREST, Vol. I. p. 817.]

PRINTING.

1. Printing is said to have been more under the power of the crown, from the time it was first invented than any other art whatever. *Company of Stationers v. Partridge*, 10 Mod. 106.

2. The king may grant the exclusive right of printing almanacks and other prerogative copies. *Stationers' Company v. Seymour*, 1 Mod. 258.

3. A grant for the sole printing of law books adjudged good. *Company of Stationers v. Parker*, *Skin.* 234.

4. The statute of 21 Jac. 1. c. 3, against monopolies, does not extend to any letters patent concerning printing. 1 Mod. 258 *notis.*

PRIORITY.

1. The priority of judgments given on the same day cannot be averred. 2 Saund. 148 d. 2 Burr. 967. *Miller v. Bradley*, 8 Mod. 189. 3 Salk. 212.

2. But the priority of writs sued-out may be inquired of by the country. *Johnson v. Smith*, 2 Burr. 950. *Wood v. Newton*, 1 Wils. 147. 2 Saund. 148 d.

3. So, if the sheriff enter under a *fi. fa.* the same day as an act of bankruptcy is committed, the priority may be inquired into. *Thomas v. Desanges*, 2 B. & A. 586; cited 2 Saund. 148 d. [b.]

PRISON AND PRISONER.

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I. RESPECTING PRISONS.

1. Every place where one is restrained of

his liberty is a prison. *Attorney-General v. Sir M. Hobert*, Cro. Car. 210.

2. The Tower is a prison within the *habeas corpus* act. *Rex v. Kendal*, 1 Ld. Raym. 66.

II. WHERE PRISONERS SHOULD BE KEPT.

Prisoners for debt may be kept where the sheriff pleases, but not malefactors. Case of *Sheriff of Essex*, 1 Ld. Raym. 136.

III. WHAT CONSTITUTES AN IMPRISONMENT.

Every restraint of liberty is an imprisonment. *Platt v. Sheriff of London*, Plow. 38.

IV. RELATIVE TO THE SUPPORT OF PRISONERS.

Though one be imprisoned, he must live by his own means, as neither the plaintiff nor the sheriff is bound to give him meat and drink. *Dive v. Maningham*, Plow. 67.

V. OF THE ALLOWANCE TO PRISONERS UNDER THE 32 G. 2. c. 28, &c.

1. The first payment of 2s. 4d. is to be made to a prisoner upon the day of giving him notice, and the weekly payment is afterwards to be made upon the first day in every week. *Anon.* Say. 102.

2. Attorney's signing a note for 2s. 4d. a week not sufficient. *Warrington v. Elliott*, 1 Barnes, 265.

3. So, though there is an affidavit of plaintiff being beyond sea. *Berryman v. Gilbert*, 1 Barnes, 284.

4. A prisoner is to be allowed 2s. 4d. per week from each plaintiff at whose suit he is in execution. *Mendes v. Worfe*, Ca. Prac. C. P. 140. 1 Barnes, 269.

5. A prisoner was discharged, the plaintiff's executor not continuing the allowance of 2s. 4d. per week. *Tidmarsh v. Procter*, Ca. Prac. C. P. 122.

6. Though allowance was forgotten for a day or two, yet prisoner was not discharged. *Beech v. Paxton*, 1 Barnes, 259. 262.

7. The court may moderate the allowance to prisoners under the lord's act; a prisoner was remanded on an allowance of 6d. per week. *Hill v. Wadmore*, 2 Barnes, 304.

8. Another prisoner was remanded on a joint allowance of 2s. 4d. per week [*1079] by two creditors. *Weaver's case*, 2 Barnes, 309. But see 1 Bos. & Pul. 366.

VI. OF THE LIABILITY OF A PRISONER FOR FEES, &c.

1. An officer cannot detain a prisoner for fees. *Mason v. Cutterson*, 1 Ld. Raym. 4. Stra. 908.

2. It is a misdemeanor in an officer to take any thing from a prisoner in his custody. 11 Mod. 62.

VII. RELATIVE TO THE REMOVAL OF A PRISONER.

1. A person in custody for the crown cannot be removed to another prison at the instance of a private creditor. *Rex v. Pawlet*, Andr. 274.

2. A prisoner in execution upon a sentence of the Admiralty, shall not be turned over to

the King's Bench on a *habeas corpus*, unless a plea be depending against him; and the like upon an *excommunicato capiendo*. *Dowler v. Kette*, 2 Ld. Raym. 789, 790. 1 Salk. 341. S. C.

3. If one be in custody upon a criminal, and also upon a civil matter, there ought, in order to remove him, to be but one *habeas corpus*, either on the crown side, or on the plea side. *Souther's case*, 6 Mod. 133.

4. A prisoner may be removed by the person at whose suit he has been taken in execution, out of the custody of the sheriff, into the custody of the marshal. *Anon.* Say. 154.

5. A prisoner is not to be turned over till the officer is paid his charges. *Anon.* 1 Stra. 308.

6. If a prisoner removes himself, he loses his 2s. 4d. a week. *Greenal v. Cooper*, 1 Barnes, 260.

VIII. RELATIVE TO THE DETAINER OF A PRISONER.

A person resident within the walls of a prison may be detained. *Anon.* 11 Mod. 4.

IX. OF THE BILL AGAINST A PRISONER.

1. There must be a bill filed against a prisoner, and therefore when that was omitted, though a declaration was served, he was held entitled to be discharged. *Wicker v. Woodhall*, Prac. Ca. K. B. 125. Say. 49. S. C.

2. Where there is no bill filed against a prisoner, the court will order one to be filed after judgment by *nil dicit*. *Keckwick's case*, Prac. Ca. K. B. 149. See T. Jo. 180.

X. OF THE DECLARATION.

1. A declaration against a prisoner must be delivered personally or to the turnkey. *Greenhouse v. Cleaver*, 11 Mod. 357. Stra. 474. S. C.

2. It is not sufficient to deliver a declaration against the prisoner to the turnkey, unless it be first filed in the office. *Anon.* 227.

3. A declaration against a prisoner in a country gaol need not be entered with the prothonotary before the delivery. *Strickland v. Hodgson*, Ca. Prac. C. P. 114.

4. The original declaration against a prisoner in the Fleet, indorsed by prothonotary, should be left at the Fleet, and not a copy. *Newhalls v. James*, 1 Barnes, 315.

5. Declarations against prisoners in country gaols may be filed any time before rule to plead. *Strickland v. Hodgson*, 1 Barnes, 268.

6. The defendant's attorney must have notice of declaration in writing before the essoin day, or an imparlance is of course. *Beach v. Hobbs*, 8 Mod. *ibid*.

7. Declaration and subsequent proceedings, which were as if defendant was at large, were set aside, he becoming a prisoner after process served. *Prynn v. Moore*, 2 Barnes, 313.

8. In a declaration in debt against a defendant in the custody of the sheriff, it is unnecessary to allege that the process issued at the suit of the plaintiff against the defendant,

though it is otherwise in actions on the case. *Parker v. Drewe*, Keny. 114.

XI. WHEN AN AFFIDAVIT IS NECESSARY.

1. An affidavit to hold to bail is necessary to detain a prisoner. 2 Saund. 1. n. [a].

2. If a defendant arrested on a *latitat* in B. R., removes himself to the [*1080] Fleet,* no new affidavit is requisite to charge him with declaration. *Sampson v. Warren*, 1 Barnes, 72. Ca. Prac. C. P. 144.

3. An affidavit of delivery of declaration, is not necessary to detain a prisoner in custody of the marshal. 2 Saund. 1. n. (1).

4. Otherwise, if in custody of the sheriff. 2 Saund. 1. n. [a].

XII. HOW AND WHEN A PRISONER SHOULD BE CHARGED IN EXECUTION.

1. The way to charge one in custody in term time, is by filing a bill against him, and delivering a declaration to the turnkey. *Tildsen v. Parfriman*, 6 Mod. 254.

2. A prisoner in the Fleet by process of C. P. may be brought up by rule; but if held by execution of another court, there must be a *habeas corpus*. *George's case*, 2 Barnes, 300.

3. Plaintiff must proceed to final judgment within the third term after declaration inclusive. *Davis v. Hall*, 1 Barnes, 279.

4. A prisoner can be brought up to court only twice, though plaintiff dies and executor wants time, &c. *Luker v. Wallis*, 1 Barnes, 265.

5. If a person come in upon *habeas corpus*, and the plaintiff do not declare in two terms, the defendant shall be discharged on filing common bail. *Hothershall v. Bows*, 6 Mod. 22.

6. If a person come in upon *habeas corpus*, though he put in bail, yet if it be not at the return of the process, he cannot give rules, but must wait two terms, and then, if there be no declaration, he shall be discharged on filing common bail without costs. *Hothershall v. Boves*, 6 Mod. 22.

7. A plaintiff instead of charging prisoner in execution, brought an action on the judgment; court discharged defendant. Prac. Ca. K. B. 179.

8. But if a prisoner is not charged till after second term by accident, he will not be discharged. 1 Barnes, 261, &c.

9. Where a prisoner arrested by process of K. B. is removed immediately to the Fleet, application for a *supersedeas*, where plaintiff does not declare in time, must be in this court. *Maddox v. Fletcher*, 2 Barnes, 299.

XIII. CONSEQUENCE OF CHARGING HIM FOR MORE THAN IS DUE, OR OF LEVYING PART.

1. On affidavit of £21 only due, though charged for £100, rule nisi to be discharged on payment of £21 and costs. *Cuttle v. Whitaker*, 1 Barnes, 265, 266.

2. A prisoner charged for £103 was refused to be discharged, though £42 was said to be paid; upon a rule for a plaintiff to in-

dorse what was due, if he indorses the whole, the court will not inquire further. *Baker v. Holmer*, 1 Barnes, 260, 263, 264.

3. In debt on bond, if the plaintiff be a prisoner in the Fleet, and is taken and re-committed on an escape warrant, and the defendant make an affidavit that nothing is due, he (the defendant) shall be discharged on common bail; but as the commitment of the plaintiff on the escape warrant is a commitment in execution, and he is thereby prevented from going before a judge at chambers to contradict the defendant's affidavit, it shall be taken to be true, the inability of the plaintiff proceeding from his own wrong. *Cotton v. Martin*, 6 Mod. 63.

4. Prisoner was discharged out of execution, part of the debt being levied by *fi. fa.* Prac. Ca. K. B. 177.

XIV. WHERE A PRISONER ESCAPES AND IS RE-COMMITTED.

1. A prisoner who escapes and returns is in lawful custody. *Anon.* 11 Mod. 341.

2. If prisoner escapes, his recaption shall be looked on as the time of render, from whence plaintiff is to proceed. *Mabson v. Butler*, 1 Barnes, 285.

3. A prisoner who escapes and is retaken on a warrant on 5 Ann. c. 9., cannot be discharged on bringing the money into court. *Hothershall v. Boves*, 6 Mod. 21.

4. A prisoner for debt who escapes, and is re-committed on an escape warrant on the statute 1 Ann. c. 6., cannot have a day rule. *Cotton v. Martin*, 6 Mod. 63.

XV.* WHEN A PRISONER IS ENTITLED TO A SUPERSEDEAS, AND [*1081] ITS EFFECT.

1. If there have been no proceedings against a person who is in prison, for want of appearing within four months, the prisoner, upon entering appearance, is entitled to a *supersedeas*. *Anon.* Say. 111.

2. A prisoner is supersedeable unless the *committitur* is on record before the end of the second term. *Unwin v. Kirchhoff*, Stra. 1215. Prac. Ca. K. B. 180.

3. So for want of getting demurrer argued in the third term. *Huggins v. Bembridge*, 1 Barnes, 287.

4. A prisoner not charged in execution two terms after judgment or render, is supersedeable. *Maud v. Brantwaite*, Stra. 943. *Holland v. Serjeant*, Carth. 469. *Russell v. Stuart*. Prac. Ca. K. B. 40.

5. A prisoner surrendered by bail was superseded because charged in the same court after he had removed himself, although he had not given notice of it to his plaintiff. *Tilles v. Abbott*, Stra. 1153.

6. After *supersedeas* issued, plaintiff shall not charge defendant with a new declaration. *Peachey v. Boves*, 1 Barnes, 261, 273.

7. Declaration, judgment, and execution against a prisoner were set aside as irregular,

being all subsequent to the time of defendant's being supersedeable, and his having applied for a *supersedeas*. *Webb v. Dowell*, Barnes, Supp. 51, 52.

8. A defendant cannot be charged in execution after three terms since judgment. *Robbins v. Wigley*, 1 Barnes, 263, 279, 280.

9. Defendant discharged by *supersedeas* before judgment, may afterwards be taken in execution; otherwise if the *supersedeas* were after judgment. *Wright v. Kerswell*, 1 Barnes, 275, 276. *Ib.* 261, 273.

10. Where a prisoner is entitled to a *supersedeas*, the plaintiff cannot charge him with a declaration, though the defendant neglects to procure his *supersedeas*. *Farmer v. Jenkinson*, Ca. Prac. C. P. 34.

11. Where a prisoner is superseded he cannot be held to bail for the old cause of action. *Meredith v. Barry*, 2 Barnes, 1315.

12. Where the defendant a prisoner shall have been superseded for want of proceeding to judgment in due time, but remains in custody at the suit of another person, the plaintiff in the action in which he had been superseded may charge him in execution. *Mitchell v. Pate*, C. T. Hardw. 287. Prac. Ca. K. B. 179. S. C.

XVI. WHEN A PRISONER WILL BE REMANDED.

1. A prisoner brought up by *habeas corpus* at his own instance, was remanded because he refused to pay the gaoler's fees. *Cope's case*, Ca. Prac. C. P. 110.

2. *Habeas corpus* to charge a member of last parliament in execution; defendant was remanded. *Dutton v. Pitt*, 1 Barnes, 136.

3. Where a man is brought by *habeas corpus*, and upon the return it appears that he was imprisoned illegally, (though there is no cause of privilege for him in the court,) yet he shall not be remanded to his usual imprisonment. *Bushell's case*, Vaugh. 156.

4. Though the return be filed, yet the court may remand the prisoner to the same prison, and not to the marshalsea. *Anon.* 1 Vent. 339, 346.

XVII. EFFECT OF DISCHARGE OF ONE OF SEVERAL PRISONERS.

1. If two are in execution for a joint debt, the discharge of one by the sheriff is not the discharge of the other. *Blagfield's case*, Prac. Ca. K. B. 177. Cro. El. 478.

2. When the wife is taken without her husband, and discharged on common bail, a new writ must go against both. *Carpenter v. Fortime*, Prac. Ca. K. B. 178. Com. 355.

XVIII. WHEN A PRISONER DISCHARGED MAY BE TAKEN AGAIN IN EXECUTION.

1. Defendant discharged by the lord's act cannot be retaken on execution, or new action. *Roberts v. Hammond*, 1 Barnes, 271.

2. Defendant discharged for plaintiff [*1082] tiff's* not proceeding to judgment, may be afterwards taken in execution. *Wright v. Kerswell*, Ca. Prac. C. P. 135, 136.

3. *Aliter*, if discharged for want of plaintiff's charging him in execution. *Clarke v. Venner*, Ca. Prac. C. P. 136.

4. A prisoner (*inter alia*) on a *capias utlagatum*, discharged on stat. 10 G. 1., cannot be taken again on new *capias utlagatum*. *Hand v. Kelly*, 1 Barnes, 278.

5. On a *supersedeas* after judgment, defendant may not afterwards be taken in execution; the defendant was discharged with costs. *Kirke v. Burrows*, 1 Barnes, 274.

[See also *ante*, div. XV. p. 1081.]

XIX. PROCEEDINGS AGAINST A DEFENDANT WHO HAS SURRENDERED UNDER THE LORDS' ACT.

A defendant surrendered to the warden of the Fleet on the fugitive act, cannot be charged with a declaration. *Baldwin v. O'Connell*, 1 Barnes, 281.

XX. PROCEEDINGS AGAINST A PRISONER AT THE KING'S SUIT.

A prisoner at the king's suit, brought up by *habeas corpus*, cannot be committed to the Fleet without the king's consent. *Coate's case*, 2 Barnes, 301, 306.

XXI. PROCEEDINGS AGAINST A PRISONER ON A CRIMINAL ACCOUNT.

1. A prisoner of the king cannot be charged in actions by private parties without leave of the court. *Rex v. Jackson*, 1 Lev. 125. *Beacon's case*, 1 Lev. 146.

2. The court will not give leave to charge a prisoner with an action, who has a pardon on condition of transportation. *Forsyth's case*, 2 Ld. Raym. 848. 7 Mod. 153. Salk. 500. S. C. 1 Wils. 127.

3. But leave was given to serve process on a prisoner who was capitally convicted, and reprieved for transportation, on the plaintiff undertaking not to sue execution against his person. *Coppin v. Gunner*, 2 Ld. Raym. 1573. Str. 873. 1 Barnard. 339.

4. A prisoner in custody for a contempt cannot be charged with a declaration without leave of the court. *Algood v. Howard*, Ca. Prac. C. P. 27.

5. A prisoner committed for a contempt cannot be charged with a declaration; but if he accepts the declaration, and suffers the plaintiff to take judgment, he waives all advantages of the irregularity. *Pepper v. Bawden*, Ca. Prac. C. P. 31.

XXII. WHEN A PRISONER MAY BE DISCHARGED ON A HABEAS CORPUS.

1. If it appear on the return to a *habeas corpus* that the prisoner was committed under a sign manual by the command of the king, he shall be discharged. *Rex v. Browne*, 2 Show. 484. 1 Bac. Abr. 378.

2. On a *habeas corpus* by one who had been a prisoner two terms, and not tried, he must be discharged. *Rex v. Waller*, 8 Mod. 5.

3. A person in custody on a *ne exeat regnum* improperly issued, may be discharged on *habeas corpus*. *Anon.* 7 Mod. 9.

4. If, upon a prisoner being brought up by a *habeas corpus*, it appear that he is in custody under an illegal judgment, he may be discharged. *Rex v. Collyer*, Say. 44.

5. On a *habeas corpus* the court will make no order as to the party, but to see he is under no illegal restraint. *Rex v. Clarkson*, Stra. 444.

6. On a *habeas corpus* to free the body of an infant from the custody of his aunt, the court will not determine the right of guardianship, but will merely set the child at liberty. *Rex v. Smith*, 7 Mod. 235. Stra. 982. S. C.

7. A feme covert brought in on the writ, the court would not constrain her to go with her husband to prison, but left her to go where she pleased. *Rex v. Viner*, 2 Lev. 129.

8. The court of Common Pleas or Exchequer upon *habeas corpus* may discharge prisoners imprisoned by other courts, upon the insufficiency of the return only, and not for privilege. *Bushell's case*, Vaugh. 154.

9. The court will not enter into [*1083] the validity* of a bye-law upon the return to a *habeas corpus*, except in the case of the city of London. *Ballard v. Bennet*, 6 Mod. 178. n. *Cuddon v. Provost*, 6 Mod. 123.

10. If no sufficient cause of commitment be returned in the *habeas corpus*, the prisoner shall be discharged by bail, &c. *Barkham's case*, and *Lawson's case*, Cro. Car. 507. 552.

11. If a commitment in execution by a court of oyer and terminer be wrong in form only, the defendant cannot be discharged on *habeas corpus*, but is put to his writ of error. *Bethell's case*, Salk. 348.

12. A prisoner on a *capias utlagatum* was discharged on a plaintiff's death. *Wagstaff v. Davy*, 1 Barnes, 258.

XXIII. WHEN AND HOW A PRISONER MAY BE ADMITTED TO BAIL.

1. A prisoner in execution may be bailed upon a *habeas corpus*, while the return is under consideration. *Rex v. Dairton*, 1 Ld. Raym. 603. *Rex v. Bethell*, 5 Mod. 23. Fort. 242.

2. The King's Bench may bail if they please in all cases, but the Common Bench must remand, if the cause of the imprisonment returned is just. *Bushell's case*, Vaugh. 157.

3. A defendant removed by *habeas corpus* from an inferior court shall put in common or special bail in the court above, according as he would have been obliged to do in the court below. *Richardson's case*, 2 Show. 182.

4. Bail on a *habeas corpus* to an inferior court, are only liable to the actions that are returned. 2 Show. 182. S. C.

[See also ante, tit. BAIL, div. (B). p. 182.]

XXIV. WHEN THE BENEFIT OF THE RULES WILL BE ALLOWED TO A PRISONER.

1. The rules may be allowed to a prisoner on an *excommunicato capiendo*. *Rex v. Buckland*, Stra. 413.

2. One committed for a contempt cannot have the benefit of the rules, nor one in execution for a misdemeanor. *Jones's case*, Stra. 817. Stra. 843. 1122.

3. A prisoner must sign the petition for a day rule before he goes at large. *Anon.* Stra. 503.

PRIVILEGE.

I. IN RESPECT OF PERSONS;—

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(b) *Clerk in court*, p. 1084.

(c) *King's servants and household*, p. 1084.

(d) *Receiver-general*, p. 1084.

(e) *Treasurer of records*, p. 1084.

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I. IN RESPECT OF PERSONS;—

(a) *Bishop*.

A *capias* does not lie against a bishop. 3 Dy. 315. pl. 99.

(b) *Clerk in court*.

If the clerk of a court be elected into a ny

office which requires his personal and constant attendance, as churchwarden or the like, he shall have his privilege; otherwise not, as for watching and warding and the like. March. 30. pl. 65.

(c) *King's servants and household.*

1. The king's servants are privileged from arrests, for the king shall not be deprived of them without leave. *Killegrew's case*, T. Raym. 152.

2. But they may be outlawed. *Id. ibid.*

3. No privilege by writ out of the Exchequer will be allowed for any of the king's household. *Seckford's case*, 3 Leon. 223.

(d) *Receiver-general.*

A writ of privilege out of the Exchequer was not allowed to the receiver-general of the revenues of the crown, sued in C. B. 3 Dy. 328. pl. 9.

(e) *Treasurer of records.*

Privilege was denied to the treasurer of the records of the King's Bench. *Rex v. Payne*, 4 Leon. 81.

(f) *Persons attending courts of justice.*

1. A party attending the trial of his cause ought not to be served with process. *Cole v. Hawkins*, Andr. 275.

2. A defendant attending the trial at *nisi prius* is privileged. *Holliday v. Pitts*, Stra. 966.

3. All persons having relation to a suit which calls for their attendance are privileged. *Anon.* Salk. 544.

4. Where a man has privilege of court, and with his wife coming thither to defend a suit against him, both shall have privilege from arrests. 3 Dy. 377. pl. 30.

5. A person who is privileged by reason of an action depending in the Common Bench, is privileged for the goods of strangers in his hands, so that they cannot be attached. *Edwards and Tedburie's case*, 1 Leon. 189.

6. On a voluntary coming in to confess an indictment, &c. no privilege *cundo et redeundo*. *Anon.* Salk. 544.

II. IN RESPECT OF PLACE;—

(a) *Exchequer.*

1. There are four causes of privilege of the Exchequer; viz. 1st, informer for the king; 2nd, accountant to the king; 3rd, debtor to the king; 4th, officer or attendant on the court. *Anon.* Salk. 546.

2. The commissioners of the treasury have the privilege of being sued only in the Exchequer. *Lampen v. Sir Edward Deering*, 2 Show. 299.

(b) *King's palace.*

Privilege of a palace where the king is always absent will not be allowed. *Elder-ton's case*, 3 Salk. 92. 284.

III. IN RESPECT OF ENJOYMENT OF SOME IMMUNITY, OR EXEMPTION FROM LIABILITY; AS FROM SERVING AN OFFICE, &c.

1. A clergyman is exempted from serving as collector and expeditor under the statute

of sewers. *Chambers's case*, Andr. 353. 1 Mod. 282. *Case of the Vicars of Dartford*, Stra. 1107. *Archdeacon of Rochester's case*, 1 Lev. 303.

2. A writ of privilege was refused to a justice of the peace for discharging him from the office of constable. *Delamott's case*, Stra. 698.

3. A physician is not privileged from being chosen constable, except in London. 1 Mod. 22.

4. A captain of the king's guards not exempted from serving as reeve of a manor. *Sir Walter Faux's case*, 1 Lev. 233.

5. But an attorney (though a copyholder) is so privileged, though the office is by custom, and he might execute it by deputy. *Stone's case*, 1 Lev. 265.

6. No person can claim an exemption from serving as jurors [*1085] in B. R., or in any case where the king is party, without express words in a charter. *Rex v. City of Canterbury*, T. Raym. 113, 114.

IV. IN RESPECT OF PROCEEDINGS BY AND AGAINST PARTICULAR PERSONS;—

(a) *Process.*

1. The privilege of the prothonotaries and sergeants and their clerks, is to be sued in C. B. by original writ; but not by bill. *Baker v. Swindon*, 1 Ld. Raym. 399. Salk. 544. n. (a).

2. Attornies of C. P. have privilege to be sued in their own court by bill. *Brown's case*, Salk. 544. 1 Ld. Raym. 399.

3. In the Exchequer, where the plaintiff is privileged, the suit is by *quo minus*; where defendant, it is by bill. *Anon.* Salk. 546.

(b) *Venue.*

1. The king may choose his county. *Rex v. Webb*, Prac. Ca. K. B. 189.

2. A barrister has the privilege of laying any transitory action in Middlesex. *Wm. Thompson v. Sir W. Scroggs*, 2 Show. 177. 2 Ld. Raym. 1556. S. P. *Bacon v. Ramry*, Prac. Ca. K. B. 187, 188. 190.

3. Though he has retired from practice. *Row v. Russell*, 2 Show. 242.

4. A master in Chancery has the same privilege. *Burrough v. Willis*, 2 Ld. Raym. 1556.

5. The marshal has the privilege of having an action of escape tried in Middlesex. *Crook v. Moedall*, Prac. Ca. K. B. 188.

V. IN WHAT ACTIONS IT IS ALLOWED.

Privilege is not allowable in actions *quintum*. *Hirdham v. Whaley*, 1 Ld. Raym. 27. Prac. Ca. K. B. 34. *Sed vide* 12 Mod. 74.

VI. HOW THE CLAIM OF PRIVILEGE SHOULD BE MADE;—

(a) *When it must be in person.*

1. A claim of privilege ought to be in person or by warrant of attorney. *Parker v. Edwards*, 1 Show. 352.

2. Jurors that will have privilege upon a charter of exemption, ought to claim it in

proper person. *Res v. City of Canterbury*, T. Raym. 113, 114.

(b) *When by writ of privilege.*

1. A clerk in Chancery cannot have his privilege in K. B. without writ. Mo. 753.

2. But if a man be arrested in the face of the court, the court has power to discharge him, though not otherwise. *Clerk v. Molineux*, T. Raym. 101.

3. A writ of privilege does not lie to the commissioners of the court of conscience. *Silk v. Rennett*, Prac. Ca. K. B. 37. 3 Burr. 1583. S. C.

(c) *When it will be allowed on motion.*

1. Privilege of a foreign minister's servant will be allowed upon motion. *Evans v. Hicks*, 2 Ld. Raym. 1524.

2. Upon an application under stat. 7 Ann. c. 12. to be discharged from custody, the defendant being a domestic servant of an ambassador, the affidavit must specify the service. *Holmes v. Gordon*, C. T. Hardw. 3. VII. WHEN AND HOW A DEFENDANT IS PREVENTED FROM INSISTING ON HIS PRIVILEGE.

1. When privileged persons are sued jointly with unprivileged persons, the privilege of the former is never allowed. Prac. Ca. K. B. 190. Comb. 6.

2. So where a wife executrix was sued with the husband in C. B. though he was clerk of the crown in Chancery, his privilege was disallowed. *Poole's case*, 3 Dy. 377. pl. 30.

3. A general privilege as debtor will not hold against a special privilege in another court; but a special privilege as accountant will. *Carterell v. Massam*, Hard. 316.

VIII. WHEN AND HOW FORFEITED OR WAIVED.

1. A clerk in Chancery by suing out a general *supersedeas* to an *exigent* forfeits his privilege. 1 Dy. 33. pl. 18.

2. It cannot be waived but by an act in a court of record. *Ogle v. Norcliffe*, 2 Ld. Raym. 869.

3. If a man waives his privilege at the suit of one plaintiff, he waives [*1086] it as to others. *Jones v. Bodecator*, 1 Ld. Raym. 136.

IX. OF PLEADING PRIVILEGE;—

(a) *When it must be pleaded.*

1. To be exempted from juries is to be pleaded by the party himself, and not returned by the sheriff. *Res v. City of Canterbury*, 1 Lev. 159.

2. An attorney of C. B. sued by bill in K. B. must plead privilege in B. R. and cannot be discharged on common bail by motion. *Mayor of Baringstoke v. Bonner*, Stra. 864. Salk. 544.

3. Privilege of the prothonotary's clerks must be pleaded with an affidavit. *Windmill v. Cutting*, 1 Stra. 191.

(b) *When it will be taken notice of without pleading.*

1. Privilege of the Exchequer need not

be pleaded, for it shall be allowed on producing the red-book of the Exchequer by a baron of the Exchequer. *Wentworth v. Squibb*, Lutw. [20.] 46. Vide 2 Ld. Raym. 869.

2. The court will take notice of the privilege of the Common Pleas, though it be ill pleaded; *quære*, of the Exchequer. *Ogle v. Norcliffe*, 2 Ld. Raym. 869.

3. A filazer of B. R. arrested *per breve* was discharged on common bail without pleading, for he ought to be sued by bill. *Brown's case*, Salk. 544.

(c) *By whom it may be pleaded.*

1. An attorney or other person in actual custody cannot plead privilege. *Alderman v. Cutting*, 11 Mod. 293., and *Anon.* ib. 302. *Duncomb v. Church*, 12 Mod. 102.

2. But otherwise, if only in the nominal custody of the marshal, though stated to be so in the declaration, or if he be wrongfully in custody, &c. *Jones v. Bodecator*, 1 Ld. Raym. 135. Salk. 1. 5 Mod. 310. *Duncomb v. Church*, ib. 93. *Wilbraham v. Lovnds*, 12 Mod. 535. Sed vide 12 Mod. 102.

(d) *At what time.*

1. Privilege may be pleaded after bail put in, but not after a general or special imparlance. *Dashwood v. Folks*, 3 Lev. 343. *Jenkes v. Lyon*, 2 Show. 145. *Duncomb v. Church*, 1 Ld. Raym. 93. 3 Salk. 271. 2 Ld. Raym. 1208.

2. It cannot be claimed after plea pleaded. Mo. 34.

3. After an arrest in K. B., defendant procured himself to be made attorney of C. P., and prayed his privilege, and it was held that privilege accrued *pendente lite* could not be allowed. *Goleborough v. Perryman*, 2 Ro. 432.

4. Conusance will not be allowed after imparlance. *Parker v. Edwards*, 1 Show. 352.

(e) *When an affidavit is necessary.*

If an attorney of the court of Common Pleas be sued in the King's Bench and plead his privilege, he shall not be sworn to his plea, nor need the writ of privilege be set out. *Anon.* 6 Mod. 114.

(f) *Form of the plea.*

1. Privilege is well pleaded in the negative, and *venit et dicit*, or *dicit* only, is a good defence; full defence is not necessary. *Kirkham v. Whaley*, 12 Mod. 74. Salk. 543, 544. 3 Salk. 371.

2. In a plea of privilege it was *predictum def. dicit.* without saying *venit et dicit*, or making any defence; and, as to the omission of *venit*, it was held good, the defendant being in *custodia mareschalli*, and being before another day of continuance; but if at another day of continuance after the day of appearance, then it must have been *venit et dicit*; and as to the defence, that was held needless. *Stevens v. Squire*, Skin. 582.

3. There are two ways of pleading privilege; 1st, with a profert of the writ; and

2dly, as a matter of fact. *Phips v. Jackson*, 6 Mod. 303.

4. Where privilege is pleaded, and it does not appear by inrolment, there ought to be a profert of the writ of privilege. *Kempfield v. Moore*, Andr. 46.

5. A plea of privilege as attorney of C. B. need not show the writ under seal, nor a venue, nor where C. B. sits, nor aver it to be by record. *Scawen v. Garret*, Salk. 545. 2 Ld. Raym. 1173. S. C.

6.* Where the privilege of the [*1087] Common Pleas was laid with a double negative, which was a denial of the privilege, the plea was overruled. *Dillon v. Harpur*, 2 Ld. Raym. 898.

7. In an action upon the case for an escape, the defendant pleads the privilege of *eundo et redeundo* from an inferior court against a process *in banco*, and seemed to the court an ill plea. *Clerk v. Molineux*, T. Raym. 100.

8. Privilege of the Exchequer pleaded that "omnes, &c. (omitting *et quilibet*) ought not to be said elsewhere than in the Exchequer," is good enough. *Semb. Barrington's case*, Hard. 164.

9. Where defendant pleads that the barons of the Exchequer, and sitting clerks, and other officers attending there, are entitled to privilege so long as it is open, and that he is a side or sitting clerk to J T, as remembrancer of the Exchequer, in the division of Lord M., this plea is bad, because *non constat* that he is one of the officers entitled, &c., and also because the privilege extends during attendance only. *Kempfield v. Moore*, Andr. 45.

10. In case of an exempt jurisdiction pleaded, the plea must show that it has jurisdiction of the matter, and that the cause arises within it. *Duncomb v. Church*, 12 Mod. 102.

X. REPLICATION.

1. Where defendant pleads his privilege as a side clerk in the Exchequer, it is a good replication that there is no record. *Kempfield v. Moore*, Andr. 45.

2. A person privileged by record pleading it, and producing his writ of privilege, it cannot be traversed or denied; but if one plead privilege as clerk or servant to another person privileged, or if an attorney plead his privilege without writ, this may be traversed and tried *per pais*. Skin. 521. 582. 1 Ld. Raym. 337. *Anon.* 12 Mod. 181. *Dillon v. Harpur*, Salk. 545.

3. Waiver of privilege must be replied, and relied upon as an estoppel. *Jones v. Bodecner*, 1 Ld. Raym. 136.

PRIVITY.

1. There are three manner of privities, viz. privity in blood, in estate, and in law. *Whittingham's case*, 8 Co. 42 b.

2. If lessee for years assign, &c. there is

no privity of estate between him and the assignee, but only of contract. *Buckley v. Park*, Salk. 317. Holt, 74.

3. Where a new estate is gained, the privity of the old estate is lost. *Dixon v. Harrison*, Vaugh. 43.

4. Privity of contract is not gone either by an assignment of the term, or by the death of the lessor; neither is it transferred to the assignee by the statute of 32 Hen. 8. c. 34; for that statute only annexes such covenants which concern the land with the reversion. *Barker v. Damer*, 3 Mod. 337.

5. Privity of estate may be transferred by an assignment of a term for years, &c. *Pitcher v. Tozey*, 4 Mod. 72.

6. Privity continues if the lessee grants but part of the land. *Broom v. Hore*, Cro. Eliz. 633.

7. Privity of contract remains between the lessor and the executor of the lessee, notwithstanding such executor has assigned his term. *Pitcher v. Tozey*, 4 Mod. 73.

8. An action lies against an administratrix of a term for rent incurred after the assignment of the lease, for the privity of contract of the intestate is not determined by his death, and administratrix shall be charged with his contracts as long as she has assets. *Coghill v. Freelove*, 3 Mod. 326.

9. A privity is necessary by the common law to distrain and avow between the distrainer and distrained; such privity is created by attornment. *Dixon v. Harrison*, Vaugh. 39.

10. Privies inheritable as general heir shall take the benefit of infancy. *Whittingham's case*, 8 Co. 42 b.

11. Privies in estate (unless in some special cases) shall not take advantage of infancy. S. C. 8 Co. 43 a.

12. Nor privies in law, as lord by escheat, &c. S. C. 8 Co. 44 a.

PRIVY SEAL.* [*1088]

1. The privy seal is not sufficient for the disposal of an inheritance or chattels real, but it is for chattels personal; nor the king's signet for money. Mo. 476.

2. All persons must take notice of the king's privy seal. *E. I. Co. v. Sandys*, Skin. 225.

PROBATE.

[See post, tit. WILL.]

PROCEDENDO.

I. WHEN A PROCEDENDO WILL BE GRANTED, p. 1088.

II. RELATIVE TO THE MOTION FOR IT, p. 1088.

I. WHEN A PROCEDENDO WILL BE GRANTED.

1. If a *certiorari* has been issued improvi-

dently, the court will grant a procedendo. 6 Mod. 17.

2. Procedendo granted on irregularity in suing out the *certiorari*. *Reg. v. White*, Holt, 132.

3. A procedendo shall be awarded to enable parties to appeal. *Peat's case*, 6 Mod. 229.

4. If the cause suggested to obtain a *certiorari* appear to be false, a procedendo shall go, although the return be filed. *Anon.* 1 Salk. 144. 6 Mod. 43 n. (c.)

5. If an order on which appeal lies be removed by *certiorari* before appeal, it ought not to be filed until the court is informed of the matter, and then they will grant a procedendo, notwithstanding the *certiorari*. *Anon.* 6 Mod. 40.

6. If special bail be required below, it shall be so above, else procedendo goes. *Crosse v. Smith*, 12 Mod. 646.

7. This writ was awarded where the return of *habeas corpus cum causa* was at too long a day. *Anon.* Fort. 268.

8. So where the plaintiff removed the cause by *habeas corpus* after notice of trial. *Anon.* Fort. 244.

9. If one defendant in a joint action in an inferior court brings a *habeas corpus*, there shall be a procedendo. *Fry v. Carey*, Stra. 527.

10. A procedendo may be granted to the mayor's court of London, after the return to a *habeas corpus* has been filed in the superior court. *Fazakerty v. Baldo*, 6 Mod. 17.

11. A writ of procedendo was awarded in a case wherein the defendant had pleaded privilege, although the court refused to award a writ of *supersedeas* to the plea of privilege. *Harrison v. Alexander*, Say. 156.

12. The record in a *quare impedit*, after the suit was stayed by aid prayer, was removed into Chancery; upon the plaintiff's moving for a procedendo, it appeared, that a gift in tail of the advowson had been made to his ancestor, as also that a verdict had been had 12 H. 8. and a presentation, &c.; but as it also appeared that the defendant and those from whom he claimed time out of mind had had the possession of the parsonage as inappropriate (saving interruption for a small time,) the court refused a procedendo. *St. John v. Dean of Gloucester*, 12 Co. 3.

II. RELATIVE TO THE MOTION FOR IT.

1. A procedendo cannot be moved for while the return of a *certiorari* continues on the file. *Rex v. Lewis*, 4 Burr. 2459. 6 Mod. 43. n. (c.)

2. But the writ must be first superseded *quia improvide emanavit*, and the return taken off the file. *Rex v. Wakefield*, 1 Burr. 488. 6 Mod. 43. n. (c.)

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I. RESPECTING ORIGINAL AND JUDICIAL WRITS.

The register is the guide for original writs; but judicial writs may be framed according to the direction and discretion of the court. *Lord Mounson v. Bourn*, Cro. Cra. 527.

II. OF THE NATURE OF PARTICULAR WRITS.

1. The original writ in ejectment is an attachment, or *pone per vadios et saluos plegios*, and not a summons. *Redman v. Edolph*, 1 Sand. 317.

2. A *post decessum* is an original writ, and must be sued out of Chancery; and the sheriff must sit as judge in person, and not by his under sheriff. 3 Dy. 292. n. (a).

III. OF THE NECESSITY OF PROCESS, AND TIME FOR ITS ISSUING.

1. Where the declaration is the first step in the action, it is erroneous. *Johnson v. Akham*, 10 Mod. 211.

2. It is usual for a plaintiff to take out his original after judgment entered. *Anon.* 2 Vent. 154.

3. A *latitat* may be sued out before the cause of action. *Kirk v. Perry*, 8 Mod. 343.

4. After the want of a bill being filed in a certain term has been certified by the chief justice to the house of lords, a new bill cannot be filed in that cause of any other term. *Martin v. Budgell*, 8 Mod. 368.

IV. WHEN ONE WRIT IS SUFFICIENT, OR WHEN SEVERAL WRITS ARE NECESSARY.

1. In real actions which are founded upon title, the demandant, where there [*1090] are several tenures, is driven to several writs. *Bucknere's case*, 8 Co. 86 b.

2. Unless where the foundation of the several estates is one, and at one time, and as out of one root. S. C. Ib. 87 a.

3. In actions real which are founded upon a tort or forfeiture, and do not comprehend any title in them, the demandant may in one writ demand divers lands and tenements which come to him by several titles. *Id. ibid.*

4. A writ against four shall be intended joint till they are several by the declaration. *Barton v. Bartlett*, Holt, 367.

5. The court will not oblige consolidating of declarations. *Mynot v. Bridge*, Stra. 1178. *Smith v. Crabbe*, Stra. 1149. Barnes, 121. *Sed vide*, Ca. Prac. C. P. 119.

V. INTO WHAT PLACES WRITS MAY BE ISSUED.

1. The king's writs do not run to Berwick, for it is not within any county in England. *Mayor of Berwick's case*, 2 Show. 365. 2 Barr. 836.

2. Mesne or final process will run into Wales. 2 Saund. 194. *Irish v. Hill*, Prac. Ca. K. B. 183. *Sed vide* Vaugh. 396, 397.

VI. RESPECTING THE FORM OF PROCESS;—

(a) Relative to the names of the parties.

1. Corporate names need not be strictly pursued in them. Gilb. 250.

2. An addition need not be inserted in an *alias* or *pluries* when no addition is required in the original writ. *Lord Banbury v. Wood*, 6 Mod. 84.

3. Proceedings were set aside because plaintiff's name not in the writ. *Thompson v. Browne*, Prac. Ca. K. B. 186. Andr. 16.

(b) Of the statement of the right in which the party sues.

1. It need not be inserted in a bill of

Middlesex in what right the party sues. *Weavers' Co. q. t. v. Forest*, Prac. Ca. K. B. 184. 2 Stra. 1232.

2. But if an assignee of a reversion on a lease brings debt for rent, he ought to be named assignee in the writ. *Nichols v. Tymms*, Lutw. [172.] 481.

(c) Of the attorney's and officer's names.

1. Process is good, though there is no attorney's name to it. *Blackhall v. Gould*, Ca. Prac. C. P. 102.

2. Process is good without the filacer's name. *Morley v. Johnson*, Prac. Ca. C. P. 107.

(d) Teste.

1. Process by original can bear date out of term. *Ramsay v. Michel*, Lat. 11.

2. *Capias* tested in vacation is void, and the writ may be quashed, and proceedings stayed. *Bennet v. Sampson*, 1 Barnes, 295. Ca. Prac. C. P. 99.

3. Tested the ninth instead of the tenth of the king, irregular. *Taylor v. Nicholls*, 1 Barnes, 299.

4. A writ of execution may bear teste the first day of the term of which the judgment is entered. *Parsons v. Gill*, Com. 117.

5. A rule was made to stay proceedings, the date of the writ being omitted. *Ridley v. Wilson*, 2 Barnes, 337.

6. Though a writ bearing teste out of term is void, yet the sheriff is justifiable. *Shirley v. Wright*, Salk. 700.

(e) What time should intervene between the teste and return.

1. A term or more may intervene between the teste and return of an original writ. 2 Dy. 175. pl. 23.

2. An attachment of privilege should have fifteen days between the teste and return. *Hayward v. Denison*, Ca. Prac. C. P. 149.

3. Proceedings stayed, the *capias* being returnable before the king's justice, and there being only six days between teste and return. *Holt v. Hawkes*, 2 Barnes, 338.

4. A *capias ad satisfaciendum* is not void, though a full term intervenes between the teste and the return. *Shirley v. Wright*, 7 Mod. 19.

5. But though a writ of execution returnable two terms from the teste is good, mesne process so returnable is void. S. C. Salk. 700. 2 Ld. Raym. 775.

6. A *distingas* for throwing down fences* is bad, if there be [*1091] not fifteen days between the teste and return. *Sampson v. Inhabitants of Penrith*, 1 Show. 80.

7. If the demandant in *formedon* sue an *alias* summons, there should be nine return days between the teste and return of it. 2 Dy. 252. pl. 94.

(f) Notice at the foot.

1. The name of defendant must be inserted at the bottom of the process according to the

5 G. 2. c. 27. *Clarke v. Paget*, Prac. Ca. K. B. 185, 186. 2 Barnard. 294.

2. Writ returnable on the Sunday, and notice to appear on the Monday, is wrong. *Jamet v. Voyer*, Ca. Prac. C. P. 105.

3. The English notice on process is good, though the year be not expressed. *Weavers' Co. q. t. v. Forest*, Stra. 1233.

4. Defendant was served with a copy of a process in an action of debt on bond for £100, and it was held no notice at the bottom of the process was necessary. *Willis v. Lewis*, Prac. Ca. K. B. 157.

(g) *Direction.*

1. Proceedings will not be stayed, though the writ is not directed to the sheriff of any county. *Chance v. Russell*, 1 Barnes, 291.

2. Proceedings stayed, process served within the cinque ports being directed to the sheriff of Kent, instead of *testat. capias* to the constable of Dover Castle. *Bag v. Culmer*, 2 Barnes, 341.

(h) *Endorsement on the back.*

An endorsement on back of the writ is no part of the writ. *Coleby v. Norris*, Prac. Ca. K. B. 186.

(i) *Relative to blanks in a writ.*

On a motion to quash a *non omittas capias*, because it recited a mandate by a sheriff to the bailiff of a liberty, without naming it, but leaving a blank for it, the objection was held good; but the rule was denied, bail having been put in. *Mallom v. Gent*, 2 Barnes, 332.

VII. RELATIVE TO THE CONTINUANCE OF PROCESS.

1. One process ought to warrant another. *Sir F. Knowle v. Beckingshaw*, Cro. Jac. 89.

2. In all continued writs, the *alias* must be tested the day the former writ was returnable. *Touchin's case*, Salk. 699.

VIII. OF TESTATUM WRITS.

1. Proceedings were set aside with costs against plaintiff's attorney, for suing out *testatum capias* from Suffolk into Kent, instead of a *capias* into Kent. *Valentine v. Hawkins*, 2 Barnes, 336.

2. Upon a judgment, *sci. fa.* went into proper county, and *test. ca. ss.* into another county without *cap.* into the proper county, and it was held to be error. *Irish v. Hall*, Prac. Ca. K. B. 183.

IX. RELATIVE TO THE EXECUTION OF WRITS.

1. Outward doors may be broken open to execute a writ of *capias utlagatum*, and inner doors to execute a *feri facias*. *Rez v. Bird*, 2 Show. 87.

2. A writ executed the day of the return is good. Mo. 711. pl. 998. Ib. 403. pl. 537.

3. A writ is well executed on the day of its return, although it be after the rising of the court. *Parkins v. Woollaston*, 6 Mod. 130.

4. A writ cannot be executed after the day of its return. *Leveridge v. Plainlow*, 6 Mod. 252. n. *Harvey v. Broud*, 6 Mod. 160. 196. *Anon.* 7 Mod. 52.

5. If a *capias* issue against a nobleman, an officer may execute the writ, though he know him to be a nobleman: the sheriff and his officers are sworn to serve the king's writ, and ought not to examine the judicial act of the court. *Benyon v. Evelyn*, Orl. Bridg. 336.

6. Upon a *capias ad satisfaciendum*, though the writ be never returned, the execution is good. *Harwood v. Phillips*, Orl. Bridg. 472.

7. After the plaintiff in ejectment had been put into possession, defendant ousted him again; and it was held that plaintiff might have another writ of possession, as the first had not been [*1002] returned. *Pierson v. Turner*, 1 Ro. 353, 354.

8. Where the original has been once executed, though improperly, it cannot afterwards be made use of for any other purpose. *Ogier v. Hayward*, 2 Barnes, 333.

X. RELATIVE TO THE SERVICE OF PROCESS.

1. Defendant is to be served with a copy of the *capias*, and not with a copy of the original. *Smith v. Anderton*, Ca. Prac. C. P. 31. *Peter v. Regnier*, 1 Barnes, 300.

2. Serving the defendant with a copy of a *testatum capias* directed to the bishop of Durham is wrong; he should have been served with a copy of the *capias* issued by the bishop. *Breake v. Smith*, Ca. Prac. C. P. 38. *Contra*, Ib. 119.

3. Copy of a process must be served with notice, though the writ be special, and the debt above £10. *Atwood v. Meredith*, Ca. Prac. C. P. 143.

4. An affidavit of serving defendant with copy of a writ (except what relates to other defendants) is not sufficient. *Cutcliffe v. Standish*, 1 Barnes, 292.

5. If the copy vary in date from the process, proceedings will be stayed. *Humfreys v. Mitchel*. Ca. Prac. C. P. 130.

6. Copy of a *testatum* served in a county palatine, without taking out a chancellor's mandate, held good. *Byer v. Whitaker*, Ca. Prac. C. P. 119. 1 Barnes, 293. S. C.

7. Copy of a *latitat* to the chamberlain of Chester may be served on the defendant without any mandate from the chamberlain. *Greeting v. Allcock*, W. Kely. 160.

8. A copy of process being tendered to defendant at his house, and he refusing to accept it, it was held leaving it there was good service. *Wood v. Dodgson*, 2 Barnes, 225.

9. A copy put through the crevice of a door to defendant, who was acquainted with the contents, held good service. *Smith v. Winthe*, 1 Barnes, 292.

10. Where a copy of process was sent by letter, it was held to be good service by the defendant's opening the cover and taking out the copy. *Borwell v. Roberts*, 2 Barnes, 340.

11. Service of process on husband only (though against husband and wife) is good for both; and on affidavit, appearance may be

entered by plaintiff for both. *Duncombe v. Love*, 1 Barnes, 293. 303.

12. Process served on a wrong person not helped by plaintiff's entering appearance according to statute. *Westall v. Finch*, 1 Barnes, 294.

13. Service of process by a bailiff who could neither write nor read is not good. *De-la-field v. Jones*, Ca. Prac. C. P. 34.

14. Proceedings will not be stayed, though the person was served in a liberty, and not by the proper officer; but the party may bring his action. *Hall v. Willy*, 1 Barnes, 290. Ca. Prac. C. P. 96. S. C.

15. So, though attorney's name is not to sheriff's warrant. *Laggett v. Watkins*, 1 Barnes, 303.

16. So though attorney's name is not to the copy of process. *Anon.* 1 Barnes, 295. 296.

17. Process dated 26th June, served on the 16th, held irregular. *Humphreys v. Mitchell*, 1 Barnes, 298.

18. Service of process on the return, is good. *Maud v. Baruld*, Prac. Ca. K. B. 186.

19. But proceedings were stayed where the writ was not served till five o'clock on the return day. *Foot v. Hume*, 2 Barnes, 330.

20. So where it was not served till three o'clock. *Ashley v. Mackarley*, Barnes, Supp. 53.

21. On service of copy of process, the process itself need not be shown. *Worley v. Glover*, Stra. 877. Prac. Ca. K. B. 184. S. C. *Panchard v. Walley*, 1 Barnes, 222. *Boswell v. Roberts*, 2 Barnes, 340.

22. If the sheriff arrests a party without saying for what, it is good. *Beale v. Taylor*, Prac. Ca. K. B. 180.

XI. RELATIVE TO THE ALTERATION OR FILLING UP OF A WRIT.

1. The alteration of a writ, after it is sealed, is a great misdemeanor, but no ground to quash the proceedings. *Carthew v. Wheat*, 8 Mod. 243.

2. Filling up a writ after it is sealed is a contempt. *Anon.* 6 Mod. 310.

XII. RELATIVE TO THE AMENDMENT OF A WRIT.

1. Miswarding process (aided by 39 Hen. 8. and 18 Eliz.) is amendable. *Dolphin v. Clerk*, Cro. Jac. 65. 108.

2. An original writ is not amendable unless in a mere misprision. *King v. King*, 7 Mod. 250.

3. Original writs cannot be changed but by act of parliament. *Webb's case*, 8 Co. 48 a.

XIII. HOW FAR THE DECLARATION SHOULD CORRESPOND WITH THE WRIT.

1. Writ of waste in three villages, and declaration of waste only in two; still the declaration is good: otherwise, if the writ be of waste in two villages, and the declaration of waste in three. *Earl of Cumberland v. Countess Dowager of Cumberland*, Mo. 862.

2. If the writ in trespass is *quare bona et catalla cepit*, and the declaration is "of a cow," it is ill after verdict. *Hanson v. Hillwell*, 1 Ld. Raym. 4.

XIV. RELATIVE TO THE ABATEMENT OF WRITS.

1. If judicial writs issue out that are not warranted by the record, they must be quashed. *Weddal v. Jocar*, 10 Mod. 306.

2. Judicial writs generally abate if the defendant die before judgement; original writs are not affected by it. *Harwood v. Phillips*, Orl. Bridge. 467.

3. In judicial writs in personal actions, the death of one of the plaintiffs does not abate the writ. *Law v. Toothill*, Carter, 194.

4. Defects in form may abate original, but not judicial, writs. *Shuttleworth v. Patterson*, 10 Mod. 270.

5. By the statute 1 Anne, c. 8., no original writ will abate upon the demise of the crown. 10 Mod. 258.

XV. OF VOID WRITS.

1. If a writ, which should be at common law, conclude "*cont. form. stat.*" it is void. *Newell v. Sydnam*, 2 And. 62.

2. A process to take the body in the first instance if found, if not to attach him by his goods, is a void process, and custom will not make it good. *Naxon v. Lilly*, Com. 537.

3. If a writ be for two things, and it appear that there is no ground for one, still the writ will stand good for the other; but otherwise if the form of one be bad. *Childe v. Durrant*, 1 Ro. 11.

XVI. OF QUASHING A WRIT.

1. Quashing a writ is not *ex debito justitie*. *Andrews v. Dingley*, Stra. 877. *Barnard*, 368.

2. A party cannot quash his own writ without cause. *Anon.* 11 Mod. 3.

XVII. WHEN AND HOW FAULTS IN PROCESS ARE AIDED.

1. Appearance cures defects in process. *Caswall v. Martin*, Stra. 1072. Lat. 118.

2. Want of fifteen days between the *teste* and return of an original is made good by pleading in chief. *Wilmot v. Tyler*, 1 Ld. Raym. 671.

XVIII. WHEN NOT.

1. A vicious original is not aided by any of the statutes of jeofails. *Redman v. Edolph*, 1 Saund. 317.

2. If there be a vicious original upon the file, the court will not intend any other good original, unless the plaintiff shows it. S. C. lb. 318.

3. If an original writ should bear date on a Sunday, the appearance of the party would not help it. *Vaughan v. Loyd*, 1 Vent. 7.

4. Though a defect in a writ is aided by the voluntary appearance of the defendant, it is not so when his appearance is by coercion. *King v. Tyler*, Com. 109.

XIX. CONSEQUENCE OF PROCESS BEING ERRONEOUS.

1. If the process is erroneous, the sheriff is bound to execute, and is protected in so doing. *Draper v. Blaney*, 2 Saund. 193. 193. n. [a].

2.* The party's remedy is by [*1094] moving to supersede it. S. C. 2 Saund. 193 a.

3. When a court has jurisdiction of the cause, and proceeds *inverso ordine*, or erroneously, no action lies against the party who sues, or the officer or minister of the court who executes the precept or process of the court; but when the court has no jurisdiction of the cause, the whole proceeding is *coram non judice*, and an action will lie against them, without any regard of the precept or process. Case of the *Marshalsea*, 10 Co. 68 b. See *Crowdes v. Goodwin*, 2 Mod. 59., and *ante*, tit. INFERIOR COURT, div. IX. p. 799.

4. The want of fifteen days between teste and return is no irregularity but error; otherwise in case of attachment. *Williams v. Fulkner*, 1 Barnes, 298. 301.

XX. OF JUSTIFICATION UNDER PROCESS.

1. A writ must be set forth specially, when a trespass is justified under it. 1 Saund. 297. n. (1).

2. It is not enough to show where returnable, without showing whence it issued. *Gray v. Hart*, Salk. 517. lb. 545.

3. A justification by virtue of process must allege that the process was delivered to the defendant. *Brigs v. Collinson*, 6 Mod. 70.

4. A sheriff who justifies under a writ (meane process) must show it returned, though his bailiff need not. Willes, 126. Holt, 409. *Brigs v. Collinson*, 6 Mod. 71.

5. A sheriff, or officer, who justifies under a writ of execution, need not show it returned. Willes, 127. n. b. 3 Dy. 299. pl. 34.

6. In a justification under process, if the date of the process differ from the day laid in the declaration, defendant must traverse it, or conclude *quæ est eadem*. 2 Saund. 5 b.

XXI. REPLICATION.

1. If the process were irregular, plaintiff should reply the fact, and not new assign. 1 Saund. 300 b. n. [i].

2. The "virtute cuius" is not traversable. 1 Saund. 23. 298. n. (3).

XXII. RELATIVE TO THE PLEADING A WRIT.

1. A writ cannot be averred to be sued out of the King's Bench at Westminster in the time of vacation. *Estwicke v. Cooke*, 2 Ld. Raym. 1557.

2. If so pleaded, it is bad on special demurrer. 1 Saund. 300 d.

3. But otherwise, if it be not alleged that the court was then held, or if the day be laid under a *videlicet*. 1 Saund. 300 d. n. [j].

XXIII. OF AVERRING AGAINST A WRIT.

No averment shall be allowed against the teste of a writ, where it is in support of justice; but it is otherwise, where it is to justify a wrong. *Mason v. March*, 3 Salk. 53. 397.

[See *ante*, tit. PRIORITY, Vol. 2. p. 1077.]

XXIV. RELATIVE TO THE PROOF OF PROCESS.

1. A WARRANT upon a writ is evidence of the writ on behalf of the party arrested. *Robins v. Robins*, 1 Ld. Raym. 504.

2. The original precept from the sheriff to the returning officer of a borough, to proceed to an election, is admissible in evidence to prove the allegation, in a declaration, that such a precept issued, &c. Willes, 426.

3. The recital of a writ in a record cannot be judged of without having the writ before the court. *Helliatt v. Selby*, 2 Ld. Raym. 903.

PROFERT.

I. WHEN NECESSARY TO BE MADE, p. 1095.

II. WHEN IT IS NOT NECESSARY, p. 1095.

III. HOW IT SHOULD BE PLEADED, p. 1096.

IV. CONSEQUENCE OF PLEADING PROFERT, p. 1096.

V. CONSEQUENCE OF OMITTING TO PLEAD IT, p. 1096.

I.* WHEN NECESSARY TO BE MADE. [*1095]

1. In general, when a deed is pleaded, there must be profert of it in court. Hob. 38. 218.

2. Where a thing cannot pass but by deed, no claim can be made by *que estate* without showing the deed. *Stowmen v. West*, 2 Ro. 397.

3. The lessee for years ought to make profert of the letters patent made to the lessee for life; for if he who is party or privy in estate or interest, or he who justifies in the right of such person, pleads a deed, (although he who is privy claims but parcel of the original estate), profert should be made. *Leyfield's case*, 10 Co. 88 a.

4. Profert is necessary when the interest is gained by the act of the party; but when the law creates the estate, and the deed does not belong to him, nor ever was in his power, he shall not show it. *Leyfield's case*, 10 Co. 88 a. Cro. Jac. 517. 1 Bulst. 154. S. C.

5. Profert of letters testamentary should be made by an executor when he brings a *sci. fa.* 2 Saund. 9 b. n. (12.)

II. WHEN IT IS NOT NECESSARY.

1. In debt on bond for performance of covenants, performance may be pleaded without a profert. 7 Mod. 259.

2. If the king's fermor brings a *quo minus* in the Exchequer, he ought to allege that he is the king's fermor, but he need not show it to the court. *Bellamy's case*, 6 Co. 38 a.

3. *Cestuy que use* in remainder brings *formedon*; he need not make a profert of the deed creating the remainder, for it belongs

to the fees, or the remainder might commence without deed. 3 Dy. 277. pl. 58.

4. A warrant of a justice of peace for excoise, or a warrant to the bailiff by the sheriff, may be pleaded without a *hic in curia prolata*. *Aylesbury v. Harvey*, 3 Lev. 205.

5. Profert of letters testamentary is not necessary when the executor is not party to the action. *Robinson v. Stone*, Stra. 1261.

6. When the defendant pleads letters of administration, he need not say *hic in curia prolata*, but the plaintiff that entitles himself to the action must. *Mellor v. Overton*, Carter, 227.

7. A lease was on condition, that the lessee should not let or assign over his lease without license by deed; the plaintiff in trespass, in his surrejoinder, pleaded a license to the lessee by deed, without making a profert; held, on demurrer, that profert was not necessary; that when a deed is necessary, *ex constitutione legis*, it ought to be shown in court, although it concerns a collateral thing, and transfers or conveys nothing; otherwise, where a deed is requisite *ex provisione homines*. *Bellamy's case*, 6 Co. 38 a.

8. So where the party pleading a deed claims no interest under it. 1 Saund. 9 a. n. [a.]

9. If a deed be denied in one court, it may be pleaded in another without profert. *Dun v. Law*, 5 Co. 74 d.

10. A deed need not be shown in pleading by a stranger, or one not privy to the grant. *Holland v. Shelley*, Hob. 303. *Carver v. Pinkney*, 3 Lev. 63.

11. In *quare impedit*, letters patent to a stranger may be pleaded without a profert in curia. *Rex v. Bishop of Chester*, 1 Ld. Raym. 296.

12. Tenant by statute merchant or staple, &c. need not show the deed; otherwise of a lessee for lives or years. *Dun v. Law*, 5 Co. 47 a.

13. If letters patent be enrolled in any court of record, they may be pleaded there without showing them. *Dun v. Law*, 5 Co. 74 a. 1 Ld. Raym. 299. S. P.

14. A profert is not necessary in pleading a writing, though under seal, unless it was delivered as a deed. *Claxton v. Basty*, 6 Mod. 58.

15. An instrument of composition with creditors need not be pleaded with a profert in curiam. *Felham v. Cudworth*, Com. 113.

16. When a deed is stated as inducement, profert is unnecessary. 1 Saund. 9 a. n. [d.]

17. A deed may be pleaded without profert, as lost by time or accident. *Read v. Brockman*, cited 2 Salk. 499. note. 1 Saund. 9 a. d. (1.)

18. But formerly, although a deed was destroyed by fire or other casualty, profert must have been made, or the pleadings would have been bad; the party's remedy was in equity. *Leyfield's case*, 10 Co. 93 a. 2 Stra.

1186. 1* Ridgw. 361. Wils. 16. [*1096]
Vide 10 Co. 98 a. n. (E.)

19. So, if a deed is in the hands of the opposite party, it may be pleaded to be so in excuse of profert. 1 Saund. 9 a. n. (1.) *Dan v. Law*, 5 Co. 74 a. 2 Stra. 1186.

20. So if destroyed by the opposite party. 1 Saund. 9 a. n. (1.)

21. A party who claims under a deed, &c. in the hands of a third person, to the possession of which he has no right, need not make a profert of that deed in pleading; therefore the indorsee of the administrator of the payee of a promissory note need not make a profert of the letters of administration in his declaration, in an action on the note against the maker. *Stone v. Rawlinson*, Willes, 560.; and *Tilley v. Foxall*, Willes, 689.

III. HOW IT SHOULD BE PLEADED.

1. Pleading letters patent, *sub sigillo*, without *sigillat'*, is well. *Rex v. Mayor of Canterbury*, Stra. 674.

2. Matters of record pleaded by way of dilatory plea, if of another court, must be *sub pede sigilli*. *Curwen v. Fletcher*, Stra. 550.

IV. CONSEQUENCE OF PLEADING PROFERT.

1. If profert is made, though unnecessarily, and *non est factum* pleaded, the production of the deed cannot be excused at the trial. *Soresby v. Sparrow*, 2 Stra. 1186. 1 Saund. 9 a. n. [d.]

2. But if a deed be pleaded as lost, and be afterwards found, it may be produced at the trial. 1 Saund. 9 a. n. [d.]

3. The court will in such case, give leave to amend. *Ibid*.

4. And when a bond is in the hands of a third person, the court will oblige him to give oyer and produce it. *White v. Earl of Montgomery*, Stra. 1198.

5. The plaintiff in *quare impedit* declared upon a grant of an advowson to his ancestor, and says, *hic in curia prolata*, but has it not to show; it was moved, that as the defendant had the deed in his hands, the plaintiff might take advantage of a copy thereof, which appeared in an inquisition in the time of Edward the sixth; but denied. 1 Mod. 266.

6. An unnecessary profert of a sentence of the Admiralty will not hurt a good replication. *Green v. Waller*, 2 Ld. Raym. 892.

7. An exemplification will satisfy the profert of letters testamentary. *Shepherd v. Shorthose*, Stra. 412.

8. When a deed is once shown to the court by any one, it is not respective as to him, but all others shall take advantage thereof. *Dun v. Law*, 5 Co. 74 a.

9. A defendant who has oyer is not bound to insert it in his plea. *Weavers' Company*, q. l. v. *Forest*, Stra. 1241.

10. When deeds are pleaded with a profert, they are intended in the custody of the court immediately. *Anon*. Holt, 211, 212.

11. If a deed be pleaded in court, and shown, and denied, it shall remain in court for ever. *Dun v. Lau*, 5 Co. 74 a.

12. The omission of the words *per scriptum suum obligatorum*, is cured by *profert* and *oyer*. *Copley v. Delannoy*, 2 Ld. Raym. 1056.

IV. CONSEQUENCE OF OMITTING TO PLEAD IT.

1. If *profert* of letters of administration is omitted, the omission is only form. 2 Saund. 402. n. (1.)

2. The fault is cured by verdict. *Salisbury v. Williams*, 2 Saik. 497.

3. But in *scire facies* by an executor on a judgment of the testator, the want of a *profert* of the letters testamentary is a ground of special demurrer. *Whiteman v. Miles*, 1 Sid. 249.

PROHIBITION.

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I. WHEN A PROHIBITION DOES OR DOES NOT LIE, IN GENERAL;—

(a) *By a party to stay his own suit.*

1. Prohibition lies by a vicar to stay his own suit in the ecclesiastical court. *Pringe v. Child*, Mo. 780.
2. Prohibition lies at the instance of the prosecutor below. *Martin v. Archbishop of Canterbury*, Andr. 258.
3. The court of K. B. will not, after sentence, grant a prohibition to the Admiralty on the application of the plaintiff below, to stay his own suit, although the libel is founded on the construction of letters patent. *Browne v. Walker*, 2 Show. 406.

(b) *For want of jurisdiction.*

1. The common law courts will grant a prohibition, if an ecclesiastical or inferior court proceeds in a cause not arising within its jurisdiction, or which belongs properly to another court. *Edward's case*, 13 Co. 9. *Case of Prohibition*, 12 Co. 76. *Lengdale's case*, 12 Co. 50.
 2. It lies to the ecclesiastical court, where one ecclesiastical court intrudes upon another. *James's case*, Hob. 17.
 3. If any orphan of London sues in the ecclesiastical court, or in the court of requests, &c., for goods, &c. due by the custom of London, or by devise, or legacy, in the will of their ancestor, or to have an account, &c., prohibition lies. *Case of the Orphans of London*, 5 Co. 78 b. *Luck's case*, Hob. 247.
 4. If the defendant in a suit in a spiritual court do not reside within the jurisdiction of the court, a prohibition lies. *Say*, 158. Mo. 554. *Vaughan v. Evans*, 8 Mod. 374.
 5. But on a libel in the spiritual court for cohabitation with a woman, who, for a considerable time, and up to the day of the citation, lived within the diocese, a motion for prohibition, on a suggestion that she lived out of the diocese, was refused. *Fenwick v. Lady Grosvenor*, 12 Mod. 610.
- A prohibition was denied, because the party who prayed it had long and often before in that suit admitted the jurisdiction of those ecclesiastical courts. *Smith v. Executors of Poyndrell*, Cro. Car. 97.
7. No prohibition, until a plea to the jurisdiction is refused. 11 Mod. 70.

(c) *When prohibited by act of parliament.*

1. A prohibition lies against judges who proceed in cases where they are prohibited by act of parliament. *Porter v. Rochester*, 13 Co. 4.
2. A prohibition will lie upon a statute that has prohibitory words, and also a penalty; *secus*, if it have a penalty only. *Jones v. Jones*, Hob. 187.
- (d) *For holding plea after judgment at common law.*

A prohibition lies, if any court holds plea after judgment at common law. *Anon.* Mo. 916. 836.

(e) *For refusing a plea.*

1. A prohibition lies, if the spiritual court refuse a plea to the jurisdiction, or proceed in a libel for a legacy to be paid out of lands. *Bastard v. Stockwell*, 2 Show. 50. *Contra*, *Anon.* 11 Mod. 412.
2. There must be a surmise that the court Christian refuses the plea. *Wright v. Wright*, Cro. Eliz. 511.
3. When *assumpsit* was brought in an inferior court, and the defendant tendered a plea there, that the contract upon which the action was brought was made out of the jurisdiction, the court having refused to allow it, on affidavit of the tender and refusal, a prohibition was granted. *Michel v. Bisby*, T. Raym. 189.

(f*) *Where they proceed erroneously.*

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1. Where the ecclesiastical court has consueance of the cause, though they proceed erroneously, a prohibition will not lie. March, 92. pl. 152. See Ib. 98 pl. 169. acc.
2. The remedy is by appeal. *Guilman v. Gill*, 1 Lev. 164.
3. A prohibition will not lie to an inferior court on a suggestion of erroneous proceeding, provided it has jurisdiction on the subject. *Smith v. Mayor of London*, 6 Mod. 78.
- (g) *For not giving a copy of the libel or articles.*
1. A prohibition lies to the spiritual court in any suit for denying a copy of the libel. *Anon.* Salk. 553.
2. If a copy of the articles be denied by the court of arches, a prohibition lies, as well as when the copy of a libel is denied. *Manning v. Smith*, 2 Show. 132. 1 Vent. 5. T. Raym. 170.
3. And if the party be excommunicated, a prohibition lies, with a *mandamus* to absolve him. 1 Vent. 5. 252.
4. No prohibition lies to the Admiralty for denying a copy of the libel. *Anon.* 1 Ld. Raym. 442. Salk. 553.
5. Prohibition does not lie for refusing a copy of the libel, where the proceeding is *ex officio*. Mo. 756. *Sed vide* T. Raym. 170.
6. But if the spiritual court refuse a copy of the articles, they shall be prohibited *quous*.

que, although the proceedings are *ex officio*. *Bennoyer's case*, 6 Mod. 87.

(h) *When proof by one witness is disallowed.*

1. A prohibition lies, if the spiritual court will not allow proof by one witness to be sufficient, where one is sufficient by common law. 2 Ro. 414. Cro. El. 666. 1 Show. 158. 172. Mo. 413. Carth. 142. *Shotter v. Friend*, 3 Mod. 284. Salk. 547. 1 Ld. Raym. 220. Hob. 183.

2. Or if they refuse any other competent proof. *Wals v. Conisby*, Hob. 247.

II. WHEN A PROHIBITION LIES TO THE ECCLESIASTICAL COURTS;—

(a) *For taking cognisance of an offence merely temporal, or of a nature both spiritual and temporal.*

1. When it lies.

1. It lies to the consistory court to stay a suit there by libel for a matter indictable at common law. *Anon.* Comb. 71.

2. If the ecclesiastical judges encroach upon the jurisdiction of the Common Pleas, to hold plea of any thing against the common law of the land, or of any thing triable by the law, that court can grant a prohibition. *Langdale's case*, 12 Co. 58.

3. A prohibition lies to a suit in the spiritual court for charging a man with soliciting a woman's chastity, if the solicitation was accompanied with force. *Palmer v. Thorpe*, 4 Co. 20. a. Salk. 552.

4. A suit may be in the spiritual court against a woman for incontinency after the death of the man, though she suggested a marriage. *Anon.* 12 Mod. 419. *Hemming v. Price*, 12 Mod. 432.

5. But if the libel be there for incontinency and getting a bastard child, it will be granted *quoad* the bastard child. *Anon.* Comb. 204.

6. So, it lies to the spiritual court for proceeding against an unlicensed master of a grammar-school, for it is a temporal offence. *Jones v. Gegg*, 7 Mod. 375.

7. So also against a clergyman for non-residence. 7 Mod. 375.

8. A prohibition lies to the ecclesiastical court for conventing a priest for felony to deprive him. Hob. 290.

9. When any libel in the ecclesiastical court contains many articles, if any of them do not belong to the cognisance of the court Christian, a prohibition may be granted generally, and, upon motion, a consultation may be made as to things which belong to the spiritual jurisdiction. *Fuller's case*, 12 Co. 41.

10. If in a suit there for ecclesiastical matter, the king's patent, an act of parliament, or any temporal matter, comes in question, a prohibition shall go. *Bonsey v. Ley*, 3 Lev. 72.

11. *Though the whole cause is originally spiritual, and such [*1100] matter arises afterwards incidentally. *Kenn's case*, 7 Co. 44. b.

2. When not.

1. If the ecclesiastical court proceed on acts of parliament or other temporal matters, they shall not be prohibited so long as they proceed according to the common law. *Sir W. Juxon v. Ld. Byron*, 2 Lev. 64.

2. If one be sued in the spiritual court, and a plea pleaded which is triable at law, if they allow it, it may be tried, and no prohibition after sentence. *Somerset v. Markham*, Cro. Eliz. 595.

3. A recovery in damages is no cause of prohibition in a suit for adultery. *Sevil v. Kirby*, 10 Mod. 386.

4. Where a remedy is given by common or statute law in the king's temporal courts, whether the matter be temporal or spiritual, the ecclesiastical courts have no jurisdiction except there be a particular saving in the statute for that purpose; but where the proceedings are *diverse intuitu*, the ecclesiastical court shall not be prohibited. *Middleton v. Crofts*, W. Kely. 153.

5. Where the judge of the ecclesiastical court proceeded to sentence of excommunication under the stat. 5 & Ed. 6. c. 12., a prohibition on the ground of no previous conviction having taken place was refused. *Bilson v. Chapman*, C. T. Hardw. 19 a.

6. If a suit has been carried on in a spiritual court for defamation, and the defendant after agreeing to commute the penance to which he has been sentenced by paying a sum of money to the party defamed, refuses to pay the money, a prohibition does not lie to a suit in that court for compelling him to pay it. *Palmer v. Thorpe*, 4 Co. 20 a.

(b) *When a custom or prescription is in question.*

1. A prohibition was denied to the spiritual court to stay proceedings upon a libel, grounded upon a custom, that the constable of the town should collect the rates assessed for the repairs of the church, which he refused to do. *Goddin v. Wainwright*, Hard. 510.

2. So, on suit there against the vicar of S, for not performing divine service in the chapel of C, as bound by custom. *Jones v. Stone*, Salk. 550. 1 Ld. Raym. 578.

3. On a suggestion in the spiritual court that the inhabitants of an ancient tenement had sat in the first seat of an aisle till removed by the bishop, a prohibition was prayed as upon an idle custom, which they went to try in the spiritual court, but denied. *Anon.* Skin. 7.

4. No prohibition lies on a suit for a mortuary, if the custom be not denied by plea. 12 Mod. 404.

5. But a prohibition lies to the ecclesiastical court where a custom or prescription is

alleged and denied, though the principal cause belongs properly to that court, as churchwardens' rates, tithes, mortuaries. *Anon.* 1 Vent. 274. W. Kel. 196. Holt, 318.

6. So a prohibition was granted after consultation, on re-stating a custom which had before been defectively alleged. *Dent. v. Coates*, 7 Mod. 429.

7. If a libel in the spiritual court is founded upon a custom, and the custom is denied, and the court adjudges that there is no such custom, no prohibition shall go. *The Churchwardens of Market Bosworth v. The Rector*, 1 Ld. Raym. 436.

(c) *When the freehold is concerned.*

1. When the freehold or the power to grant an office may come in question in the spiritual court, a prohibition shall be granted. *Sharrock v. Bourchier*, T. Raym. 88.

2. A prohibition was granted to a suit in equity for discovery of matters to make the defendant forfeit his freehold. *Firebass's case*, Salk. 550.

3. Tenant in tail levied a fine to the use of himself for life, the remainder in fee to J. S. and died; the counsel of the marches would settle the possession upon the heir of the tenant in tail against the purchaser, upon which a prohibition was granted. March, 51. pl. 79.

(d) *When the church or church-yard is concerned;—*

1. When it lies.

1. A prohibition lies to the spiritual court to a suit against parishioners, to [*1101] compel payment of a tax made by order of the bishop towards rebuilding the church; but not if such a rate be made at a vestry of the parishioners regularly summoned. *Rogers v. Davenant*, 2 Mod. 8.

2. So, on a suit there for repairing a parish-church, where the party was chargeable to repair a chapel which had parochial rights. *Husly v. Cassock*, Comb. 132. 148.

3. If a person lives in one diocese, and occupies lands in another, where he is taxed towards the finding of bells for that church, and a suit is commenced in the bishop's court where the lands are, a prohibition will be granted; for it is not a spiritual cause neglected to be done, because church ornaments are a personal charge upon the inhabitants, and not upon the land-owners who dwell elsewhere; but the repairing of the church is a real charge upon the land. *Woodward's case*, 3 Mod. 211.

4. If a libel for a rate to repair a church and the ornaments thereof do not show how much is demanded for each, a prohibition shall go for the whole. *Anon.* 7 Mod. 122.

5. A man is compellable in the ecclesiastical court to repair a way which leads to the church; but upon a libel there to repair

a highway, a prohibition lies. March, 45. 70.

6. Prohibition lies to the ecclesiastical court for meddling with railing out of the church, because it belongs to the laity. *Smith v. Pannell*, Hob. 246, 247.

7. So, on a libel there for locking up a chapel, where the parson had a grant of 10l. per ann. for reading prayers there. *Boon v. Jackson*, Comb. 93.

8. Prohibition lies to the vicar to prevent him cutting trees in a church-yard. 2 Ro. 111.

9. So, it lies against a master of a parsonage-house, &c. Mo. 917.

2. When not.

1. A prohibition to the ecclesiastical court will not lie upon a suit by a parish against a chapel of ease for reparations, if the chapel bury all the parish. *The parish of Aston v. Castle Birwidge Chapel*, Hob. 66, 67.

2. A prohibition was denied for the wardens of a company cited for a tax for the repair of a church, charged on their hall. *Thuryfield v. Jones*, T. Jones, 187.

3. A prohibition will not lie on a suit to the spiritual court for dilapidations suffered before a general pardon. *Powle v. Trumbull*, 2 Show. 421.

4. Upon a libel for a tax upon the parishioners for not repairing of their church, who suggest that they had a chapel of ease in the same parish, a prohibition was denied; for of common right they ought to repair the mother church. *Godfrey v. Evereden*, 3 Mod. 264.

5. The court will not grant a prohibition to a libel against parishioners for not repairing the church, although the word church does not in common parlance include the chancel, which they are not bound to repair. *Rogers v. Davenant*, 1 Mod. 237.

6. Nor does it lie to the spiritual court to stop a suit to compel a rate made at a vestry regularly summoned by the parishioners for the repairs of the parish-church. *Case of Bermondsey Church*, 2 Mod. 223.

7. In a suit in the spiritual court for a church rate, where the parishioners were taxed ten times the value of an ancient rate, without saying what, a prohibition was moved for upon account of the uncertainty of the rate, but denied. *Forté v. Buiere*, 10 Mod. 13.

8. The spiritual court shall not be prohibited from enforcing the payment of a parish rate made by the majority of the parishioners in vestry, although for the rebuilding of the nave of the church. *Wayte v. German*, 2 Show. 141.

9. It will not lie upon a suit in the ecclesiastical court for a pew or seat in the body of the church. *Booley v. Baily*, Hob. 69.

10. A prohibition was refused on a suggestion that there is a custom within the parish of S, that the church-wardens with

the major part of the parishioners may order the seats in the church there, and are to see to the repairs of them; and that the church-wardens would have placed the plaintiff in a pew there, and the defendant libelled against him in the spiritual court. *Langley v. Chute*, T. Raym. 246.

11. A prohibition is not granted [*1102] able for a^a matter done in the church-yard, upon a suggestion that the place is a lay fee. *Quilter v. Newton*, Carth. 152.

(e) *When church-wardens are concerned.*

1. Prohibition lies after sentence to a suit in the spiritual court by former church-wardens against their successors, wherein an account is decreed and a rate made for reimbursing, &c., that court having power only to order an account; and in this case no affidavit is necessary. *Dawson v. Wilkinson*, Andr. 11. C. T. Hardw. 381. S. C.

2. The spiritual court shall not be prohibited from citing a person chosen church-warden to take the oath of office; but if they require an oath, which tends to accuse the defendant, a prohibition lies. *Waterfield v. Bishop of Chichester*, 2 Mod. 118. *Week's case*, 2 Mod. 278.

(f) *When a person holding a particular office or situation is concerned.*

1. A prohibition lies to stay a suit in the Arches for removing a chancellor as not qualified, he having been allowed, &c. *Jones v. Bishop of St. Asaph*, Comb. 305.

2. So, to stay suit as to an examination relating to the office of master of a free-school, he having been once licensed. *Wood v. Hill*, Comb. 324.

3. It lies to the bishop to try the right of a lecturer, though the bishop is a judge of the fitness of the person. *Holt*, 418.

4. So, where the chancellorship of a bishop is granted for life, and he is questioned in the ecclesiastical court concerning his ability to exercise that office, with a view to deprive him. *Sutton's case*, Cro. Car. 65.

5. A prohibition lies to the spiritual court on a suggestion that they are proceeding to deprive the parson of a donative for being drunk at the sacrament. *Anon.* 7 Mod. 31. *Read v. Deatery*, Ib. 199.

6. Where he that is parson of another parish comes in *pro interesse suo*, a prohibition lies. *Cro. Eliz.* 251.

7. If the spiritual court call in question the right of presentation, prohibition lies. *Gerrard's case*, 2 Leon. 168.

8. A prohibition lies to the ecclesiastical court for questioning the institution after induction. *Hutton's case*, Hob. 15.

(g) *In suits for slander;—*

1. When it lies.

1. A prohibition lies to the spiritual court on a libel for calling a woman "a jade." 2 Show. 487. March, 99, pl. 170.

2. Libel in the ecclesiastical court for these words; "she is a beastly quean, a drunken quean, a copper-nosed quean, and she was one cause wherefore B left his wife, and has misspended 500*l.*, and she keeps company with whores and rogues;" upon which a prohibition was granted. *March*, 89, pl. 144.

3. Prohibition to a libel for calling "rogue and rascal." *Musgrave v. Povee*, W. Kely. 101.

4. So, for saying "you are a rogue, and have had fellows to swear false." 2 Show. 454.

5. For calling a man "Beelzebub." *Anon.* 1 Ld. Raym. 397.

6. So, those words of a man: "thou art a drunkard, and usest to be drunk thrice a week." *March*, 6, pl. 11.; 66, pl. 103.

7. It lies to the ecclesiastical court, in a suit there for calling a person "fool, ass, goose," &c. because merely words of heat and passion. *Newman v. Kingerby*, 2 Lev. 49.

8. So, for saying "he has no sense, is a dunce and a blockhead; I wonder the bishop would lay his hands on such a fellow; he deserves to have his gown pulled over his ears;" because a parson is not punishable in a spiritual court for being a knave or a blockhead, more than another man. *Ceester v. Parsons*, 11 Mod. 141.

9. To a suit for calling a parson "blockhead and knave." 1 Ld. Raym. 423. S. C.

10. For any words spoken of a clergyman which are actionable at common law. *Hall v. Downes*, Com. 309.

11. To the court of the constable and marshal, on a libel sued there for saying to a knight, "you are a scandal to the name of gentleman, and to the order of knighthood, a pitiful fellow," &c. *Chambers v. Jennings*, 7 Mod. 125. *Holt*, 597. *Salk*. 553.

12. A man prosecuted an action on the^a case, and in the [*1103] spiritual court, for the same words; and a prohibition was granted. *Anon.* Palm. 379.

13. Where some words are actionable at law, and some punishable in the spiritual court, a prohibition shall be granted; for otherwise it would be a double vexation. *Anon.* 3 Mod. 74.

14. Where it appears, either on the proceedings below, or affidavit, that the suit is for words spoken that are actionable in London, a prohibition lies after sentence; otherwise, if this appears only on a suggestion not verified by affidavit. *Sturly v. York*, Andr. 7.

15. So, it lies to a suit for calling "whore" in London, though the parties live out of London. 1 Ld. Raym. 711.

16. So, for the words "old thief and old whore," in London. 1 Vent. 343. 352.

17. Words tantamount to "whore" are

within the custom of London, as calling a man "cuckold." *Vicars v. Worth*, 11 Mod. 357. *Stra.* 471. 545.

18. Or saying she has made her husband a "cuckold." *Bennet v. King*, 11 Mod. 195.

19. "Strumpet" is tantamount to "whore" in London. *Cook v. Wingfield*, *Stra.* 555. 623.

2. When not.

1. A prohibition will not be granted where the libel is for calling a woman "whore." *Worsley v. Liddal*, 1 Sid. 433. 2 Lev. 63.

2. Nor upon a suggestion that the woman lived in a place where by custom, such defamation is punishable in the temporal courts, as London, &c. without an affidavit thereof. *Hind v. Thomson*, *Andr.* 299.

3. Nor unless oath is made that the words were spoken there, and also of the custom there. *Anon.* 4 Mod. 367. *Watson v. Clarke*, 1 Show. 131.

4. So, though it was spoken in heat. *Aubery v. Barton*, 2 Ld. Raym. 1136.

5. Nor for calling "old thief and old whore." 1 Vent. 10.

6. Nor for calling "impudent whore," or "whore and bawd." *Herbert v. Merrit*, 1 Vent. 7. 61. 220.

7. So, for the word "strumpet." *Stra.* 823.

8. Or "bawd." *Lockey v. Dangerfield*, *Stra.* 1100. *Andr.* 286. S. C. *March*, 99. pl. 170.

9. So, for calling one "son of a whore." *Vincent v. Alpy*, 3 Lev. 119.

10. So, for saying "you were B's whore before he married." *Snell v. Bishop*, 3 Lev. 137.

11. Or for saying "he keeps a whore in his house." *Elliot v. Chamberlain*, 3 Lev. 350.

12. Nor for calling one "rogue, rascal, whoremaster, and son of an old damned perjured affidavit bitch." *Smith v. Wood*, *Comb.* 226.

13. Nor for calling a husband "cuckold," though averred that it signified his wife is a whore. *Merril v. Kendal*, *Comb.* 312. 2 Lev. 66.

14. A prohibition was denied upon a suit in the spiritual court for calling a woman "witch." *Mo.* 906.

15. Nor for words spoken of the wife to the husband; viz. "she is a drunken, cheating, forsworn jade." *Anon.* *Comb.* 37.

16. Nor to a suit by husband and wife and their son for calling the son a "bastard." *Mey v. Hodge*, 2 Ld. Raym. 1287.

17. Nor for saying of one that he is a "whoremaster, and has had and now has a bastard." *Macksey v. Megey*, *Comb.* 434.

18. A prohibition shall not go where scandalous words are spoken of the function of a spiritual person. *Anon.* *Comb.* 25.

19. Nor on a suit in the ecclesiastical court

for saying of a parson "he preaches lies." *Cranden v. Walden*, 3 Lev. 17.

20. Or for saying "he lies with all the women in the parish." *Yates v. Lodge*, 3 Lev. 18.

21. Prohibition to the spiritual court on a suit there for words will not be granted after sentence. *Coke v. Hawkins*, 12 Mod. 13. 1 Show. 33. *Hawkins v. Cook*, *Carth.* 213. S. C.

22. Nor after sentence for calling a woman "whore," though the words were spoken in a place where they are punishable by a particular custom, as in London. *Asgil v. Hunt*, 10 Mod. 439. *Stra.* 187. S. C. *Anon.* 12 Mod. 236.

23. The husband cannot stop his wife's proceedings in the spiritual court for* defamation. *Tarrant v. Mawr*, [*1104] *Stra.* 576.

(h) *In suits for tithes* ;—

1. When it lies.

1. If lessee for years be sued for tithes, he in reversion can have a prohibition. *Mo.* 915.

2. Prohibition was granted to the spiritual court, because executors were sued there for double damages for not setting out tithes. *Weekes v. Trussell*, 1 Sid. 181. *Contra*, *Wilkes v. Russel*, T. Raym. 95.

3. If a suit be instituted in a spiritual court against the occupier of a corn mill for predial tithes, a prohibition lies. *Clarke v. Darby*, *Say*, 43.

4. A contract was made between the vicar and a parishioner to pay so much for increase of tithes; the vicar died, his successor sued in the ecclesiastical court for them, upon which a prohibition was granted, because the contract was of a temporal nature. *March*, 87. pl. 140.

5. It lies against the king's fermor. *Sir G. Gerard v. Sherington*, 1 Leon. 286.

6. So it lies upon surmise, that the lands were the Cistercian's, and the plaintiff is immediate farmer to the king. *Countess of Linnox's case*, 2 Leon. 71.

7. A prohibition lies to the ecclesiastical court upon the suit for tithes, grounded upon a custom against common right. *Barker v. Cocker*, *Hob.* 329.

8. So, if in a suit for tithes, the parishioners plead that he is not parson, because of simony, and the spiritual court refuse the plea. *Colt v. Bishop of Coventry*, *Hob.* 163.

9. So, upon a libel there for tithes in kind, of a park disparked for which formerly a modus had been paid. *Cowper v. Andrews*, *Hob.* 39.

10. Prohibition lies if the vicar sue the parson for tithes of glebe. *Mo.* 457.

11. It lies upon a surmise that there not being sufficient herbage for the cattle of the plough, the owners have used to depasture in green tares tithe-free. *Perry v. Some*, 2 Leon. 27, 28.

12. So, it lies upon a label for tithes for barren cattle, upon a suggestion that the

party had no cattle but for plough and pail; so also where a parson libelled for tithe of conies. *March*, 68. pl. 87.

13. Where the ecclesiastical court entertains a question as to a modus, prohibition lies. *Hood v. Hebdon*, C. T. Hardw. 203.

14. It lies after sentence in the spiritual court for tithes, where a modus is pleaded. 1 Dy. 74. pl. 49.

15. Where the suit is upon a modus *decimandi*, if the modus be denied, a prohibition lies till it is tried. *Scot v. Wall*, Hob. 247. W. Kely. 196. Holt. 598.

16. The archbishop of Canterbury cited one dwelling in Essex, for subtraction of tithes growing in Essex, to the Arches court, which court is held in London, and is the court of a peculiar jurisdiction of the archbishop of C, called a deanery, and exempted from the authority of the bishop of London; the court of C. B. granted a prohibition. *Porter v. Rochester*, 13 Coke, 4.

17. It lies upon a suggestion that the lands are discharged, as they were in the hands of a prior. 1 Leon. 240, 241. 331. 332.

18. If the defendant in the ecclesiastical court pleads that the tithes belong to another, and the plea is refused, a prohibition lies. *Anon.* 1 Vent. 248. 335.

19. A suggestion that the parishioner is to pay the tenth part of milk at the parsonage-house, or at any other place, is a good ground for a prohibition. *Dodd v. Ingleton*, T. Raym. 278.

20. It lies to the ecclesiastical court upon a suit for all the tithes, where the king or patentee has right to two parts. *Hoskin's case*, Hob. 115.

21. If proof of payment or subtraction of tithes is denied, a prohibition will be granted. 3 Mod. 284.

22. So, upon a suit for tithes of willows, upon a surmise that they are used as timber in that country. *Guffy v. Pindar*, Hob. 219.

23. To a suit for tithes of hay and grain, where the lands in the hands of an abbot and his farmers have from time immemorial been charged with tithes of wool and lambs only. 3 Dy. 394. pl. 16.

24.* A suggestion of a modus [*1105] for tithes of a water corn-mill which anciently had only a pair of mill-stones, but of late two pair, yet the prohibition shall go to the whole, because the mill is the substance, &c. *Grimley v. Falkingham*, 4 Mod. 45.

25. So, upon a suit for the second hay, tithe having been paid for the first according to the custom. *Hide v. Ellis*, Hob. 250.

26. It lies upon a surmise that the owners have used to have the hay on the headlands for cutting down the corn. *Anon.* 2 Leon. 70.

2. When not.

1. No prohibition in a suit for tithes

where the question is between the improPRIATOR and vicar. *Drake v. Taylor*, Stra. 87.

2. If the parson libels in the spiritual court against the owner of lands for tithes which he severed, but a stranger took and carried away, no prohibition shall issue, for he might plead the same matter in bar in the spiritual court. *Gerrard's case*, 4 Leon. 7.

3. It lies not where the doubt is only *cui solvenda*. 1 Leon. 94. 128. 3 Leon. 203. *Sed vide contra*, 3 Leon. 265.

4. A prohibition to the ecclesiastical court will not lie upon a suit by the parson for tithes contrary to a verbal agreement for money. *Hawles v. Bayfield*, Hob. 176.

5. Nor, upon a surmise that the parson came in by simony, as it is more proper for the spiritual court. *Busby v. Wentworth*, Cro. Eliz. 642.

6. A parson promises for 11s. that the parishioner shall be acquitted of tithes as long as he shall be parson; the parishioner has no remedy by prohibition, but only on the agreement. *Aldresh v. Ray*, Palm. 36.

7. A composition for tithes before the 13 Eliz. may be pleaded in the ecclesiastical court, and is no ground for a prohibition. *Startup v. Doderidge*, 2 Ld. Raym. 1161.

8. If one of two joint-tenants of tithes sues in the ecclesiastical court without the other, or a feme covert sues solely for defamation, this is no cause of prohibition. *March*, 25. pl. 26. p. 47. pl. 111. p. 93. pl. 112.

9. The court will not grant a prohibition to a suit for tithes of barren ground on the statute 2 & 3 Edw. 6. c. 13., unless on affidavit that it was pleaded below and refused, and the suggestion allege the land to be *exempta natura sterilis*. *Horner v. Bommer*, 6 Mod. 86. 96.

10. A prohibition was denied, where the libel was for tithes for agistment of cattle ploughing in one parish and depasturing in another. *Sidales v. Lowther*, 5 Mod. 96.

11. So, on a suggestion that a hundred ought to be discharged of herbage or other tithes by custom. *Hicks v. Woodson*, Comb. 403, 404.

12. Nor upon surmise that money ought to be paid to the parish-clerk in lieu of tithes. *Swell v. Wood*, 1 Leon. 94.

13. It lies to a libel there for a pension payable for tithes, though it issue out of lay land. *Cowper v. Andrews*, Hob. 43.

14. Nor upon suggestion that tithe had been paid to the vicar, &c., and time out, &c. 3 Leon. 203.

15. Nor for a modus or other foreign matter, unless pleaded below. *Anon.* Salk. 551.

16. Where there is a composition for tithes, a prohibition lies not; the remedy is by appeal. *Bradshaw v. Thornton*, Carth. 70. Holt. 671. 1 Show. 81. S. C.

17. No prohibition is grantable to a suit brought in the ecclesiastical court for a way

for the removal of tithes. *Halsey v. Halsey*. W. Jo. 230.

18. It lies not upon surmise that the person has used to take the corn growing upon every tenth land, for the custom is unreasonable. *Stebbs v. Goodlack*, 1 Leon. 99, 100. *Contra*, 2 Leon. 70.

(i) *In suits concerning marriages* ;—

1. When it lies.

1. A man was sued in the spiritual court for having married with his father's brother's wife, and a prohibition was granted. *Harrison v. Burwell*, Vaugh. 206, 207, &c.

2. Prohibition lies on a libel collusively brought in the spiritual court to dissolve a marriage on the ground of incest, with a view to bastardize the issue. *Anon.* 2 Mod. 315.

3.* So, on a suit there for an- [*1106] nulling a marriage as incestuous after the death of one of the parties. *Hicks v. Harris*, Comb. 900. *Vide ib.* 356. 360.

4. So, if pending the suit one of the parties dies, a prohibition shall go *quoad* annulling the marriage. *Hicks v. Harris*, 12 Mod. 35.

5. On a libel *causa jactationis maritaggi*, the suggestion for a prohibition was, that he was indicted at the Old Bailey for marrying two wives, and that he was convicted in a court of that offence which had a proper jurisdiction, &c.; a prohibition was granted. *Boyle v. Boyle* 3 Mod. 164. Comb. 72. S. C.

6. The courts of law have cognizance of what marriages are incestuous and what not, and may prohibit the spiritual court from questioning them. *Harrison v. Burwell*, Vaugh. 207. 220.

2. When not.

1. Though sometimes prohibitions have been granted in causes matrimonial, yet it was said that if it were now *res integra*, they would not be granted. *Watkinson v. Mergatroy*, T. Raym. 464, 465.

2. Prohibition shall not go in a suit on a contract of marriage *in futuro*, unless the party also sues at common law. *Jesson v. Collins*, Holt, 457, 458, 459.

3. A prohibition was denied on a libel for incestuous marriage, but proceedings were stayed by rule on information of covinous practice in the father to defeat the children. *Collet's case*, T. Jones, 213.

4. A prohibition will not be granted to proceedings in the spiritual court against one for marrying his brother's or sister's daughter, and a prohibition denied. *Watkinson v. Mergatroy*, Skin. 37. T. Raym. 464. S. C.

5. So, on a marriage with the wife's sister's daughter, being within the Levitical degrees, a prohibition will not be granted. *Elliston v. Gastrell*, Com. 318.

(j) *In suits respecting the probate, &c. of a will.*

1. The court will prohibit the spiritual court from granting probate of a writ made by a feme covert, although by marriage articles, she was authorized to make an appointment. *Taylor v. Rains*, 7 Mod. 148.

2. The spiritual court is to judge whether a person is capable of making a will, and therefore shall not be prohibited from granting probate of a will made by an infant, upon a suggestion that he was under seventeen years of age. *Smallwood v. Brickhouse*, 2 Mod. 316.

3. But on a suggestion that a testatrix was a married woman, the superior courts will prohibit the prerogative court from trying the fact, whether she had power from her husband to make a will. *Brook v. Turner*, 1 Mod. 211.

4. It lies not to the spiritual court for proving a will containing both lands and goods. *Hudson v. Fisher*, Holt, 180. *Searle v. Williams*, Hob. 290.

5. If the lord of a manor has probate of wills within his manor, prohibition lies to restrain the ecclesiastical court from granting probate of such wills. *Orphans of London's case*, 5 Co. 73 b.

6. Upon suggestion that a deviser was not of sane and perfect memory at the time of making a will, which will contained a devise of manors, lands, &c. as well as of personal property, a prohibition will be granted generally, and not specially for the land only. *Marquis of Winchester's case*, 1 Co. 23 a. Salk. 552.

7. It was granted to the spiritual court against their revoking the probate of a will, because the executor was become a bankrupt. *Hill v. Mills*, 1 Show. 293. 295. Skin. 299. S. C.

8. A suit in the spiritual court, for fraudulently taking away a will which had been proved there, will not be prohibited. *Deer's case*, 12 Mod. 325.

(k) *In suits respecting the distribution of a testator's or intestate's effects.*

1. It lies to a judge of the prerogative court for interfering in the distribution of goods after an administrator appointed, *Vandam v. Deconell*, W. Jo. 228.

2. So, it lies to the spiritual court to prevent distributing an [*1107] estate *pur autre vie*.* *Oldham v. Pickering*, Holt, 503, 504.

3. Or if the ordinary endeavour to compel the administrator to make distribution of the surplusage. *Slawney's case*, Hob. 83. 191.

4. So where they compelled an executor to exhibit an inventory in order to a distribution. *Pole v. Smith*, 5 Mod. 247.

5. It lies to a suit for taking away the goods of an intestate from the administrator, because an action of trover may be brought for them. *Sadler v. Daniel*, 10 Mod. 21.

6. Though there is no survivorship by their law among joint-legatees, yet if they

will not admit the survivorship to take place, they shall be prohibited. *Bastard v. Stukely*, 2 Lev. 209.

7. After administration granted, the ordinary has not power to compel the administrator to make distribution; and if he go about to repeal the letters for not doing it, a prohibition lies. *Hill v. Bird*, Aleyn, 56.

8. A motion for a prohibition upon a dispute between a peculiar and the prerogative court, whether *bona notabilia* or not, was refused. *Cottingham v. Lofis*, 10 Mod. 272.

(l) *In a suit for a Legacy*;—

1. When it lies.

1. A prohibition lies to the court of Arches on a libel for a legacy of books given to the library at Lambeth, on a suggestion that the plaintiff was cited out of the diocese, and that the archbishop of Canterbury is judge of the court. *Sheffield v. Archbishop of Canterbury*, 2 Show. 146.

2. One who was bound by bond and covenant to pay portions to the daughters of a stranger at twenty-four years of age, devised by his will portions to be paid to the daughters at twenty-one: they sued in the spiritual court for payment under the will, upon which a prohibition was granted, because the payment at twenty-one would not have been a discharge of the bond and covenants appointing them to be paid at twenty-four. *Davie's case*, Mo. 246.

3. A prohibition lies if the spiritual court proceed on a libel for a legacy to be paid out of lands. *Bastard v. Stockwell*, 2 Show. 50.

4. So upon a suit for part of the money appointed by will out of the lands devised to be sold, for it is but a legacy in equity. *Edwards v. Grace*, Hob. 265.

5. Prohibition was granted in a suit for a legacy, because the judge refused to allow the executor to retain assets for bonds; upon which a special consultation was granted, *ita quod invenial securitatem* to repay the legacy if there was any recovery on the bonds. Mo. 413.

6. So to stay a suit in the court Christian commenced against an executor by one for a legacy bequeathed to him by his father, who willed that his goods should be parted amongst his children according to the custom of London. *Harvey v. Harvey*, 4 Leon. 12.

7. Prohibition lies for suing the administrator of an executor for a legacy given by his testator. *Tucker v. Twell*, C. T. Hardw. 185.

2. When not.

1. No prohibition lies to suit by an executor in the spiritual court, after assent to a legacy. March, 96. pl. 167.

2. A makes his will, and thereby makes G and D his executors; D makes his will, and executors, and dies; G dies intestate, his administrator sues the executors of D in the spiritual court for a legacy due from A,

and a prohibition was denied. *Willen v. Gill*, T. Raym. 123.

3. It will not lie where the defendant pleads a release in bar of a legacy, and the plaintiff, confessing the release, replies, that the testator who made it was an idiot, though they proceed to examine the idiocy. *Anon.* Hob. 188.

4. It will not lie to the court Christian in a suit for a legacy to be paid out of money arising from lands devised to be sold by the executors for that purpose. 3 Dy. 264. pl. 41.

(m) *In a suit for fees*.

1. If an apparitor, a register, or a parish-clerk, sues for his fees in the spiritual court, a prohibition shall go. 1 Mod. 167, 168 *notis*. 1 Ld. Raym. 703. *Anon.* 12 Mod. 583. *Clerk v. Lee*, 10 Mod. 261. 263.

2. A prohibition lies to a suit there for* fees for swearing [*1108] churchwardens. *Gossin v. Ellison*, 1 Salk. 330.

3. A prohibition lies to a suit for fees in the court of admiralty. *Clerk v. Lee*, 10 Mod. 264.

4. Or in the court of honour. 10 Mod. 26.

5. A prohibition will not lie to a suit in the ecclesiastical court for proctor's fees. *Johnson v. Lee*, 5 Mod. 242. *Johnston v. Oxenden*, 4 Mod. 255.

6. But if a proctor libel in the spiritual court for his fees in a suit there, and also for expenses of a journey and other disbursements, a prohibition shall go for all except the fees. *Horton v. Wilson*, 1 Mod. 167.

7. It lies to the ecclesiastical court upon a suit by the parson and churchwardens for burial fees of a dead corpse carried through and buried elsewhere. *Colt v. Bishop of Coventry*, Hob. 175.

(n) *Miscellaneous*;—

1. When it lies.

1. Where an original cause belongs properly to the spiritual court, and by plea a thing triable properly by our law comes in question, if their proceeding differs from our law, and they do not pursue the same manner of trial, a prohibition lies. *Wood v. Churley*, 2 Ro. 439.

2. A prohibition lies to the ecclesiastical court where they go about to take proofs of witnesses in *perpetuum rei memoriam*. *Napper v. Steward*, Hob. 248. 286.

3. So if they go about to examine the delinquent upon oath, *quoad* the execution, though the original cause belong to them. *Spendlow v. Sir William Smith*, Hob. 84.

4. If the ecclesiastical court proceed upon a canon which is contrary to the common law, statute law, or custom, a prohibition lies. March, 22. pl. 50. & 67. pl. 54.

5. Sir D M, knight, was sued in the ecclesiastical court by the name of Sir D M, knight and baronet, and pleaded it there that he is only knight, and not baronet, and the court having disallowed the plea, and

proceeded to excommunication, a prohibition was granted. *Sir D. Massingberd's case*, T. Raym. 219.

6. One was excommunicated for not receiving the sacrament in his parish church in the city of Bristol after a monition; he pleaded in the ecclesiastical court, that he had received the sacrament in the country at his parish church there, which plea they refused; a prohibition was granted. *Anon. Skin.* 101.

7. Upon alleging offer of plea, claiming property, and refusal of the plea, a prohibition will be granted. *Edmonson v. Walker*, 1 Show. 179.

8. A prohibition lies to the spiritual court against a citation *ex officio* to answer articles. *Birch v. Lake*, 1 Mod. 185.

9. The court will prohibit the spiritual court from proceeding against a person for keeping a school without license, if it appear that the patronage is not in the ordinary but in the founder. *Bates v. Kendal*, 1 Mod. 3.

10. If the matter in the libel appears insufficient, a prohibition shall be granted, though the matter in the declaration be sufficient. *Lourey v. Reynes*, 2 Lev. 218.

11. A prohibition lies to the ecclesiastical court, if upon a trial and verdict in a prohibition, a consultation be awarded, and the same be accepted, which was tried before. *Farmer's case*, Hob. 286.

12. A prohibition lies to the ecclesiastical court, though the cause arise within a county palatine. *Hutton's case*, Hob. 15, 16.

13. Prohibition lies to the delegates in a suit for beating a clerk, where a plea of justification was not allowed. *Kelly v. Walker*, Cro. Eliz. 655.

14. A prohibition was granted because the spiritual court refused to take a plea that the plaintiff there was not incumbent. *Pendleton v. Green*, 3 Leon. 265.

15. So if they proceed upon a custom against law. *Reynold's case*, Mo. 916.

2. When not.

1. If the ecclesiastical court proceed against a man without citation, where they have jurisdiction, no prohibition lies; the remedy is by way of appeal. March, 98. pl. 169; 92. pl. 152.

2. The court Christian cites the members of corporations by their proper names, though it proceeds against them [*1109] in* their politic capacities; for that court has no way to compel an appearance but by personal process, and a prohibition was denied upon such citation. *The case of Wax Chandlers' Company*, Skin. 27, 28.

3. A prohibition was denied to a suit for brawling, against the mayor, who came to suppress a riot. *Wormouth v. Collins*, 2 Ld. Raym. 850.

4. Where an appeal was made to the archbishop of C, as a visitor of a college, by a fel-

low thereof, and the appellant prayed a prohibition, suggesting another to be visitor, the prohibition was denied, the archbishop having acted as visitor for four hundred years, and no other now claiming the power. *Martyn v. Archbishop of Canterbury*, Andr. 258.

5. It lies not to stay a suit for not providing communion wine at Easter, on a suggestion that the parson ought to do it. *Rector of Westbury's case*, Comb. 76.

6. Many men recover costs in the spiritual court; one of them releases, the others sue there for their costs, this is no cause of prohibition; so if baron and feme recover costs there for defaming the wife, and the baron releases, this will not bar the wife. March, 73. pl. 112. See lb. 25. pl. 26. & pa. 47. pl. 74.

7. It was denied to a suit by the wife against the husband for alimony. *Hyat's case*, Cro. Jac. 364.

8. It will not lie to stop a feme covert, suing singly upon the statute of distributions. *Death v. Beaux*, 10 Mod. 64.

9. If the wife be sued singly in the spiritual court, where the husband ought to have been joined, this is no cause for a prohibition, though it may be a good one for an appeal. *Clerk v. Lee*, 10 Mod. 264.

10. A prohibition is never granted on part of the case. *Turner v. Getkin*, Gilb. 131.

11. Upon a petition to any ecclesiastical judge, without suit there, no prohibition lies. March, 45. pl. 70.

12. A prohibition to the spiritual court was refused till the special matter was pleaded there. *Stone v. Harwood*, C. T. Hardw. 357.

13. A prohibition does not lie on a suggestion of being cited out of the diocese, after plea pleaded. *Anon.* 2 Show. 155.

14. Where the ecclesiastical court proceeds in a matter merely spiritual, though their proceedings be contrary to the common law, yet no prohibition lies. *Shatter v. Friend*, 1 Show. 172.

15. So, where the bishop libels for an annuity, &c., before his own commissary. *Anon.* Comb. 131.

16. The ecclesiastical courts may hold plea of an excuse for not going to church, and no prohibition lies. March, 93. pl. 162.

17. The spiritual court shall not be prohibited to punish for fornication, though one of the parties be dead. *Hemmings v. Price*, Holt, 457.

18. Prohibition lies not to an appeal in the court of Arches from a petition to the ordinary for a license for setting up a monument. *Cart v. Marsh*, Andr. 69, 70.

19. It does not lie to a suit in a spiritual court for a faculty to erect a gallery in a church or chapel. *Pawson v. Scott*, Say. 178.

20. Prohibition is not allowable for excommunicating one for costs. Mo. 540.

21. Not to stay a suit in the ecclesiastical court for procurations. *Sanderson v. Clagget*,

Stra. 421. *Kirton v. Guildler*, T. Raym. 360. 2 Show. 97. S. C.

22. It does not lie to a suit in the spiritual court for forging an order of that court. *Stader v. Smallbrooke*, 1 Lev. 138.

23. Nor on a libel for a pension charged on an impropiator. *Girton v. Gilder*, 2 Show. 97.

III. WHEN A PROHIBITION LIES TO THE ADMIRALTY COURTS;—

1. When it does lie.

1. Prohibition lies if the admiralty court holds plea of a thing done upon the land, whether in England or in a foreign country. Cro. 450. 2 Ro. 413. *Bridgeman's case*, Hob. 11. Ib. 80. 213.

2. If they hold plea of a matter upon the Thames, which is *de corpore comitatus*. Mo. 916.

3. The master of a ship pledged it in Spain for £50, for which the ship on its return was attached in the Thames, and* [*1110] prohibition was granted; otherwise, if the ship had been pledged upon the sea for necessary tackle. Mo. 918. T. Raym. 489. 496.

4. If a ship be taken at sea, whether by letters of mart or by piracy, if it be sold *infra corpus comitatus*, and the party libels against the vendee in the admiralty, a prohibition lies. March, 110. pl. 108.

5. It lies for holding plea of an agreement made at sea, and put in writing and sealed in foreign lands; not so if only a bare remembrance had been made of it at land. *Palmer v. Pope*, Hob. 79. 212.

6. If the court of admiralty issue process in the nature of an embargo to stop a ship going to the East Indies, contrary to the charter of the East India Company, a prohibition lies before appearance; for it is clear it is not within their jurisdiction. 6 Mod. 12.

7. Where there were thirteen part-owners of a ship, and one of them refused to let her go to sea, whereupon a stipulation was taken for the share of the party refusing, and afterwards the ship went her voyage, and this stipulation being put in suit in the court, a prohibition was granted; because the building the ship and the charter-party were at land. *Rez v. Perry*, 3 Salk. 23. Comb. 109, 110. S. C.

8. Prohibition lies to the admiralty for suing there for mariner's wages. *Woodward v. Bonitham*, T. Raym. 3.

9. So it lies to a suit for the wages of a master of a ship. *Day v. Snelgrove*, Com. 74.

10. The master was prohibited to sue the part-owners for seamen's wages which he had paid. *Anon.* Fort. 230. *Woodward v. Bonitham*, T. Raym. 3.

11. It will lie upon a libel by an ambassador against an alien, for his goods, as confiscated to his master. *Palmer v. Pope*, Hob. 79. 212.

12. If it appears on the face of the proceed-

ing that the admiral has not jurisdiction, he may be prohibited at any time. *Rez v. Brown*, 12 Mod. 134, 135.

13. It will lie for holding a plea of things done in foreign lands, though the libel allege it *infra jurisdictionem maritimum*. *Palmer v. Pope*, Hob. 80. 213.

14. So where it has not original jurisdiction, although a question arises which is proper for their conuizance; *secus*, where it has original jurisdiction, though a question arises not proper for them. *Tremolina v. Sands*, Comb. 462.

15. Prohibition lies against one suing in the admiralty for a cause of action which by the civil law makes a party liable, but the common law does not. Mo. 776.

16. Prohibition to the admiralty will lie for holding a plea of a thing done in any port. *Palmer v. Pope*, Hob. 79.

17. Prohibition to the admiralty for refusing a plea of claim of property. 11 Mod. 6. n.

18. If the court of admiralty proceed both against the ship and the owners, a prohibition lies as to the owners. *Johnston v. Shepney*, 6 Mod. 79.

19. If a tradesman furnish a ship with sails and other necessaries, and after the owners have publicly sold both ship and tackle, he libels in the admiralty court against the ship, the master, the old owner, and the new owner, the court will grant a prohibition as to the ship, the master, and the new owner. *Hoare v. Clement*, 2 Show. 338.

2. When not.

1. It does not lie to the admiralty on a suit there for seamen's wages. *Anon.* Comb. 71.

2. A prohibition does not lie to the court of admiralty to stop a suit there by all the mariners of a ship jointly against the master; but if the master and seamen of a ship join in a libel in the admiralty court against the owners, for wages, a prohibition lies. *Anon.* 2 Show. 86.

3. Prohibition was denied to a seaman's suit in the admiralty for wages upon a contract with a freighter; for it need not be *super altum mare*. *Smith v. Crosby*, Fort. 230. 3 Lev. 60.

4. A prohibition was denied where the original cause arose upon the sea. *Spark v. Stelford*, Hard. 183.

5. A suit in the admiralty by a part-owner to give security for the ship, will not be prohibited. *Dimmock v. Chandler*, Stra. 890.

6. It lies not to stay a suit there against the master of a ship who had hypothecated it for necessary repairs, &c. *Corset v. Hurly*, Comb. 135.

7.* Nor to stay a suit there for [*1111] the caption of a ship on the sea, although the conversion was on the land. *Rez v. Browne*, Comb. 444.

8. A prohibition will not lie to the court of admiralty for refusing a plea of the statute of limitations, if it be badly pleaded.

Ewer v. Jones, 6 Mod. 26. 2 Ld. Raym. 937. S. C.

9. Prohibition to the admiralty will not lie after a sentence upon a surmise of a thing not appearing in the libel. Hob. 79. 213.

10. There can be no prohibition to the admiralty after sentence, unless it appear upon the libel that the thing was not done upon the high seas. *Tousson v. Tousson*, 1 Ro. 80. Admiralty case, 12 Co. 78.

11. A prohibition to the admiralty will not lie for judging a cause within their jurisdiction contrary to the rules of our law. Hob. 12.

12. No prohibition lies to the admiralty for suing a recognizance there taken by way of stipulation against one that was surety in the nature of bail. *Par v. Evans*, T. Raym. 78.

IV. WHEN A PROHIBITION LIES TO THE COURTS OF EQUITY.

1. If a court of equity intermeddles with any matters properly triable at common law, or which concern freehold, it may be prohibited. *Heath v. Ridley*, Cro. Jac. 335. 483.

2. A prohibition granted to the court of the chamberlain of Chester, for a court of equity cannot charge the inheritance of a man's land with a rent. *Oseley v. Sir G. Warberton*, T. Raym. 221.

3. It lies to the chancery court of the cinque ports to stay a suit there for discovery of a custom. *Curling v. Long*, Comb. 261.

4. So to a chancery court in Wales to stay a suit there against one who lives out of their jurisdiction, though the bill was for discovery of a deed which concerned lands within their jurisdiction. *Tranter v. Duggins*, Comb. 468.

V. WHEN A PROHIBITION LIES TO THE COURTS OF WALES.

1. A prohibition lies to the court of the marches of Wales on a suit there for a legacy. *Ellis v. Wynn*, T. Raym. 191.

2. Prohibition lies to the grand sessions in Wales, for proceedings against a defendant that lived out of their jurisdiction. *Vaughan v. Evans*, 2 Ld. Raym. 1408. Stra. 630. S. C. *Tranter v. Duggan*, 12 Mod. 138. 172. 173.

3. So, if an action be brought in the court of the marches in Wales in the nature of an ejectment. *Anon.* 2 Ro. 309. 2 Brownl. 29.

VI. WHEN A PROHIBITION LIES TO INFERIOR COURTS;—

1. When it does lie.

1. A prohibition will be granted to a court baron if it hold plea of above 40s. *Coats v. Suckerman*, 1 Ro. 252.

2. If a contract be for 4*l.*, and a plaintiff, to give an inferior court jurisdiction, split it into several actions, a prohibition shall go. *Catchmade's case*, 6 Mod. 91. March, 141. pl. 214.

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3. Prohibition was granted to the court of requests, upon a suit for rent. *Hudson v. Middleton*, 2 Ro. 433.

4. A prohibition lies to the court of requests, if the judges will compel the parties to be bound to stand to the order of their court. 2 Ro. 96. 103.

5. If a man be sued in the court of requests, to account there, a prohibition lies. March, 99. pl. 171.

6. A prohibition was granted against a suit in the court of requests, for money due upon an account. *White v. Grubb*, March, 102. pl. 175.

7. If after imparlance a plea be tendered to an inferior court, alleging the matter to be out of its jurisdiction, and the court refuse to receive the pleas, a prohibition shall go. 1 Mod. 64 *notis*. Holt, 186. 1 Vent. 180. 1 Saund. 98. 1 Show. 12.

8. If the want of jurisdiction appear on the face of the proceedings in an inferior court, a prohibition shall go even to a court of appeal, and after the cause is remitted, and costs awarded to the appellant. 1 Mod. 64 *notis*.

2. When not.

1. No prohibition to an inferior court for proceeding in a cause arising out of their jurisdiction, till that matter has been* pleaded. *Cook v. Licence*, [*1112] 1 Ld. Raym. 346.

2. Nor if such plea is pleaded after imparlance, and the court refuse it. 1 Show. 12.

3. The court will not grant a prohibition, upon a mere surmise that the matter is not within the jurisdiction of the inferior court. *Wayman v. Smith*, 1 Mod. 64.

4. A prohibition shall not go to an inferior court, although the cause of action arose out of the jurisdiction, unless that matter has been tendered in a plea to the court below, and refused. *Cox v. St. Albans*, 1 Mod. 81.

5. Nor on a suggestion that the party had tendered a plea to the jurisdiction, which was refused, unless it appear that the plea was verified, and tendered in person during the sitting of the court. *Sparks v. Wood*, 6 Mod. 146.

6. If the defendant neglects to plead to the jurisdiction, he shall not afterwards have a prohibition. *Marriott v. Shaw*, Com. 278. *Mendyke v. Stint*, 2 Mod. 272.

7. If an inferior court has cognizance of the action, a prohibition will not lie on a suggestion that the cause of it arose out of the jurisdiction. *Anon.* 11 Mod. 132.

8. The court will not grant a prohibition after sentence, if the inferior court has jurisdiction over the cause. *Hargill v. Hunt*, 11 Mod. 304. *Jackson v. Neale*, 2 Lev. 230. March, 105. pl. 181.

VII. PROCEEDINGS IN PROHIBITION;—

(a) *Relative to the party's right to a prohibition in general.*

The granting a prohibition is not a discre-

tionary act of the court, but *ex debito justitiæ*. *Woodward v. Bonilhan*, T. Raym. 4. *Ford v. Welden*, T. Raym. 92.

(b) *Of the nature of express prohibitions.*

There are several writs of express prohibitions; they are of two sorts, one founded upon suggestion, the other upon record. *Langdale's case*, 12 Co. 58.

(c) *In what stage of the cause below a prohibition will be granted.*

1. A prohibition was denied before libel issued. *Turner v. Gethin*, Gilb. 91. 131.

2. There is no precedent of a prohibition *quia timet*. *Baker v. Bakera*, 1 Vent. 313.

3. Prohibition to the admiralty was denied before appearance, and libel filed. *Johnson v. Shippen*, 2 Ld. Raym. 983.

4. If a libel be entered in the court of admiralty, and process issues to force the defendant to appear, the court of King's Bench will not entertain a motion for a prohibition till after appearance, although it may *prima facie* seem that the court of admiralty has not jurisdiction; for, until appearance, the real merits of the cause cannot be before the court. *Trantin v. Watson*, 6 Mod. 12.

5. But under particular circumstances, a prohibition has been granted to the court of admiralty before appearance. *Sands v. East India Company*, 6 Mod. 12.

6. Until proceedings after the plea have been had below, the court will not grant a prohibition. *Borough v. Fowler*, Keny. 354.

7. Before sentence in the ecclesiastical or admiralty courts, a prohibition may be granted, upon a suggestion of a matter of fact not appearing on the face of the proceedings below; but after sentence, it will not be granted upon the bare averment of a fact; yet the want of jurisdiction appearing upon the face of the libel, or of any part of their proceedings, is a sufficient ground for prohibition after sentence. *Smith v. Langley*, Ca. T. Hardw. 317.

8. A prohibition may be granted at any time, though after sentence, where it appears upon the face of the libel that the cause is not of spiritual cognizance. *Aegil v. Hunt*, 10 Mod. 439. 2 Mod. 274. 3 Mod. 224. *Gardner v. Booth*, Salk. 548. 11 Mod. 5. n. 11 Mod. 6. n. 12 Mod. 206. Carth. 33, 34. 97. 142. 3 Salk. 87. 287. Say. 177. *Chickham v. Dickson*, 12 Mod. 192. *Anon.* 11 Mod. 5. *Shatter v. Friend*, 1 Show. 161. *Tymkinson v. Freeman*, 2 Show. 155.

9. Although the party has allowed their jurisdiction by pleading, &c. *Pocock v. Nash*, Comb. 254. 463. *Sed vide Anon.* 7 Mod. 107.

10. Otherwise, in matters that [*1113] belong to^a the spiritual court, though for particular reasons triable at the common law too. 10 Mod. 12. 439, 440.

11. It lies after sentence on a suit there for words, *viz.*; "Mr. N. is a rogue and a dog, and will never be good until three feet under

ground; and I had rather my son should make hay on a Sunday, than hear Mr. N. preach." *Pocock v. Nash*, Comb. 253.

12. So, if a plea to the jurisdiction be refused or prevented by artifice, a prohibition will lie at any time. *Mendys v. Stial*, 3 Mod. 272.

13. So, after sentence in the court Christian for disallowing proof by one witness. *Baynoll v. Stokes*, Mo. 907. *Shatter v. Friend*, 1 Show. 173.

14. For any thing not appearing in the libel, or for matters suggested that are collateral to the libel, no prohibition lies after sentence. *Shatter v. Friend*, 1 Show. 161. *Pool v. Gardner*, 12 Mod. 206, 207. *Anon.* 7 Mod. 8. See also *Noy*, 67. 1 Sid. 166. *Fort* 347. 3 Salk. 288. *March*, 73. pl. 111. 92. pl. 156.

15. A prohibition will not lie after sentence in the spiritual court, if they have jurisdiction of the cause. *Browne v. Averie*, 2 Show. 25.

16. Where the spiritual court tried a prescription to a right of choosing churchwardens, a prohibition was denied after sentence. *Bannister v. Hopton*, 10 Mod. 12.

17. No prohibition to the admiralty court after sentence, but for cause apparent on the record. *Anon.* 8 Mod. 194.

18. In order to obtain a prohibition to a suit for a mortuary, the custom must be denied in the ecclesiastical court. *Johnson v. Oldham*, 1 Ld. Raym. 609.

19. Prohibition will not be granted after consultation. *Bowry v. Wallington*, Lat. 6.

20. Where a defendant is cited out of the proper diocese, and pleads, no prohibition lies after sentence. *Case of Prohibition*, 12 Co. 76. 12 Mod. 206. Salk. 548. Comb. 105, 106. 132. 7 Mod. 137.

21. After a consultation for not proving the suggestion, it does not lie on the same libel. *Anon.* Comb. 63.

22. A prohibition ought not in general to be allowed after sentence, where an appeal lies, 3 Mod. 284. *Fort*. 199.

(d) *By what court grantable.*

1. Prohibitions for encroaching jurisdiction are as well grantable in the Common Pleas as King's Bench. *Bushe's case*, Vaugh. 157. 209.

2. The Common Pleas may award a prohibition, although no suit be there pending. *Langdale's case*, 12 Co. 58. Ib. 109. S. C.

(e) *Relative to the time at which the motion should be made.*

No prohibition is grantable the last day, or the last but one, of the term. *Anon.* 2 Ro. 456. *Prac. Ca. K. B.* 187. Lat. 7.

(f) *What affidavit, &c. is necessary in support of the motion.*

1. On motion for a prohibition, an authentic copy of the libel must be produced, proved by affidavit. *Eglefield v. Anderson*, Ca.

Prac. C. P. 107. 1 Barnes, 305. *Tranter v. Watson*, 6 Mod. 13.

2. Where motion for a prohibition is founded upon matter of suggestion only, an affidavit is necessary of the truth of the suggestion. 10 Mod. 387. *Burdett v. Newell*, 2 Ld. Raym. 1211. C. T. Hardw. 392. Salk. 549.

3. Otherwise, where the matter of the suggestion appears on the face of the libel, though after sentence. *Godfrey v. Liewellin*, Salk. 549. *Selby v. York*, C. T. Hardw. 392.

4. A prohibition denied for want of an affidavit that a plea was refused in the ecclesiastical court. *Anon.* Skin. 90.

5. On motion for a prohibition, the court will not take judicial notice of a custom in London, after sentence. *Cook v. Wingfield*, 8 Mod. 176.

6. Therefore, to obtain a prohibition to a suit for words spoken in London or Bristol, there must be a plea, or affidavit of the custom. *Driver v. Driver*, Andr. 304. *Hinds v. Thompson*, Andr. 299.

7. In the Common Bench, a prohibition shall not be awarded until the suggestion is of record; otherwise in the King's Bench. *Noy*, 75. See ib. 108.

8. Unless a civilian can be got [*1114] to argue* for the prohibition, none shall be heard against it. *Pitt v. Evans*, 1 Barnes, 305.

(g) *Respecting bail.*

1. The court will not, on granting prohibition to a suit for a master's wages, compel the owner to give bail, unless by consent, and where there are no equitable circumstances in the owner's favour. *Clay v. Snellgrave*, 1 Ld. Raym. 576. 1 Salk. 33.

2. A prohibition to the admiralty was denied unless the defendant would appear and give bail. *Wharton v. Pitts*, Salk. 548. See side ib. 548. *contra*.

(h) *When several prohibitions are necessary.*

1. The prohibitions must be several if the libels are several. *Gerrard v. Sherrington*, 1 Leon. 286.

2. Where several join in a suggestion, the prohibition may be joint, but the declaration should be several. *Chicken v. Dickson*, Comb. 448.

3. Where there are several moduses, there several prohibitions shall be granted; when one modus only, though divers parties, all shall have but one prohibition. *March*, 94. pl. 163.

4. There may be two prohibitions in one cause. *Mo.* 917.

(i) *Of the parties to the suit.*

1. Though the wife be sued singly in the spiritual court, yet both husband and wife must be joined in praying a prohibition. *Savil v. Kerby*, 10 Mod. 387.

2. In prohibition, either of the contend-

ing parties may be plaintiff. *Anon.* 12 Mod. 423.

(j) *Effect of death.*

A prohibition by husband and wife is not abated at common law by the death of the husband; and if it were, the action surviving, it was aided by statute 8 & 9 W. 3. c. 11. *Middleton v. Croft*, C. T. Hardw. 395.

(k) *How to be directed.*

Prohibition to the marches of Wales is directed to the party plaintiff there. *Anon.* 1 And. 279, 280.

(l) *Time for service.*

1. Where a rule to show cause for a prohibition is not served till after sentence, it is the same as if the motion had been after sentence. *Surlly v. York*, Andr. 7.

2. A prohibition granted before sentence, but delivered after, is a prohibition after sentence. *Chicken v. Dickson*, Comb. 448.

(m) *Relative to the suggestion for a prohibition.*

1. *When necessary.*

1. No prohibition lies to an inferior court without a suggestion. *Bishop v. Corbet*, 1 Lev. 253.

2. Though it appear on the face of the libel that the spiritual court has no jurisdiction, the court will not grant prohibition without suggestion. *Blaxton v. Honore*, 12 Mod. 435.

2. *How it should be.*

1. A prohibition may be granted on a suggestion on a matter which does not appear on the face of the libel. 11 Mod. 5.

2. Hearsay is a good surmise for a prohibition. *Webb v. Potts*, *Noy*, 44. Ib. 28.

3. A vicar libels for tithes; denying it to be a vicarage, is a proper suggestion for a prohibition. *Smith v. Waller*, 1 Ld. Raym. 587.

4. If an inferior court has cognizance of the action, a prohibition will not lie, on a suggestion that the cause of it arose out of the jurisdiction. *Anon.* 11 Mod. 132.

5. A suggestion that payment of tithes, legacy, &c. is in question, is not sufficient to have prohibition. *Anon.* 1 Ro. 12.

6. Nor that a party has only one witness to prove the thing in question. 1 Ro. 12.

7. A suggestion to prohibit the spiritual court from proceeding on a right to a pew in a church, must show whether the church was *representative* or *donative*. *Jacob v. Dallo*, 6 Mod. 230.

8. If a suggestion be founded on a charter, a profert of such charter is not necessary. *Sands v. Exton*, 2 Show. 303.

9. In a suggestion, &c. for words, it is not sufficient to say, that if the words were* spoken, they were [*1015] spoken in L. *Lutw.* [439.]

10. But where a prohibition is prayed for words spoken in London, on a suggestion of the custom, it is sufficient if it appears on

the libel (though not in the suggestion) that the words were spoken in *L. Surly v. York*, Andr. 7.

11. The suggestion is bad, if it is that the words were spoken "in St. Bride's in London, or the parts near adjacent." *Id. ibid.*

12. A prohibition cannot be granted upon a suggestion of merits, and also that the spiritual court refused a copy of the libel, for they are of different natures. *Anon.* 6 Mod. 308.

13. If one prescribe for two things in a suggestion for a prohibition, and fail in one, yet it is good for the other. *Case of Prohibition*, Yelv. 55, 128, 129.

14. If the suggestion be apparently vicious, the court overrules it, without putting the defendant to demur. *Slugge v. Bishop of Landaff*, 1 Leon. 181.

3. When amendable.

1. A suggestion is amendable. *Sands v. Exton*, 2 Show. 303.

2. But it cannot be amended after a prohibition granted. *Girton v. Gilder*, 2 Show. 97.

4. How given in.

The suggestion ought to be given into court by attorney. *Gerrard v. Sherrington*, 1 Leon. 286.

5. Of proving the suggestion.

1. The suggestion in the case of tithes, whether great or small, must be proved within six calendar months from the test of the prohibition. *Foy v. Lieter*, Salk. 554. *Leicester v. Foy*, 6 Mod. 261. *S. C. W. Jo.* 231. *Copley v. Collins*, Hob. 179. 1 Saund. 138. n. [e]. *Thomas v. Gifford*, 2 Show. 92. *Id.* 308.

2. The six months to prove a suggestion are to be reckoned only in term time, and not in vacation. *Mo.* 573.

3. The time for proving the suggestion (where the declaration is ordered to be amended), is to be computed from the amendment. *Mallon v. Acklom*, 2 Barnes, 345.

4. A suggestion in a prohibition to a suit for tithes, that it was barren land, lately enclosed, shall be tried by two witnesses. *Stroud v. Hoskins*, Cro. Car. 208.

6. When the suggestion is false.

No prohibition shall be granted where the suggestion appears to be false. *Bredon v. Gill*, 1 Ld. Raym. 220. 587.

(n) Relative to the declaration.

1. A declaration in prohibition, variant from the suggestion, is bad. *Harrow's case*; 7 Mod. 114.

2. The alleging, in the declaration, that the plaintiff in the spiritual court had proceeded there *contra formam prohibitionis*, is but a supposed contempt, and suggested only as a ground for a prohibition. 8 Mod. 3.

3. Where, in prohibition to a suit for a church-rate by churchwardens, the party

declared upon a custom relating to the proportion and manner of payment, it is necessary to show how the churchwardens are chosen. *Burton v. Wileday*, Andr. 32.

4. The delivery of the prohibition need not be averred, unless the proceeding is for damages. 1 Saund. 140. n. (3).

5. A surmise that the person was used to accept the tenth part of the corn which was made into sheaves, is bad. 1 And. 199.

6. A venue must be laid in a declaration in prohibition. *Anger v. Brown*, 2 Show. 146.

7. In an attachment on a prohibition where damages are given to the plaintiff, he ought to lay the venue where the suit in the ecclesiastical court was; otherwise the want of a venue hurts not. *Brogan v. Anger*, T. Raym. 387, 388.

8. It is error if the count vary from the suggestion. *Gomersall v. Bishopp*, 1 Leon. 128.

(o) Relative to a stay of proceedings.

After rule to declare, the defendant may submit and stay proceedings. *Gegge v. Jones*, Stra. 1149.

(p) Relative to the plea to a prohibition.

1. In prohibition, both parties are actors, and may take traverse upon traverse. *Fort.* 350.

2. A surmise that takes away jurisdiction* is traversable, ex- [*1116] cept where a *modus decimandi* is in question. *Wright v. Wright*, Cro. Eliz. 511.

3. The court will not compel the parties to take issue upon a suggestion for a prohibition, where, upon examination, they find it to be false. *Case of Bermondsey Church*, 2 Mod. 223.

4. In a suggestion in prohibition for tithes, if the plaintiff entitles himself by prescription under an abbot, and shows unity of possession by the 31 H. 8. c. 1, a plea that the abbey was founded within time of memory, confessing the unity afterwards, is good, for he need not traverse the prescription. *Snow and others v. Wiseman*, 2 Mod. 60.

5. In prohibition upon a prescription *de non decimando* by a spiritual man for temporal land, the defendant traverses that the spiritual judge did not refuse to accept his plea of *non decimando*; the traverse is void. *Mo.* 425.

6. Where in prohibition it is pleaded that three churchwardens are chosen for the parish, and that two are churchwardens for one vill, and the other for the other villa, this is consistent. *Burton v. Wileday*, Andr. 32.

6. Refusal of a plea is not traversable. *Statford v. Neale*, Stra. 483.

8. The court will direct a plea to a declaration in prohibition to be amended, in order to bring the question to be tried regularly

before the court. *Newson v. Bowdrey*, 7 Mod. 70.

(q) *Verdict and damages.*

1. In prohibition, the contempt is but form, and the jury need not give any verdict about it. *Stalford v. Neale*, Stra. 482.

2. The finding or not finding of such contempt is altogether immaterial. 8 Mod. 3.

3. If the plaintiff in prohibition will have any advantage of the defendant's proceeding below after a prohibition, this being matter of evidence, should be proved at the trial, and damages then insisted on for so doing. *Id. ibid.*

(r) *Relative to the consultation;—*

1. In what cases grantable.

1. If there is a declaration by him who sued out the prohibition, and no plea in due time, judgment may be by *nihil dicit*; but if on the other side, a consultation shall go. *Turner v. Reinier*, 12 Mod. 447.

2. Where a prohibition is founded on a prescription, and the defendant traverses the prescription, if the plaintiff demurs, a consultation shall go. *Jacob v. Dallois*, 2 Ld. Raym. 755.

3. Where a suggestion for a prohibition is not proved within six months, where it ought to be so, the party shall have a consultation without delay. *Anon. Com.* 147. *Foy v. Lister*, 2 Ld. Raym. 1172. *Gardner v. Booth*, 12 Mod. 196.

4. A subtracts tithes in one diocese, and removes into another, and being afterwards found in the first, is there cited, &c.; a consultation was awarded, for subtraction of tithes is local. *Salk.* 549.

5. In prohibition, if it appear that the right of tithes is in question, or that the prescription is not proved, a consultation shall go. *Sherburne's case*, Cro. El. 306.

6. On a suggestion in prohibition of a modus to pay so much a year to the parish clerk in lieu of tithes to the rector, a consultation shall be granted. *Savell v. Wood*, Cro. El. 71.

7. A consultation was granted, a donative being in question. *Quarles v. Fayrchild*, Cro. El. 653.

8. A consultation was granted for the probate of a will, *quoad bona*, where the will was of lands and goods. *Hill v. Thornton*, Cro. Car. 165, 166, 391, 395.

9. A consultation awarded *nisi* to prove a will of land and goods, where the land was charged with payment of certain legacies. *Netter v. Brett*, Cro. Car. 391.

10. In a suit for agistment of dry cattle, a consultation was granted. *Stratford v. Neal*, Fort. 350.

11. A prohibition had been granted upon a surmise that the plaintiff in prohibition had but one witness; a consultation was

granted. *Robert's case*, 12 Co. 63. Cro. Jac. 289. S. C.

12. A consultation was granted to the spiritual court for calling one witch and enchantress. 2 Leon. 53.

13. A consultation was granted because the prohibition was general, where* it ought to have been [*1117] special. *Man's case*, 4 Leon. 16.

14. Where a prohibition is granted upon a modus or custom that is void, and a verdict is given for the plaintiff, yet a consultation must go. *Startup v. Dodderidge*, 2 Ld. Raym. 1162.

15. Consultation, where granted in one court, for the same cause it shall be granted in another. *Lyss v. Watts*, Cro. Eliz. 277.

2. In what not.

1. On a prohibition to a suit for tithes of *wheat*, the land being suggested to be lately improved, and was so proved, but that tithes of *wool* and *lambs* had been always paid for it, though by the statute the same tithes continue payable for seven years, the parson cannot have a consultation, for he has not sued for these. 2 Dy. 170. pl. 5.

2. A consultation lies not to delegates on a *caveat*. 2 Keb. 392. pl. 80.

3. A consultation cannot be in a prohibition unless the defendant shows a right in himself. *Turner v. Gethin*, Gilb. Rep. 132. 2 Brownl. 38.

4. A consultation does not lie, though the *modus* is not proved. 2 Keb. 134. pl. 100.

5. Where in prohibition a *modus* is sufficiently found, the having stated it in the declaration as a custom for all tenants of a certain tenement to pay it instead of tithes will be sufficient, and no consultation can go. *Sharp v. Lenthal*, C. T. Hardw. 292.

6. A prohibition was obtained upon prescription *de modo decimandi*, by payment of a certain sum of money at a certain day; upon issue, the jury found, that the sum was payable at another day; held, no consultation shall be granted. 13 Co. 58.

3. At what time.

No consultation can be granted out of term. *Fuller's case*, 12 Co. 41.

4. What consultation should be granted.

1. The consultation must be according to the libel. *Hoskin's case*, Hob. 115.

2. If the libel be for all the tithes, and prohibition awarded for want of a writ to two parts, the parson cannot have a consultation for the third part, but must libel *de novo* for the third. *Semb.* Hob. 115. 300, 301.

3. Where the libel is entire, there no consultation can be awarded for part; *secus*, where it is several. *Trotter v. Loane*, Hob. 191. 300, 301. See also *Yelv.* 129.

4. The spiritual court proceeded against a parish clerk (appointed by the parson) to remove him, and to punish him for scanda-

lous crimes that are punishable by indictment; on a prohibition, a consultation was granted as to the removing him, and the prohibition stood as to the punishing him. *Townsend v. Thorpe*, 2 Ld. Raym. 1507.

5. A libel was in the disjunctive, that A occupied certain lands, or paid rent for them; yet, on prohibition, the defendants shall have a consultation in respect of such lands, which the said A, at the time of the tax, had in his own hands. *Jeffrey v. Kenchley and Forster*, 5 Co. b.

5. Effect of it.

1. A consultation after verdict in a prohibition is final. *Farmer's case*, Hob. 286.

2. The awarding a consultation not only avoids and sets aside the prohibition, but gives the plaintiff in the spiritual court leave to proceed there on his libel. 8 Mod. 3. 2 Keb. 404. pl. 17.

3. A consultation gives no new power to sue for any thing, but only to proceed on the very libel already exhibited. *Stratford v. Neale*, 8 Mod. 2.

4. Where there is a special consultation for heresy, schism, and erroneous opinions, &c., if the party be convicted and recant, he shall not be punished by ecclesiastical law. *Fuller's case*, 12 Co. 41.

(a) Effect of a nonsuit or retraxit.

One being nonsuited, or a retraxit entered, in prohibition, the other can proceed. Mo. 460.

(t) Costs.

1. Formerly, it seems, no costs were allowed in prohibition. *Anon.* Comb. 20.

2. Held, that damages and costs ought not to be taxed against a defendant, where the matter in a prohibition is found against him; though for a contempt in proceeding after prohibition, costs* and damages [*1118] ought to be assessed. *Ausgierv v. Brogan*, T. Jones, 128.

3. If the plaintiff in prohibition prevails in any part of his case, he shall have costs. *Middleton v. Croft*, Stra. 1062. C. T. Hardw. 395. Andr. 57. S. C.

4. He is entitled to costs from the original motion for the prohibition. S. C. C. T. Hardw. 395. Andr. 60, 61. *Sed vide Thompson v. Comfort*, Hob. 192.

5. On judgment by default in prohibition, the plaintiff shall have a writ to inquire of his damages, and his costs taxed from the time the rule for prohibition was made absolute. *Bettinson v. Henchman*, Ca. Prac. C. P. 20. *Bettinson v. Savage*, Com. 335. S. P.

6. The plaintiff is intitled to the costs, as well of the suggestion itself, as all subsequent costs. *Wills v. Turner*, Ca. Prac. C. P. 11.

7. A rule for a prohibition is discharged without costs. *Mills v. Gregory*, Keny. 134.

VIII. WHEN A SECOND PROHIBITION MAY BE OBTAINED.

1. A second prohibition is not, in general, grantable after a consultation. *Anon.* 2 Vent. 47.

2. But if a consultation be unduly obtained, as on proceedings by bill in equity, a second prohibition may be awarded. *Sibley v. Crasley*, Cro. Eliz. 736.

IX. EFFECT OF A PROHIBITION, AND CONSEQUENCES OF DISREGARDING IT.

1. There are two things in prohibition; contempt of the crown, and disherison of it. *Ede v. Jackson*, Fort. 345.

2. If, after prohibition granted, defendant libels another for the same cause mentioned in the suggestion, attachment lies. Mo. 599.

3. So upon the person libelling *de novo* for the same cause. 1 Leon. 111.

4. An attachment was granted against the chancellor for proceeding after prohibition. *Dr. Weinright's case*, T. Jones, 47.

5. If granted, and the party still prosecutes his suit in the spiritual court, he shall pay damages and costs for his contempt. *Facy v. Lange*, Cro. Car. 559.

6. A recovery of damages in an action *per prohibition* is no answer to an action on the stat. 2 Hen. 4. c. 11. for double damages, and 10*l.*, for suing plaintiff in the admiralty court. *Smith q. t. v. Gibson*, C. T. Hardw. 317.

PROMISE.

I. WHAT PROMISES ARE GOOD, p. 1118.

II. HOW A PROMISE SHOULD BE PERFORMED, p. 1119.

III. HOW A PROMISE MAY BE DISCHARGED, p. 1119.

IV. PLEADING, p. 1119.

I. WHAT PROMISES ARE GOOD.

1. Where the doing of a thing will be a good consideration, the promise to do it is also good. *Thorpe v. Thorpe*, Com. 99.

2. An *assumpsit* to pay for a horse a barley-corn a nail, doubling every nail, is good. *James v. Morgan*, 6 Mod. 305.

3. So, a promise to deliver a grain of rye on Monday, and an additional two grains, in arithmetical progression, on every Monday during the year. *Thornborough v. Whitacre*, 6 Mod. 305. 2 Ld. Raym. 1164.

4. A promise to pay so much, when JS comes from Rome, is good; and it ought to be paid in a convenient time after his return. *Spanish Ambassador v. Gifford*, 1 Ro. 336.

5. If a person promise to pay a sum of money, in which he and another person were indebted, it is good, although not in writing. *Stephens v. Squire*, 5 Mod. 305.

6. An agreement that a man shall enjoy certain lands which are in his possession, and charged with an annuity to a third person, without molestation from the annui-

tant, is not a sufficient consideration for a promise. *Strong v. Courtney*, 6 Mod. 266.

7. If A is about to hire a horse from B, and C, in order to encourage B [*1119] to lend the horse, say, "let A have the horse, and I undertake that he shall re-deliver it to you safely," this is a collateral promise within 29 Car. 2. c. 2. s. 3., and void, it not being in writing. *Buckmere v. Darnell*, 6 Mod. 249.

8. Where the original security is void, a promise founded on that security is void also. 2 Saund. 137 d. n. [6]. *Cockshott v. Bennett*, 2 T. Raym. 763. *Norman v. Beaumont*, Willes, 484. n. (1).

II. HOW A PROMISE SHOULD BE PERFORMED.

1. If a promise to give B as much as he gives to any of his sons, it is not performed by making B his executor. *Shipston v. Booler*, 1 Sid. 25.

2. In an action on the case upon a mutual agreement, the evidence was, a note;—"brought by A R of H 100 pieces of muslin, at 40s. per piece, to be fetched away by ten pieces at a time, and to be paid for as taken away;" held, that by sealing and marking the pieces the property is altered, and that they remain only a security for the money; and that, if they are not taken away in a reasonable time, the party may have an action for his money, but may not sell the goods; and though there be no actual promise to deliver the goods, yet, they being to be paid for when taken away, this implied a promise to deliver them. *Knight v. Hopper*, Skin. 647.

3. Upon *assumpsit* of a surrender to be made, the surrender must be by deed. *Sleigh v. Bateman*, Cro. Eliz. 488.

III. HOW A PROMISE MAY BE DISCHARGED.

1. A promise before breach may be discharged by parol. *Cook v. Newcomb*, T. Raym. 42. 1 Keb. 158. pl. 105. 2 Mod. 259.

2. But if it be once broken, then it cannot be discharged without a deed or release in writing. *Milward v. Ingram*, 2 Mod. 44.

3. Or by satisfaction. *May v. King*, 12 Mod. 538.

4. In *assumpsit* on a promise to pay five pounds, in consideration of exchanging horses, the defendant cannot plead a parol discharge. *Edwards v. Week*, 2 Mod. 259.

5. Where a promise is made in consideration of something to be done by the promiser, who fails therein, the promise is discharged. *Thornton v. Kemp*, Cro. Eliz. 477.

IV. PLEDGING.

If there be a promise to perform two things, and one is performed, and an action brought for the non-performance of the other, it is not sufficient for the declaration only to mention the latter. *Beresford v. Goodrouse*, 1 Ro. 356.

[See further *ante*, tit. ASSUMPSIT. div. IX. p. 115, &c.]

PROMISSORY NOTE.

1. Promissory notes, payable to such a one, or order, are transferable by indorsement, by virtue of stat. 3 & 4 Ann. c. 9.; and the indorsee may maintain an action. 10 Mod. 353.

2. The indorsee sued the drawer upon a note, by which he promised "to account with J S, or his order for 50*l*. value received;" and held good upon the said statute. *Morrice v. Lee*, 8 Mod. 362.

3. An action of *assumpsit* could not be maintained upon a promissory note by the custom of merchants before the statute. *Cutting v. Williams*, 1 Salk. 24.

4. In an action on a promissory note against the drawer, the plaintiff need not allege notice to the defendant of the indorsement. *Lawrence v. Jacob*, 8 Mod. 43.

5. A note was given in part of payment of money on a Saturday, and not offered to the drawer until the Monday following; this is no new credit given to the drawer, but the indorser is still liable. *Mead v. Caswell*, 9 Mod. 60.

[See *ante*, tit. BILL OF EXCHANGE and PROMISSORY NOTE, Vol. I. p. 224.]

PROOF.* [*1120]

1. Where no defence is made, the courts at law take the matter *pro confesso*, and give sentence for the plaintiff, without obliging him to prove the truth of his case. *Bow v. Jurat*, 10 Mod. 440.

2. The same practice in the court of Chancery. *Anon.* 10 Mod. 431.

3. But it is otherwise in the spiritual court, where proof is required. *Bow v. Jurat*, 10 Mod. 440.

[See *ante*, tit. EVIDENCE.]

PROPERTY.

1. Possession alone is *prima facie* evidence of property. 2 Saund. 47 c.

2. A right of property may be either absolute or special; either is sufficient to maintain trover. 2 Saund. 47 a.

3. A special property may arise from bailment, as where goods are hired by a lodger. J. Kely. 24. 2 Saund. 47 b.

4. A employs his father to buy goods for him, which he does, and pays part of the money; the property is in the father, and a bill of sale to the son in his name, made some time afterwards, will not divest the property. *Anon.* 12 Mod. 344, 345.

5. A man cannot relinquish his property in goods unless they be vested in another. *Hayne's case*, 12 Co. 113.

6. By receiving money and putting it into a bag, the property is altered, and detainue will lie for it. *Carter v. Shepherd*, 12 Mod. 189.

7. If one throws grain into my corn, I can take away the whole. *Ward v. Eire*. 1 Ro. 133.

8. By bill of lading, the property is assigned, and the possessor may bring an action, and the invoices signify nothing. *Evans v. Martell*, 12 Mod. 156.

9. Earnest does not alter the property, but only binds the bargain. *Anon.* 12 Mod. 349.

10. The property of chattels draws to it the possession. 2 Saund. 47 a.

11. The property of goods forfeited by act of parliament is vested in the informer by bringing the action, even before the seizure. *Roberts v. Wethered*, 5 Mod. 194.

12. After judgment upon an information of seizure of goods as forfeited, the property is divested out of the first owner. *Martin v. Welford*, Carth. 323.

13. If a ship be taken by letters of mart, and is not brought *infra præsidia* of the king, who granted them, the property is not altered. March, 110. pl. 118.

14. By the laws of France and Spain, a continuance in the possession of the enemy for twenty-four hours is an alteration of property; and so also by the old English law; but now, neither our law, nor the *jus gentium*, allows the possession of the enemy to introduce any alteration of property, before such a time as they are carried *infra præsidia*. *Assiervedo v. Cambridge*, 10 Mod. 78, 79, 80.

15. A ship was taken by the French in 1697, off Yarmouth, carried into Northbergen, then sold to A, and afterwards to B, who sent her to the West Indies, afterwards to France, and in 1695, to England; where, she being re-taken, it was resolved by the court of admiralty, that the property had not been altered. *East India Company v. Sands*, cited 10 Mod. 79.

16. A man has property in animals, which are *feræ nature*, found on his lands, *ratione loci*. *Sutton v. Moody*, Com. 33. 12 Mod. 144. S. C. Salk. 559.

17. A man may have a property in a dog. 3 Salk. 140.

18. Every one who has swans within his private waters has property in them. 7 Co. 15 b.

19. So one who has *libera piscaria* has property in the fish. (Co. Litt. 122. denied). Salk. 637. lb. 35. March, 48, pl. 77.

20. None can have a property in deer, unless reclaimed. *Mullocks v. Eastly*, 3 Lev. 227.

21. In trover for a hawk, if he does not say that it was reclaimed, the action will not lie, for it does not appear he had a property in it; and to say that he was possessed of it, *ut de bonis suis propriis*, will not help it. March, 12, pl. 32.

22. If a man start game in his own ground,

and kill it in another's, it is his by reason of the first starting. *Sutton v. Moody*. 12 Mod. 145.

23. A sale in a market overt of [*1121] a horse stolen does not alter the property, unless the direction of the stat. 31 Eliz. is strictly pursued. *Barker v. Reding*, W. Jo. 163.

24. By the last clause of the statute, the owner may recover it back, upon repaying the money for which the horse was sold within a convenient time. W. Jo. 164.

25. Sale of goods in a shop out of London does not alter the property, nor even there, if the felon be convicted on the owner's evidence. *Anon.* 12 Mod. 531.

26. The property taken by pirates is altered by a sale in market overt *bona fide*. Hob. 79.

PROTESTATION.

1. A protestation is of two sorts; 1st., to avoid duplicity in pleading; and the adverse party cannot traverse matter thus protested; 2ndly, to avoid being concluded by the matter so denied by protestation. 2 Saund. 103.

2. It may be taken in a replication. 2 Saund. 103.

3. A protestation must not be repugnant to, or inconsistent with, the plea containing it. 2 Saund. 103.

4. A protestation in a plea contrary to judgment of law is void. Hob. 156.

5. No matter that is material, traversable, or pleadable, can be taken by protestation. 2 Saund. 104.

6. That which is the ground of the party's suit cannot be taken by protestation. 2 Saund. 103 a. *Yelding v. Fay*, Mo. 356.

7. It is perfectly inoperative in the pleading into which it is introduced. 2 Saund. 103 a. *Crispe v. Belwood*, 3 Lev. 495.

8. It is of no service to the party that takes it, if the issue be found against him, unless it be of matter which cannot be pleaded, or on which issue cannot be joined. 2 Saund. 103 a. 103 b. 104.

9. A protestation, if idle or superfluous, or repugnant, may be shown for cause of demurrer, but does not vitiate the plea. 2 Saund. 103 a.

PROTHONOTARY.

1. A clerk of the prothonotary is entitled to no privilege as a defendant, but only to an attachment. *Kempfield v. Moore*, Andr. 46.

2. The clerks of a prothonotary of C. B. not actually serving as such, are not entitled to any privilege. *Payne v. Fry*, Stra. 546.

PUIS DARREIN CONTINUANCE.

I. WHAT MATTERS ARE PLEADABLE PUIS DARREIN CONTINUANCE, p. 1121.

II. WHAT MATTERS ARE NOT SO PLEADABLE, p. 1122.

III. AT WHAT TIME PLEADABLE, p. 1122.

IV. HOW THE PLEA SHOULD BE, p. 1122.

V. EFFECT OF SUCH PLEA, p. 1122.

VI. PROCEEDINGS SUBSEQUENT TO THE PLEA, p. 1122.

I. WHAT MATTERS ARE PLEADABLE PUIS DARREIN CONTINUANCE.

1. One may plead puis darrein continuance that the plaintiff has brought a second action and recovered, though the second action may be abateable. *Anon.* Comb. 357.

2. If the plaintiff die between the day of *nisi prius* and the day in bank, the fact must be pleaded puis darrein continuance. *Fox v. Tilly*, 6 Mod. 225.

3. Where, in debt against one as executor, defendant pleads a retainer, and plaintiff replies that he is executor *de son tort*, the defendant may rejoin, that after the last continuance he has taken out administration, and this is no waiver of the former plea. *Vaughan v. Brown*, 7 Mod. 274. Andr. 328. S. C.

4 In the same case it was held the plaintiff might have put in issue any part of the first plea or rejoinder. S. C. Andr. 332.

5.* A promissory note given [*1122] by a plaintiff to a defendant before an original sued out, but not due till afterwards, cannot be pleaded as a set-off in bar of the plaintiff's action, but must be pleaded puis darrein continuance. *Pilgrim v. Kinder*, 7 Mod. 463.

II. WHAT MATTERS ARE NOT SO PLEADABLE.

1. A matter in *esse* at the time of the first plea cannot be pleaded puis darrein continuance. *Vaughan v. Browne*, Andr. 332.

2. So if the non-existence thereof was owing to the party. *Id. ibid.*

3. A plea puis darrein continuance cannot be received contrary to an implied admission in the former plea. *Sparkes v. Crofts*, 1 Ld. Raym. 266.

4. A marriage before the last continuance day cannot be pleaded in a plea of puis darrein continuance. *Wilson v. Wymonsold*, Bay. 268.

III. AT WHAT TIME PLEADABLE.

1. The defendant cannot plead a release made after verdict and before judgment, because he has no day in court. *Coll v. Bishop of Coventry*, Hob. 162.

2. After demurrer joined in debt by an administrator, the defendant cannot plead a repeal of the administration after the last continuance; otherwise after issue joined. Mo. 871.

3. But in general a plea may be pleaded puis darrein continuance of a demurrer as well as after issue. *Stoner v. Gibson*, Hob. 81. *Luddington v. Kime*, 1 Ld. Raym. 266. *sem.*

4. A plea after the last continuance was

admitted a week after the term begun. *Parsons v. Franklin*, T. Jones, 129.

IV. HOW THE PLEA SHOULD BE.

1. In debt on bond, payment of part and an acquittance puis darrein continuance, may be pleaded in bar to that part of the demand, but not in abatement. *Pearce v. Packstone*, 12 Mod. 541. 1 Ld. Raym. 691. S. C. Holt, 560.

2. But not so in contract, because it may be given in evidence. *Pearce v. Packstone*, 12 Mod. 542.

3. A plea of a release puis darrein continuance should say *actio non* and not *inquisitio non*. 3 Dy. 361. pl. 10.

4. A plea puis darrein continuance must be verified on oath. *Lovel v. Elstoft*, 2 Mod. 307. *Martin v. Wyvill*, Stra. 493.

V. EFFECT OF SUCH PLEA.

1. A plea puis darrein continuance, inconsistent with the first, is a waiver of it. *Vaughan v. Brown*, Andr. 332. *Barber v. Palmer*, 1 Ld. Raym. 693.

2. So if in the last plea the words are *relicta verificatione*. Andr. 332.

3. If after the issue joined the defendant pleads a plea in abatement puis darrein continuance, this is peremptory, as well upon demurrer as by verdict. *Beaton v. Forrest*, Aleyn, 66.

VI. PROCEEDINGS SUBSEQUENT TO THE PLEA.

1. If issue or demurrer be joined upon a plea pleaded puis darrein continuance of a demurrer, yet the court must consider of the first demurrer; but if the first plea had been to issue, the second plea or demurrer had waived it. *Stoner v. Gibson*, Hob. 81.

2. A plea puis darrein continuance pleaded at the assizes, and demurred to, cannot be tried there, but must be certified by the judge of assize to the superior court, as part of the record of *nisi prius*. *Abbot v. Rudgeby*, 2 Mod. 307.

5. A plea puis darrein continuance when verified by oath cannot be refused by the court. *Lovel v. Elstoft*, 2 Mod. 307. cited.

PURCHASE AND PURCHASER.

1. A purchase is always intended by title, therefore a disseisin no purchase. Plow. 47.

2. When the heir takes by purchase, the ancestor must part with his whole fee. 2 Mod. 208.

3. A grant to a man, by the name of knight, who was only an esquire, or to knight by the name of esquire, is void.* *Rex v. Bishop of Chester*, [*1123] 12 Mod. 185. 1 Ld. Raym. 303. S. C.

4. In all leases, deeds, &c., by a corporation, their true name of creation ought to be put in the deed. 1 And. 196. 202 to 219. 248, 249.

5. To "the two best men of a corporation," is not a good name of purchase. 2 And. 12.

6. A grant to a man by a wrong name may be good, *si constat de persona*; but the *demonstratio personæ* must appear upon the face of the grant. *Rez v. Bishop of Chester*, 1 Ld. Raym. 304.

7. None but *bona fide* purchasers, for a valuable and not inadequate consideration, can take advantage of the statute 27 Eliz. c. 4. *Twyne's case*, 3 Co. 80 b.

8. Where a person knowing his own title, does not give notice of it to a purchaser, he shall never set it up against the purchaser. *Savage v. Foster*, 9 Mod. 35.

9. Purchasers under a consor are contributory to the charge as between themselves, and are entitled to contribution from the consor and his heirs. *Harbert's case*, 3 Co. 11 b.

QUAKER.

1. The statute 7 & 8 W. 3. c. 34. admits quakers to make affirmation instead of oath, provided it be not to bear any office or place of profit in the government, and therefore a quaker may be admitted to his freedom on his affirmation. *Rez v. Mayor of London*, 5 Mod. 403. *Morris v. Mayor of Lincoln*, 12 Mod. 190. *Rez v. Maurice*, Carth. 448.

2. But on demanding surety of the peace, he must take the usual oath. *Hilton v. Byron*, 12 Mod. 243.

3. He is no witness in an appeal of murder. *Castell v. Bambridge*, Stra. 856.

4. A quaker may be indicted for keeping open shop on a fast day ordained by proclamation. *Anon.* 6 Mod. 210.

5. Quakers are suable in the spiritual court for tithes or repairs of a church, though a statute gives a remedy before justices of peace. *Screen v. Cockernutt*, Fort. 347.

[See also ante, tit. AFFIRMATION, Vol. I. p. 44.]

QUARE IMPEDIT.

I. WHEN IT LIES, p. 1123.

II. WHEN NOT, p. 1124.

III. PROCEEDINGS IN THE SUIT;—

(a) *Of the parties*, p. 1124.

(b) *Process*, p. 1125.

— (c) *Where it should be brought*, p. 1125.

(d) *Relative to the declaration*, p. 1125.

(e) *What abates the writ*, p. 1126.

(f) *When the writ may be amended*, p. 1127.

(g) *Effect of outlawry of the plaintiff*, p. 1127.

(h) *What may be pleaded*, p. 1127.

(i) *Of the replication*, p. 1128.

(j) *Verdict and judgment, &c.; and herein of the writ to the bishop*, p. 1128.

(k) *When damages and costs are recoverable*, p. 1129.

1. WHEN IT LIES.

1. Quare impedit will lie of a church in ancient demeane. *Cox v. Bransly*, Hob. 48. 335.

2. If the bishop collate before lapse, the true patron may have his quare impedit, or present upon him seven years after if he will. *Holland v. Shirley*, Hob. 302. 339.

3. It may be brought by executors to remove a clerk collated wrongfully in the lifetime of the testator. *Rez v. Bishop of Coventry*, 4 Leon. 15. 1 And. 141.

4. The patentee may maintain a quare impedit upon the very first disturbance, if it be expressly mentioned in the grant, notwithstanding it be a thing in action. *Earl of Bedford v. Bishop of Exeter*, Hob. 140.

5. Disturbance is necessary to maintain the action. Hob. 137.

6.* By 7 Ann. c. 18., no usurpation shall displace the interest [*1124] of any person entitled to an advowson, but such person may present or have quare impedit. 1 Mod. 256 *notis*.

7. If after presentment by a stranger, the king grant the manor with the advowson, the patentee may have a quare impedit, and make his title by the last presentment of the king, without mentioning the presentment of the stranger. *Anon.* Hob. 140.

8. A has the nomination, and an abbot the presentation, to a church; the king comes to the possession of the abbacy, and presents without nomination; quare impedit lies against the incumbent only, without naming the king. 1 Dy. 48. pl. 17.

9. If an executor of the grantee of the next avoidance grant it over, his grantee may maintain quare impedit without a proffer of the will. 2 Dy. 135. pl. 13.

10. Incumbent being in by usurpation, cannot be removed without a quare impedit. *Rez v. Bishop of Norwich*, 1 Ro. 236.

11. A presentation by the grantee of the next avoidance is a sufficient title for the heirs of the grantor; the co-heirs need not allege any presentment by their ancestor. *Countess of Northumberland's case*, 5 Co. 97. b.

12. So also of lessee for years, for life, tenant in dower, by the curtesy, &c. *Id.* *ibid.*

II. WHEN NOT.

1. When the patron has presented one incumbent, and the university presented another after, the bishop has election to take one presentee or the other, and if the bishop admits and institutes the presentee of the university, the patron cannot maintain a quare impedit, because there was no disturbance. *Fitzherbert v. Rervee*, Com. 169.

So after an assize of *darrein presentment* purchased, if a quare impedit be brought for the same avoidance, the assize abates. *Andrews v. Bishop of York*, Hob. 184.

3. None can have a *quare impedit presentate ad medietatem ecclesie*, but only when

there are two several patrons and two several incumbents of the church within one and the same town. *Smith's case*, 10 Co. 135 b.

III. PROCEEDINGS IN THE SUIT;—

(a) *Of the parties.*

1. Tenants in common and joint-tenants must join in the writ. *Reynoldson v. Blake*, 1 Ld. Rym. 197. 2 Saund. 116 b.

2. But if two joint-tenants of an advowson make partition to present by turns, and one grants over his share, the grantee may alone bring quare impedit. *Phillips v. Bishop of Salisbury*, 12 Mod. 321, 322.

3. No incumbent shall be removed by the statute West. 2. by quare impedit or assize of *derrein presentment* purchased within six months, unless the incumbent be named in the writ. *Boswell's case*, 6 Co. 51 b. 52 a.

4. The patron must not of necessity be named in the writ. *Hall and Bishop of Bath's case*, 2 Leon. 58.

5. When, by the judgment in a quare impedit, the inheritance, estate, or interest of the patronage is to be divested, he who presented (and his clerks received) ought to be named in the writ; but when the inheritance, estate, or interest of the patron shall not be divested by the judgment, then, if another disturber be named in the writ, it is not necessary to name the rightful patron. *Hall v. Bishop of Bath*, 7 Co. 25 b.

6. Although the bishop claims nothing but an ordinary, yet he shall join in the quare impedit. *Bishop of Gloucester and Savacre's case*, Cro. Eliz. 65.

7. Though one be in by wrongful collation, yet the bishop is such an incumbent as must be named by the patron in his quare impedit. *Holland v. Shelley*, Hob. 302.

8. A quare impedit by the king against the incumbent, to present by reason of simony in the incumbent, need not make the patron a defendant. *King v. Souton*, 2 Show. 167. *King v. Bishop of York*, 3 Lev. 16.

9. In quare impedit, the patron's not being made a party to the writ is not error. *Henslow v. Bishop of Sarum*, 1 Dy. 76. pl. 34.

(b)* *Process.*

[*1125] 1. The old writ of quare impedit is now out of use, and what is at present called by that name is the writ of *quod permittat*. *Rex v. Bishop of Meath*, 10 Mod. 311.

2. The common law process in quare impedit is summons, attachment, and distress infinite; and if the defendant do not appear, or cast an essoin, there shall be judgment for the plaintiff; but unless the defendant be personally served with the summons, and good and not nominal summoners be returned by the sheriff, a judgment by default shall be set aside. *Searl v. Long*, 1 Mod. 248. 2 Mod. 264, 265. S. C.

3. By the statute Marlbridge (52 Hen. 3. c. 12.) it is enacted, "that in a plea of quare

impedit, if the disturber come not at the first day that he is summoned, nor cast an essoin, then he shall be attached at another day; at which day if he come not, nor cast an essoin, he shall be distrained by the great distress; and if he come not then, by his default a writ to the bishop of the same place shall go that the claims of the disturber for that time shall not be prejudicial to the plaintiff, saving to the disturber his right at another time when he will sue for it; and the same law shall be observed in all writs where attachments lie, as in making disturbance, so that the second attachment shall be made by better pledges, and afterwards the last distress. *Scwel v. Long*, 2 Mod. 265.

4. When the register gives a writ for the whole, it is a sufficient warrant to bring it for any part, if the cases will warrant it. *Smith's case*, 10 Co. 135 b.

5. In case of a prerogative turn the writ is general *quas ad nostram spectat donationem*. *Snow v. Firebrass*, Salk. 556.

(c) *Where it should be brought.*

1. A quare impedit must be brought in the county where the cathedral church is, though the advowson itself be in another county. *Merrick's case*, 2 Dy. 194. pl. 33.

2. A quare impedit lies in the Common Pleas here for an advowson in Wales. *Buckley v. Rice*, Plow. 129.

3. All quare impeditis for disturbance to churches within the lordships marches of Wales, shall be brought in England in the next adjoining county. Vaugh. 409, 410.

(d) *Relative to the declaration.*

1. Quare impedit is a possessory action, in which the plaintiff must always declare upon his possession. *Anon.* 3 Salk. 293.

2. In a quare impedit, the plaintiff must allege a presentation in himself, or in those under whom he claims. *Tyfton v. Sir R. Temple*, Vaugh. 7, 8, 57.

3. So likewise must the defendant; being both actors. Vaugh. 7, 8, 57. 60.

4. The plaintiff and defendant are actors one against another, if they are both out of possession. *Rex v. Bishop of Meath*, 10 Mod. 309.

5. But if the defendant be in possession, he is not obliged to make a title, or become actor. 10 Mod. 309.

6. In quare impedit, by one claiming for life under a will, a presentment by the devisee for life himself is sufficient, and a presentment need not be alleged in the deviser. *Specot v. Bishop of Exeter*, 5 Co. 57 a.

7. Presentment alleged in lessor or donor, and also in lessee or donee, is not double; the presentment of the lessor or donor only is traversable. *Countess of Northumberland's case*, 5 Co. 97 b. Cro. Eliz. 518. Moore, 455. 2 And. 48. S. C.

8. It is sufficient title to allege a presentment in the grantee of a next avoidance of

the ancestor, without alleging a presentment in the ancestor himself. *Mo. 455.*

9. It is not necessary for the tenant of a particular estate, in pleading, to show the presentment of the grantor. *Smith v. Wilson, 1 And. 190.*

10. The plaintiff never declares of a presentment without more, but always lays a seisin of some estate or other; yet a presentment of itself both makes and proves a fee. *Digby v. Fitzherbert, Hob. 102.*

11. It is generally necessary for the crown to allege a presentation in a quare impedit as well as a subject; but the want thereof may be cured by a verdict, finding that [*1126] the crown was seised* in fee ut de uno grosso. *Rex v. Bishop of Landaff. Stra. 1006.*

12. Setting out a *commendam retinere* does not amount to such an allegation. *Id. ibid.*

13. Where one presents by usurpation, it ought to be surmised that he was seised of it in gross, although in truth it be appendant. *King v. Dare, 1 And. 301, 302.*

14. The constant count in a quare impedit is to allege seisin generally; the time of seisin is immaterial; and if it be not material, the not denying of it is no admission, for non-denial is only an admission of things materially alleged. *King v. Bishop of Chester, Skin. 660.*

15. In quare impedit, it is sufficient for the grantee in fee of the patron to allege a presentation by a prior grantee of the next avoidance. *2 Dy. 106, pl. 18.*

16. The plaintiff makes title by devise and assent of the executor, and says not *virtute legationis*, yet it is good. *Bishop of Gloucester v. Veal, Cro. Eliz. 678.*

17. The plaintiff may lay the presentment in a grantee. *Fitton v. Hall, Cro. Eliz. 518.*

18. If the count alleges a presentation of A by the king, and admission and institution accordingly, and that the church is void by the death of A, it is good, without saying that A was inducted. *Gyles v. Colahill, 3 Dy. 360, pl. 7.*

19. In quare impedit for a united church, after the patron has had a presentation, he may declare that he was seised of every second turn as in gross. *Reynoldson v. Blake, 1 Ld. Raym. 200.*

20. The king may allege two presentments or two matters in bar, and his count shall not be double. *Plow. 243.*

21. The writ was *ad ecclesiam*, and the declaration was *de advocacione duorum partium*; yet held well. *Windsor's case, 5 Co. 102 a. Cro. Eliz. 680. Moore, 558. S. C.*

22. If the plaintiff declares that W T was seised of a manor *ad quod advocatio medietae, &c., pertinuit et adhuc pertinet, &c.*, it implies two several patrons and two incumbents. *Smith's case, 10 Co. 135 b.*

23. The plaintiff may declare upon an agreement by indenture to present by turns;

such composition or agreements may be made by record, by deed, or by parol. *Bishop of Salisbury v. Philips, 1 Salk. 43. Carth. 505. S. C.*

24. If an agreement between tenants in common to present by turns be once executed, in quare impedit afterwards brought amongst them, the agreement need not be shown. *Anon. 1 Dy. 29, pl. 194.*

25. To present to the hospital or parish church of B, is good in the disjunctive. *William v. Bishop of Lincoln, Cro. Eliz. 791.*

26. Plaintiff claiming under a grant from one who had two parts of the advowson appendant to a manor, (a stranger having the third,) need not show how the grantor's term commences, for the appendancy shows it to have been by prescription. *Eveleigh v. Turner, 3 Dy. 299, pl. 32.*

27. If a man get a fee by presentation, and make that his title in a quare impedit, he must allege it to be *tempore pacis*; but if the title be by reason of his being seised of a manor to which the advowson is appendant, it is not necessary. *Stroud v. Bishop of Wells, 1 Mod. 230. Stroud v. Horner, 2 Mod. 185.*

28. It is sufficient to lay a seisin *tempore pacis tempore domini regis*. *Rex v. Bishop of Chester, 2 Salk. 561. 1 Ld. Raym. 292. S. C.*

29. Subscribing the articles need not be alleged in quare impedit, either in the declaration or plea. *Rex v. Whaley, Stra. 843.*

30. When brought by the king, he must declare *ad damnum*. *Hob. 23.*

31. The omission *inde producit sectam*, may excuse the defendant from answering. *Rex v. Bishop of Meath, 10 Mod. 310, 311.*

32. But it is not assignable for error after he has answered. *Id. ibid.*

33. When the count is ill, an exception comes too late after the vacancy has been admitted by pleading a presentment under it. *Id. ibid.*

(e) What abates the writ.

1. If the writ be purchased against two, pending a *formedon* against one of them, it abates, though the plaintiff declare* of a new disturbance. *Earl [*1127] of Bedford v. Bishop of Exeter, Hob. 137, 138.*

2. If two bring quare impedit, and they vary in the title, the writ shall abate. *Mo. 184.*

3. It will abate, if it appear, of the plaintiff's own showing, that the church is full of his presentation. *Hutton's case, Hob. 15.*

4. If one of several plaintiffs die before judgment, the writ will not abate, on account of the mischief from lapse. *Mo. 455. 2 Saund. 72 g. S. P.*

5. So, for danger of a lapse, there can be no vouching in it. *2 Saund. 116 b.*

6. If a parcener, being a feme covert, die before judgment, the writ to the bishop may

issue for the husband and the other parsoners. *Mo. 455.*

7. If four parsoners of an advowson bring a quare impedit, and one releases after the last continuance, the writ shall not abate, but there shall be summons and severance, and the others may proceed. *Mo. 455.*

8. A square impedit without naming the patron is not abateable without plea. *Falm. 309.*

(f) *When the writ may be amended.*

The writ may be amended by inserting the word "*ad.*" *Rookesby's case, Cro. Eliz. 119.*

[*See also ante, tit. AMENDMENT, div. (a), Vol. I. p. 62.*]

(g) *Effect of outlawry of the plaintiff.*

1. In quare impedit, if the plaintiff be outlawed pending the writ, that outlawry gives the king the title. *Fitzherbert v. Reeves, Com. 178.*

2. But on reversing the outlawry, the plaintiff shall have execution of his judgment, and the king's incumbent shall be removed. *Fitzherbert v. Reeves, Com. 179.*

(h) *What may be pleaded.*

1. In all quare impedit, the defendants may traverse the presentation alleged by the plaintiffs, if the matter of fact will bear it. *Tufton v. Temple, Vaugh. 16, 17.*

2. But the defendant must not deny the presentation alleged, where there was a presentation. *Id. ibid.*

3. The bishop can never counterplead the plaintiff's title, without making a title to himself, either as patron or by lapse; for otherwise he has nothing but to grant institution. *Anon. 3 Salk. 293.*

4. In a quare impedit by the chancellor and university, it is a good bar, that before the avoidance the manor was seised into the king's hands for the penalty of 20*l.* a month. *Chancellor of Cambridge v. Waldegrave, Hob. 126, 127.*

5. In a suit by four, a release by one is a bar only as against himself, and does not bar the others. *Fitton v. Hall, Cro. Eliz. 518. 2 And. 49.*

6. It is no bar that a lapse is devolved to the king, who presented defendant during the writ, for the plaintiff complains of a disturbance before the writ. *Stanley v. Chaffin, 1 And. 238, 239.*

7. The declaration having set forth that P, the late archbishop, was seised as of fee (in right of his archbishoprick) of the advowson of the church of A, &c., and the archbishop in his plea admits this seisin, and a vacancy by promotion as alleged in the declaration, but insists that the crown by patent granted to D the deanery of A, with all its rights, members, &c., by virtue whereof he was possessed of the church of A, as a member of the deanery, &c., this is bad, as it neither shows a presentation, nor that the

church was a member of the deanery. *Rex v. Whaley, Stra. 837.*

8. Before induction, the clerk cannot plead his patron's title to the advowson. *Battaile v. Cooke, 1 Dy. 1. pl. 8.*

9. The incumbent cannot bar the plaintiff in a quare impedit, by entitling any other than the patron under whom he claims. *Elvis v. Bishop of York, Hob. 319.*

10. In quare impedit, the bishop pleaded that he claimed nothing but as ordinary, and it was holden bad, for want of alleging notice of the refusal, though in a case where the crown presented. *King v. Bishop of Hereford, Com. 358.*

11. In quare impedit brought by the king, it is no plea to say that he has another quare impedit pending for the same church. *Rex v. Webbe, 2 Ro. 109.*

12. It is no plea that incumbent has resigned* pending suit. [*1128] *Beverly v. Cornwall, 1 And. 179, 180.*

13. Nor that incumbent was an inveterate schismatic. *1 And. 189, 190.*

14. In a quare impedit, the seisin is not traversable, but the presentment is. *King v. Bishop of Chester, Skin. 657.*

15. Plenarity is no plea against the king, queen, and the bishop of York. *1 Leon. 226. Rex v. Archbishop of Armagh, 8 Mod. 8.*

16. A plea that the bishop refused the clerk *quia minus sufficiens in literatura* was adjudged ill in C. P., being too general, and that judgment was affirmed on error in K. B.; but both the judgments were reversed in the house of lords. *Hele v. Bishop of Exeter, 3 Lev. 313. Lutw. [451]. S. C.*

(i) *Of the replication.*

1. If the king suggests a title, and the defendant makes title, and traverses the king's title, the king in his replication must maintain his own title suggested in the declaration, for it is not sufficient for him to traverse and destroy the title made by the defendant. *Rex v. Hinkley, &c. 1 Mod. 276. Rex v. Bishop of Worcester, Vaugh. 61.*

2. In quare impedit by the crown for the next turn of a living void by promotion, defendant pleads that the crown presented A, who is since dead, and that he himself is now presented, and is parson imparsonnee, with a traverse that the church is still vacant by the promotion; this is a confession and avoidance, and the traverse being therefore bad, may be passed over, and issue taken upon the avoidance. *Rex v. Whaley, Stra. 837.*

(j) *Verdict and judgment, &c.; and herein of the writ to the bishop.*

1. The plaintiff must recover by his own strength, and not by the defendant's weakness. *Tufton v. Temple, Vaugh. 8. 58. 60.*

2. By stat. West. 2., these three points are inquirable: if the church be full or void; if full, of whose presentment; and, lastly,

the inquiry of the value of the church; but in a quare impedit, or an assize of darrein presentment, these points were not inquirable *ex officio* at common law. *Boswell's case*, 6 Co. 51 a.

3. The plaintiff in a quare impedit may take his judgment at the common law, and relinquish the benefit of the statute. *Specot v. Bishop of Exeter*, 5 Co. 57 a. 1 And. 189. Goldsb. 35. 3 Leon. 198. Senk. 258. S. C.

4. Judgment with a *cesset executio* is given upon the bishop's disclaimer. *Tufton v. Temple*, Vaugh. 6.

5. In quare impedit against two, if judgment be given against one, there shall be a *cesset executio* till the plea of the other is tried. 1 Ro. 363.

6. In a quare impedit, the venire must be returnable upon one of the common return-days. *Rex v. Bishop of Meath*, 10 Mod. 310.

7. The plaintiff and defendant are both actors, and may each of them have a writ to the bishop. *Colt v. Bishop of Coventry*, Hob. 163. *Tufton v. Temple*, Vaugh. 6, 7.

8. Though the bishop, who is patron, die pending the writ, plaintiff may still have judgment, and the writ to remove the clerk in possession directed to the succeeding bishop or metropolitan. *Merrick's case*, 2 Dy. 194. pl. 33.

9. The king was seised of the advowson of a vicarage, and the bishop of the advowson of a rectory near it; the king's incumbent dying, the bishop united the livings, the king presented another vicar; and, on the bishop's refusing, brought a quare impedit against the bishop, and had judgment. *Rex v. Jackson*, 8 Mod. 5—8.

10. If defendant have judgment on demurrer to the declaration, he shall have a writ to the bishop without making a title. *Danvers v. Bishop of Worcester*, 1 Dy. 24. pl. 153.

11. In a quare impedit, where the bishop disclaims, and the parson loses by default, there shall go a writ to the bishop *non obstante reclamations* to remove the incumbent, but with a *cesset executio* until the plea is determined between the plaintiff and patron. *Tufton v. Temple*, Vaugh. 6.

12. Upon recovery in quare impedit, where it is found that the church is full of the presentment of a stranger pending the writ, and it does not appear whether the incumbent came in by better title than the plaintiff had, the plaintiff is entitled to a writ to the bishop generally, and the bishop must execute it,

and cannot return that the church* [*1129] is full of another. *Boswell's case*, 6 Co. 52 a.

13. By the common law, if a disturber (being defendant) present pending the writ, and his clerk is admitted, instituted, and inducted, and afterwards judgment is given against the defendant, such clerk shall be removed; so in all cases where any clerk

comes in pending the writ by presentment of one against whom the plaintiff has a good title, his clerk shall be removed. *Bewerley v. Cornwall*, Cro. El. 44. S. C. 6 Co. 51 b.

14. Otherwise, where the stranger has good right. *Boswell's case*, 6 Co. 51 b.

15. Where *ne disturba pac.* is pleaded, which is in effect the general issue, the plaintiff may either pray a writ to the bishop, or, at his choice, maintain the disturbance for damages. *Colt v. Bishop of Coventry*, Hob. 162. Vaugh. 58.

16. If the archbishop of Canterbury be plaintiff in a quare impedit, the writ must be awarded to the other archbishop. *Rex v. Warrington*, 1 Show. 329.

17. If a quare impedit should be brought against the archbishop of York, as a disturber, the writ shall be directed to the archbishop of Canterbury. S. C. 1 Show. 329, 330.

18. If the king's title be not fully clear, yet by consent of the plaintiff a writ to the bishop may be awarded. *Chancellor of Cambridge v. Walgrave*, Hob. 127.

19. If the king be no party, yet if his title be clear against both parties, a writ to the bishop shall be awarded for him. Hob. 127. 163.

20. If the issue be not found for the king, as it is joined, yet if sufficient matter be found for the king, the court must award a writ for him. *Rex v. Bishop of Rochester*, Hob. 118, 119.

21. In quare impedit, nonsuit after appearance is peremptory and a bar, although another quare impedit be brought within six months. *Portman's case*, 7 Co. 27 b. Hob. 138. *Berkely v. Hansard*, 2 Salk. 559. 1 Brownl. 161.

22. So, if the plaintiff in quare impedit discontinue his suit. *Portman's case*, 7 Co. 27 b. Hob. 138.

23. Otherwise, if the writ abates for insufficiency of form, or if the writ abate for misnomer of the plaintiff or defendant, if the plaintiff confesses it. *Portman's case*, 7 Co. 27 b.

24. But if the plaintiff be made a knight, the writ shall abate, and it is peremptory. Id. ibid.

25. If the plaintiff proceed to maintain the disturbance, and it be found against him, he has lost the benefit of that judgment which he might have had, and shall be totally barred. *Brickhead v. Bishop of York*, Hob. 138. 320.

26. If the plaintiff be nonsuit, or the defendant never appear, yet neither can have a writ to the bishop until they have made a title appear for form's sake. *Colt v. Bishop of Coventry*, Hob. 163.

27. In quare impedit against the bishop and incumbent, the bishop claiming only as ordinary, issue between the others, and judgment for the plaintiff, on the writ to the

bishop, he is not estopped from returning that pending the issue, and the church being void, another had presented a clerk of whom the church is now full; and if his return be false, plaintiff may have a *quare non admisit* against him, and a *scire facias* against the incumbent to try the title. *Bassel v. Straford*, 3 Dy. 260. pl. 21.

28. A recovery in *quare impedit* against a clerk whom the king presented by usurpation avoids the usurpation. *Rez v. Thornborough*, 1 Mod. 253.

(h) *When damages and costs are recoverable.*

1. At common law, before the statute West. 2., damages were recoverable in *quare impedit*; since, they are only recoverable in those cases where they are given by that statute. *Boswell's case*, 6 Co. 51 a. *Roll v. Osborn*, Hob. 23.

2. The king shall not recover damages in a *quare impedit*, though all the counts are to his damage. *Boncell's case*, 6 Co. 51 a. *Jenk. 28. 281. Contra, Reg. v. Thyn*, 2 Dy. 236. pl. 28.

3. In *quare impedit* against the archbishop and clerk, on default by all, damages shall be had against all, but the plaintiff must make title, and process shall go to inquire, &c.; and though the jury find plenarily by the clerk, of the collation of the archbishop, the plaintiff shall recover the presentation and* damages. *Watson v. Bishop of Canterbury*, 2 Dy. 241. pl. 48.

4. Where the presentation is recovered, damages shall be also, though the six months be past. 3 Lev. 59.

5. In error in *quare impedit*, defendant shall have costs and damages. *Henslow v. Bishop of Sarum*, 1 Dy. 77. pl. 36.

6. A writ of error was brought on a *quare impedit*, pending a year, the value of the living for a year was given in damages. *Holrei v. Ebison*, 10 Mod. 274.

7. It is no error that the damages were adjudged for half a year's value under W. 2. c. 5, where it appeared that the presentation was not deraigned within six months. *Henslow v. Bishop of Sarum*, 1 Dy. 76. pl. 34. [*See ante*, tit. *CORRUPTIO*, div. II. (f) Vol. I. p. 382.]

QUE ESTATE.

1. A man cannot prescribe by a *que estate* for a rent, advowson, toll, &c. 2 Mod. 144. *Jenk. 183.*

2. A toll or other profit a *prendre* that lies in grant, cannot be claimed by a *que estate* directly by itself, but it may be claimed as appurtenant to a manor by a *que estate* in the manor. *James v. Johnson*, 1 Mod. 231, 232. 2 Mod. 144. S.C. 1 Sid. 298. *Jenk. 183.*

3. It cannot be pleaded of an *estate tail*. *Rez v. County of Warwick*, 2 And. 155.

4. A termor for years cannot declare upon

a *que estate*. *Dorn v. Gashford*, Com. 44. Salk. 363. Carth. 432. S. C. *Seamour v. Pashley*, 2 Show. 485. *Contra, Coats v. Made*, 1 Sid. 298.

5. A *que estate* may be pleaded of a term in a stranger, but not in those under whom he claims. *Cotes v. Wade*, 1 Lev. 190.

6. In an action on the case for stopping a gutter, a declaration in a *que estate* to the house to which the stoppage was a nuisance, without alleging a *seisin* in fee, is bad. *Pepyn v. Bustine*, 2 Show. 81.

7. In making title, the commencement of particular estates must be shown. *Scilly v. Dally*, Salk. 562.

8. In replevin, the defendant avowed; the plaintiff replied in bar to the avowry, that king James was seized, and granted to sir R, who granted to J S, *que estate* by divers meane assignments, came to J D, and he put in his beasts; the plea was held to be bad, for the plaintiff ought to show that he put in his cattle by the license of J D, and should therefore derive a title to him. *Tucker v. Hodges*, Skin. 303.

QUEEN.

1. The queen consort is a sole person exempt by the common law; and may make leases and grants, and sue and be sued, without the king. *Clarke v. Pennifather*, 4 Co. 23 b.

2. The queen has a right to *aurum reginae* under certain restrictions. *Case of Aurum Reginae*, 12 Co. 21.

QUI TAM.

1. In every case of contempt to the king, the action must be *qui tam*. 1 Saund. 136.

2. But where a statute gives a certain penalty to the party grieved, he need not join the king in an action. *Anon. Holt*, 610, 611.

[*See post*, tit. *STATUTE*.]

QUO WARRANTO.

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[See also *ante*, tit. INFORMATION, Vol. I. p. 801,
&c. *passim*.]

I. WHEN AN INFORMATION QUO WARRANTO LIES.

1. An information quo warranto lies against the steward of a court. *Anon.* 11 Mod. 383. *Rez v. Huleton*, Stra. 621. S. C.

2. Information lies for acting as a trustee under an act of parliament without due appointment. *Rez v. Nicholson*, Stra. 299.

3. It lies for setting up a new office. *Rez v. Bayles*, Stra. 836.

4. If a person set up a leet, a fair, or a market, it is as a usurpation on the crown, for which a quo warranto lies; and there may be two judgments, one for a seizure, and the other for a fine. *Anon.* 6 Mod. 184.

5. It lies for the office of constable. *Rez v. Gondys*, Stra. 1213.

6. It lies for a ferry. *Rez v. Reynell*, Stra. 1161.

7. If an election has been made agreeably to long usage, but contrary to the terms of the charter, and it do not appear that any bye-law exists to ground such election, an information quo warranto will be granted. *Rez v. Tmlyn*, C. T. Hardw. 316.

II. WHEN NOT.

1. An information in nature of a quo warranto cannot be filed at the instance of a private prosecutor for setting up a warren. *Rez v. Louther*, Stra. 637. 2 Ld. Raym. 1409.

2. Quo warranto not grantable for holding a court-leet at the instance of the lord of the hundred. Andr. 15.

3. B. R. will not grant an information for private usurpation of a franchise; but the proper remedy is to apply to the attorney-general. *Ibbotson's case*, C. T. Hardw. 261.

4. No quo warranto for a forfeiture by non-attendance. *Lord Bruce's case*, Stra. 819.

5. The court will not grant an information, where the only acting is voting for parliament men as burgesses, they having in fact a right to vote, though not as burgesses. *Rez v. Harvey*, Stra. 547.

6. No quo warranto lies for the office of church-warden. *Rez v. Dawneby*, Stra. 1196.

7. An information on the 9 G. 2. cannot be maintained for a claim, but actual intrusion only; and non-residence, where a power of amotion is vested in a person designated by charter, is not an avoidance of office before that is exercised, when immediately an unlawful holding may commence, which may justify any proceedings in quo warranto on the part of the crown. *Rez v. Ponsonby*, 1 Keny. 1. Say. 245. 1 Ves. jun. 1. S. C.

III. RELATIVE TO THE PROCEEDINGS;—

(a) *Parties*.

In the case of the city of London, it was

held the quo warranto should have been brought against the burgesses and inhabitants. *Rez v. Bishop of London*, 1 Show. 281.

(b) *When several writs are necessary*.

In quo warranto for several franchises, there must be several suits, and several pleas and judgments. *Rez v. Corporation of Dublin*, Palm. 7.

(c) *Of the form of the information*.

1. If a man claim more than his charter warrants, he will be ousted of all. *Rez v. Corporation of Dublin*, Palm. 8.

2. Where, in an information against a defendant for exercising an office of trust, it is laid to be a public office, and defendant demurs, he cannot afterwards object that it is not an office for which a quo warranto lies. *Rez v. Neal*, C. T. Hardw. 106.

3. It is not sufficient in a quo warranto of liberties to derive an interest to a stranger in them from the queen, without making title to himself; for the writ is quo warranto he himself uses them. *Partridge's case*, Cro. Eliz. 125.

(d) *When an amendment will be allowed*.

1. The court will permit an information quo warranto to be amended, if it* will not tend to delay the trial. [*1132] *Rez v. Ellams*, 7 Mod. 220.

2. To an information in the nature of a quo warranto, the defendant having erroneously pleaded that he was sworn into office before twelve burgesses, in a case, where, by the statute of 11 G. 1. c. 4., he was required to have been sworn before the presiding officer, after issue taken on the fact stated, and found for the crown, on his application for leave to replead, the court held the issue taken upon the swearing to be indecisive of the question upon the statute, and therefore that a repleader might well be awarded, but directed the plea to be amended, &c. *Rez v. Phillips*, 1 Keny. 531.

3. A plea in quo warranto was allowed to be amended after demurrer, and cause set down for argument. S. C. C. T. Hardw. 42.

(e) *Plea*.

1. Quo warranto is in nature of a writ of right, to which defendant can have no plea, but to justify or disclaim, and judgment is final; but in case of information in nature of a quo warranto it is only when against the defendant. *Anon.* 12 Mod. 224, 225.

2. It is no plea that a stranger has such liberties. *Reg. v. Partridge*, 2 Leon. 28. 212.

3. If the king grant to J S and his heirs *catalla felonum* within his manor of D, and afterwards J S grants to the king his heirs and successors the manor with the said franchise, and then the king grants to J N and his heirs the said manor, and further grants to him and his heirs within the said manor *tot talia tanta, &c. privilegia, &c., et quot qualia, &c. que* the said J S had, in quo warran-

to J N ought not to plead generally, but in special, the first charter made of the said goods of felons, and the regrant, &c. *Abbot of Strata Mercella's case*, 9 Co. 24 a.

4. If in a quo warranto the defendant claim liberties by prescription, and others by charter, he may conclude *et eo warranto utitur, &c.*, and it shall be taken distributively. Mo. 297.

5. A plea in it of the constitution of a town is equally ill, if it enlarges or abridges that constitution. *Reg. v. Gill*, Gilb. 313.

6. A plea that is insufficient confesses the usurpation. *Reg. v. Phillips*, Stra. 394.

(f) Evidence.

1. In quo warranto against one for acting as bailiff, a judgment of ouster against the persons under whose nomination he was chosen may be given in evidence. *Reg. v. Hebben*, Andr. 388.

2. But it is not conclusive. *Id. ibid.*

(g) Trial.

1. The king can first try the title, and afterwards insist upon the forfeiture. *Reg. v. Corporation of Maidenhead*, Palm. 81.

2. In a quo warranto, there being a mistrial, it was prayed that the *postes* might be certified, but being against the queen it was denied, for if it should, the defendant might exemplify the verdict as duly tried, and it would be an evidence against the queen. *Neuill v. Payne*, Cro. Eliz. 304, 305.

(h) Judgment.

1. Judgment of seizure *quousque* shall be given on the non-appearance of a corporation in an information quo warranto. *Reg. v. City of Chester*, 2 Show. 366.

2. On a *nihil dicit* to a quo warranto information, the judgment is *quod capiatur* . *Reg. v. Tyrrell*, 11 Mod. 235.

3. Where the franchises are usurped, the judgment is *quod extinguatur* ; but when they are abused, it is *quod capiatur in manus domini regis* . *Smith's case*, 4 Mod. 54. 56.

4. The judgment given in quo warranto against the city of London, that the liberties thereof be seized into the king's hands, did not dissolve the corporation, or remove the members from their corporate offices. S. C. 4 Mod. 53.

5. Where, in quo warranto, some issues are found for the king, and others for the defendant, but it appears defendant has no title, judgment must be against him. *Reg. v. Hebben*, Andr. 391, 392.

6. There must be a judgment of ouster where the party is found duly elected, but not sworn. *Case of Mayor of Penryn*, Stra. 582.

7.* In an information quo warranto, if a usurpation be confessed by the defendant for only part of the time laid in the declaration, a general

judgment of ouster is erroneous. *Reg. v. Taylor*, 7 Mod. 169. Stra. 952. S. C.

8. The king is concluded upon a verdict in the mere right in a quo warranto, but not in an information. *Reg. v. Carpenter*, 2 Show. 47.

9. Outlawry lies upon a quo warranto for keeping an inn. *Patrick's case*, Cro. Jac. 528. 531.

(i) Costs.

Costs are given on discharging a rule for a quo warranto. *Reg. v. Carpenter*, Stra. 1039.

(j) Consequence of it.

1. The king thereby gains nothing, but only redresses an injury. *Reg. and Constable's case*, 3 Leon. 72.

2. A defendant found guilty of usurping the office of mayor of Tregony several years, &c. was fined 200l. *Reg. v. Cracker*, 8 Mod. 285, 286.

QUOD CUM.

1. The declaration cannot commence with a quod cum in an action of debt on a penal statute; it should be "for that, &c.;" for in penal statutes, every thing necessary to support the action must be positively averred. *Dunstall v. Dunstall*, 2 Show. 27. *Sed vide Pove q. t. v. Weeks*, 2 Show. 247.

2. Nor a declaration in an action of trespass *vi et armis*; but it is cured by verdict. *Mercer v. Southwell*, 2 Show. 180. *Ib. notis.*

3. A declaration in case was formerly held bad with a quod cum. *Gowmey v. Fletcher*, 2 Show. 296.

4. But in assumpsit case or debt, it is no objection. 2 Show. 180. *Ib.* 447.

QUOD EI DEFORCEAT.

1. A quod ei deforceat is in the nature of a writ of right for a tenant in fee-simple. 2 Saund. 32.

2. It is in the nature of a formedon for a tenant in tail. 2 Saund. 38.

3. It may be brought by tenant for life, or tenant by curtesy or dower. *Ibid.*

4. It lies not upon a recovery by *nihil dicit* , but only upon recovery upon default before appearance. *Elmer v. Thacker*, Cro. Eliz. 263.

5. In a quod ei deforceat in Wales, the defendant cannot vouch a vouchee in an English county. *Vaughan v. Casewell*, 1 Mod. 8.

6. In a quod ei deforceat in the nature of a writ of right of lands in Wales, after the jury was sworn and charged, and before verdict, the demandant was nonsuited, on which final judgment was given; afterwards he brought another quod ei deforceat in the nature of a writ of right against the same tenant of the same lands; on error, the first judgment was held to be a good bar. *Richard v. Penryn*, 5 Co. 85 b.

QUOD PERMITTAT.

1. A quod permittat is a writ of right in its nature, and yet a lessee can have it. *Lutw.* [672.]

2. It lies against the terre-tenant, though the nuisance was erected by a stranger. *Shalmer v. Pulleney*, 1 *Ld. Raym.* 277.

3. The statute of W. 2. c. 24. which gives this writ against the alienage of him who did the nuisance, extends not to the alienage of the alienage. *Shalmer v. Pulleney*, *Lutw.* [672.]

4. If the nuisance is done in the time of a prior owner of premises to which the nuisance is, the present owner need not show how he came to his estate, but it is sufficient to say *ad nocumentum liberi tenementi nuper J. P.*, and now of the said plaintiff. *Id. ibid. Baten's case*, 9 *Co.* 53 b.

5. It is no variance between the writ and the declaration, that the former states the erection to be to the nuisance of the frank tenement, lately P's, now the plaintiff's, and the latter avers it to be to the nuisance of the plaintiff. *Baten's case*, 9 *Co.* 53 b.

6. The plaintiff need not assign any nuisance in certain, as that the rain fell from the said house, newly built, upon the plaintiff's house, &c., for as the declaration* shows that the defendant's house overhangs the plaintiff's, such must be the necessary consequence. *Id. ibid.*

7. If it be to abate *quadam edificia*, without mentioning the number or nature of them, yet it is good. *Lutw.* [670, 671].

8. In a quod permittat for turning of water, a man cannot vouch. 2 *Saund.* 32. [See also ante, tit. NUISANCE, div. IV. Vol. II. p. 977.]

RANSOM.

1. Before the 22 Geo. 3. c. 25., the master of a ship having the care not only of the ship, but of the goods on board, might, while under a capture by an enemy at sea, if there were no hopes of a re-taking, compound with the captain captor for the ransom of the captured ship and cargo. *Tranter v. Watson*, 6 *Mod.* 12.

2. And this agreement to ransom was so far binding on the owners, that if the captain captured advanced the ransom money, he might recover it in an action at common law for money laid out and expended to their use. 6 *Mod.* 13.

3. So, if he delivered his own person into the custody of the captain captor as a hostage for performance of the ransom, he might libel against the ship and cargo in the court of admiralty for the money. 6 *Mod.* 13. 11 *Mod.* 6 n.

5. For the redemption of the ship and cargo by means of ransom is considered in the admiralty as a species of salvage. 6 *Mod.* 13. *Anon.* 11 *Mod.* 2.

5. So, a promise by a captain of a ship on behalf of his owners, when the ship was taken, to pay monthly wages to one of the sailors, in order to induce him to become a hostage, was held binding on the owners, although they abandoned the ship and cargo. *Yates v. Hall*, 6 *Mod.* 13 n.

6. But now by 22 Geo. 3. c. 35., "no person shall ransom, or contract for the ransoming, of any ship or cargo captured by the enemy, under penalty of 500*l.*; and all contracts, agreements, bills, notes, or other securities, made or given for such purposes are void." 6 *Mod.* 13 n. 11 *Mod.* 6 n.

RAPE.

1. The statute 13 Edw. 1. c. 34., declares, "that if a man do ravish a woman, married, maid, or other, when she did not consent, neither before nor after, he shall have judgment of life and member; and likewise when a man doth ravish a woman, married lady, damsel, or other, with force, although she consent after." 11 *Mod.* 27.

2. An act that makes an offence by name (as rape, &c.) to be felony, virtually makes all that are present aiding and assisting principal, though one only does the fact. 11 *Mod.* 27.

3. In an action of assault by a husband, for an intent to ravish his wife, his wife is a competent witness. *Anon.* 11 *Mod.* 294.

[See also post, tit. WOMEN.]

RATE.

1. A rate for rebuilding or repairing the church must be set by the parishioners. 2 *Mod.* 222.

2. A scavenger's rate cannot be made for a division. *Rez v. Inhabitants of St. Leonard, Stra.* 638.

3. By 43 Eliz. c. 2. s. 1., poor's rates shall be raised weekly or otherwise. 6 *Mod.* 214 n.

4. The King's Bench will not examine objections to a poor's rate. *Stra.* 393.

5. Poor's rates are not to be removed by certiorari. *Rez v. Inhabitants of Uxminster, Stra.* 932, 975.

6. A person is not chargeable to the poor's rate as being the occupier of the meeting-house where he preaches. *Rez v. Inhabitants of Southwark, Stra.* 745.

7. A parish rate may be distrained for in a different parish in the same county. *Tracy v. Talbot*, 6 *Mod.* 215.

8. If a house originally entire, be divided into separate apartments, with an outer door to each apartment, and no communication with each other, the several apartments shall be rated as distinct* [*1135] mansion houses; but if the owner live therein, all the untenanted apartments shall be considered as parts of his house. *S. C.* 6 *Mod.* 214.

9. An inhabitant, who comes into a parish in the middle of a quarter, cannot be rated for the whole quarter. *Id. ibid.*

10. By 17 Geo. 2. c. 38. s. 12, persons coming into a house in the middle of the quarter, shall only pay rates for the time they occupy the premises. *Id. ibid.*

11. A distress cannot be made for a rate by a warrant issued before it is due, nor can it be made for a quarter's rate before the end of the quarter. *Id. ibid.*

[See also *ante*, tit. CHURCH, div. XIII. p. 285., and tit. HIGHWAY, div. IX. p. 762.]

RAVISHMENT OF WARD.

[See *Moore v. Hussey*, Hob. 94, &c.]

REAL ACTION.

1. In a real action, if the tenant make default on the original, the demandant shall have a grand cape, and if he make default after appearance, a petit cape. *Staple v. Heydon*, 6 Mod. 4.

2. No *præcipe* lies against a termor, but a writ of dower lies against guardian in socage. *Bredeman's case*, 6 Co. 57 b.

3. Wherever in a real action the default is avoidable, so that a grand or petit cape shall go, in a personal action a default is not peremptory. *Staple v. Heydon*, 6 Mod. 6.

4. Although a man have been out of possession for sixty years, yet, if his entry be not tolled, he may enter, and bring any action of his own possession. *Bevil's case*, 4 Co. 8 a.

REBUTTER.

If defendant do not rebut when called upon, plaintiff should strike out the previous pleadings, and enter judgment as for want of a plea. 1 Saund. 318 a.

RECEIPT.

1. A receipt is not conclusive evidence against the party giving it, unless perhaps in a deed. 1 Saund. 325. n. [b].

2. If unstamped, though not admissible evidence, it may be shown to a witness to refresh his memory. *Id. ibid.*

RECITAL.

1. The non-recital of the names of the occupiers of a lease of lands, does not avoid the demise thereof. *Trepp's case*, 3 Leon. 235.

2. A void lease, or one expired, need not be recited in the king's grant. *Harria v. Wing*, 3 Leon. 243, 244.

3. The recital in patents ought to be very strict. S. C. 3 Leon. 246, 247.

4. No recital is necessary where the second patent determines the first. S. C. 3 Leon. 247.

5. Grants of the king need not recite leases not of record, or copyholds. *March*, 206. pl. 246.

6. A recital in the condition of a bond is not material, nor can it be taken advantage of. *St. John v. Diggs*, Hob. 130. *Sed vide* 2 Saund. 414.

7. The particular recital of a deed may restrain the general words of it. 2 Saund. 47. t. n. [c].

8. What is material, and what not, in case of a mis-recital, is to be measured with reference to the instrument in which the mis-recital is. *Benyon v. Evelyn*, Orl. Bridg. 335.

9. If a lease be made from the end of another term, and there is no such term, the new term commences immediately. *College of Manchester v. Trafford*, 2 Lev. 241. *Bassett v. Lewis*, 1 Lev. 77. 234.

10. The recital of one lease in another, is not a sufficient proof that there was such a lease as is recited. *Roue v. Huntingdon*, Vaugh. 74, 75.

11. Recital in letters patent of a former patent is no evidence of such patent without producing it. *Cragg v. Norfolk*, 2 Lev. 108.

12. Whether certain lands are forests should appear by matter of record;* but their being so named [*1136] in grants, offices, and conveyances, is not any proof of their being forests in law. *Case of Forests*, 12 Co. 22.

RECOGNIZANCE.

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- IX. OF THE RECOGNIZANCE OF BAIL;—

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I. RESPECTING RECOGNIZANCES GENERALLY.

1. A recognizance is in the nature of a judgment. 2 Saund. 7.

2. It is a record. *Buston v. Ridley*, 11 Mod. 223.

3. A recognizance at common law was but a bond acknowledged. *Hutchins v. Player*. Ori. Bridg. 302.

4. At common law it was a record from the time of the caption and acknowledgment, and bound the person and lands from thence before the enrolment. Hob. 195, 196. 222. 2 Saund. 8 k.

5. But by the statute of frauds from the enrolment only. 2 Saund. 8 k.

6. If a recognizer of a recognizance acknowledged before a master in Chancery die before it be enrolled, it may be enrolled at the petition of the executors. *Halton's case*, 4 Leon. 8.

7. A recognizance does not of itself imply a record, for it is not perfect till it is enrolled. 2 Saund. 68. n. [c]. 71 b.

8. It must be enrolled within six months; and if not enrolled, is considered as a bond debt in equity. 2 Saund. 8 k.

9. A recognizance of bail in C. B. binds from the caption, but in B. R. from the entry only. *Stuttle v. Wood*, Salk. 600. 659.

10. The sheriff cannot take a bail-bond (but only a recognizance) from persons arrested by him under process issuing on an indictment at quarter-sessions for a misdemeanor. 2 Saund. 59. *Bengough v. Rossiter*, 6 Mod. 179. n.

11. If an indictment be removed by the prosecutor into the King's Bench by a *certiorari* out of London or Middlesex, the defendant must enter into a recognizance to try it the same term or the sittings after; but if removed out of any other county, he is without day, and if he do not appear, process shall issue till he be outlawed; but if a defendant remove an indictment, he must enter into a recognizance pursuant to the 5 W. & M. c. 2. *Rex v. Banks*, 6 Mod. 246.

12. If a *venire facias de novo* be granted on an indictment after a mistrial, the defendant must enter into a new recognizance. *Rex v. Tracy*, 6 Mod. 179.

13. A peer must enter into a recognizance to keep the peace. *Rex v. Marquis of Carmarthen*, Fort. 359.

14. A recognizance "*ad respondend.*" generally, extends not only to the crime for which the party was committed, [*1137] but* to all such crimes as he shall be charged with. *Reg. v. Ridpath*, 10 Mod. 152, 153.

15. Debt lies not against the heir. 2 Saund. 7.

16. But *sci. fa.* lies against the heir and terre-tenants. 2 Saund. 6 c.

17. A *capias* does not lie on a recognizance. 11 Mod. 43. Mo. 274. Yelv. 42.

18. A recognizance is conclusive evidence that it was acknowledged by all named in it. 1 Saund. 291 c. n. [c].

19. At common law, the connusee could

only have execution by a *levari facias* or a *fi. fa.*, and he must have sued them out before a year elapsed; but by stat. of Westm. 2., he may have *elegit*. Vaugh. 102. 2 Saund. 68.

20. A copyhold cannot be seized on recognizance. 7 Mod. 38.

21. If the sheriff deliver more than a moiety, the execution is void. *Putten v. Perbeck*, Salk. 563.

22. The attorney-general, as well as the officer, is entitled to costs by the act 8 Anne, c. 7., where there is judgment for the king, and the recognizance ordered to be put in suit. *Attorney-General v. Munn*, Park. 92.

II. HOW A RECOGNIZANCE SHOULD BE; AND BEFORE WHOM IT SHOULD BE TAKEN.

1. A recognizance may be taken by the Lord Chancellor, and execution awarded by him. 2 Saund. 8 k.

2. The Chancery and all the courts at Westminster had, by the common law, before the statute of Acton Burnel, and still have, power to take recognizances. *Edgcomb v. Dee*, Vaugh. 102. 11 Mod. 53.

3. So, likewise, may every judge take a recognizance in any part of England, as well out of term as in term. *Edgcomb v. Dee*, Vaugh. 103. 2 Saund. 8 b. n. (5). *Hall v. Winchfield*, Hob. 195.

4. A recognizance taken by a judge of the King's Bench, upon the removal of an indictment, in more than the sum mentioned in 5 W. & M. c. 11., is good. *Rex v. Ewer*, 7 Mod. 10.

5. A recognizance cannot be taken by any by prescription. *Chamberlain v. Thorp*, 1 Leon. 131.

6. A recognizance acknowledged by an infant is void. *Randal v. Walk*, Cro. Jac. 59.

7. A recognizance to three, before one of whom it is taken, is void as to him, but good for the others. 2 Dy. 220. pl. 16.

8. If a recognizance be not sealed with two seals, it is void as a recognizance, but debt lies on it as an obligation. *Ascue v. Hollingworth*, Cro. Eliz. 494.

9. Where a recognizance to appear, &c., upon a statute varies from the statute, it is not good by the statute, but may at common law. *Reg. v. Ewer*, Holt, 612.

10. If entered upon bringing a writ of error, though differing from that required by the statute, still it is good. *Fanehawe v. Morrison*, 2 Ld. Raym. 1140.

III. WHEN AND HOW THE RECOGNIZANCE IS FORFEITED.

1. Appearance on a recognizance in B. R. must be in person, and not by attorney. *Anon.* 11 Mod. 233.

2. If the party do not appear, be the cause of his absence what it will, the recognizance is forfeited. *Reg. v. Ridpath*, 10 Mod. 153.

3. A recognizance conditioned to try an indictment is forfeited, though there be a trial, if the verdict be set aside for a defect in the *venire facias*. *Rex v. Tracy*, 6 Mod. 179.

4. Procuring a wrong venue for the trial of an indictment is a forfeiture of the recognizance. *Anon.* 11 Mod. 4.

5. On a recognizance to appear in B. R. on the last day of term, the party has till the last moment of it to appear in. *Rex v. White*, Stra. 1220.

6. Non-appearance is no breach of a recognizance for behaviour. *Rex v. Ridpath*, Fort. 358.

7. Bail entering into a recognizance that the plaintiff shall prosecute with effect, imports payment of the condemnation. *Barnes v. Worlick*, Yelv. 59.

9. Upon a recognizance in replevin to prosecute with effect, if the plaintiff is not nonsuit, nor the judgment affirmed, it is a prosecution with effect, and the recognizance is not forfeited. *Duke of Ormond v. Bierly*, Carth. 519.

9.* A father may be bound in [*1138] a recognizance to keep the peace towards his daughter; and if the condition be to appear the first day of term, he must attend, or the recognizance will be forfeited; but if he do *die in diem*, the court may dispense with the appearance, by respiting it accordingly. *Newdigate's case*, 7 Mod. 17.

IV. RELATIVE TO THE DISCHARGE OF A RECOGNIZANCE.

1. A recognizance to appear on a certain day, and in the mean time to keep the peace, was discharged on the ground that the day had passed, and that no indictment had been lodged. *Rex v. Benn*, C. T. Hardw. 98.

2. A recognizance made to the queen for appearance, is discharged by an arrest of the consor by the high commissioners of the queen before the day, and keeping him in prison at the day. *Mo.* 121.

3. A recognizance was discharged upon producing the prosecutor's consent verified by affidavit. *Rex v. England*, C. T. Hardw. 158.

4. The court on default of prosecution can only respite, and not discharge a recognizance. *Anon.* 7 Mod. 97.

5. A recognizance for keeping the peace is never discharged till the end of the term, unless the attorney-general comes in and desires it. *Rex v. Foster*, 12 Mod. 448.

6. Sureties to keep the peace cannot be discharged until the condition of the recognizance is performed. *Rex v. Howard*, 11 Mod. 109.

7. A recognizance to appear cannot be discharged unless performed; but it may be respited. *Rex v. Drummond*, 11 Mod. 200.

8. A *nolle prosequi* on one information does not discharge the recognizance. *Rex v. Ridpath*, Fort. 358.

9. Render in discharge of bail in an action, will not discharge the bail on an indictment. *Rex v. Davison*, Salk. 105.

V. RELATIVE TO THE ESTREATING THE RECOGNIZANCE.

1. Two justices of the peace after the expiration of 32 Geo. 2. c. 25., might take a recognizance for the appearance of a person charged with wilfully sinking a ship upon the high seas, contrary to 4 Geo. 1. c. 11., at the next session of admiralty; and such recognizance might be estreated into the Exchequer. *Rex v. Muilman*, Park. 241.

2. Judges of oyer and terminer are the proper judges whether a recognizance ought to be estreated or spared. *Rex v. Tomb*, 10 Mod. 278.

3. Though a recognizance for appearance has been estreated, yet if the party appears, and takes his trial next sessions afterwards, it may be compounded in the court of Exchequer for a very small matter. 10 Mod. 178.

4. If taken before a justice of the peace, and forfeited, and then removed into B. R., it cannot be estreated. *Anon.* Comb. 3.

VI. RELATIVE TO THE REMOVAL OF A RECOGNIZANCE.

1. A recognizance given upon a writ of error is taken by itself, and is no part of the record, and therefore it may be removed into the King's Bench by *certiorari*. *Bardsale v. Drew*, 4 Mod. 104.

2. The common recognizance on a *certiorari* to remove an indictment does not oblige to the payment of costs. *Rex v. Sidney*, Stra. 1165.

VII. RELATIVE TO THE ASSIGNMENT.

1. A recognizance may be assigned to the terre-tenant to discharge his land, but not to a stranger. *Barrow v. Gray*, Cro. Eliz. 553.

2. The comusee of a statute cannot assign his interest after extent and liberate, if the consor continues in possession. *Hammond v. Wood*. Salk. 563.

VIII. HOW IT SHOULD BE PLEADED.

1. It is no good plea to say, that such a one was bound in a recognizance, but he ought to say, *per scriptum obligatorium*, and to conclude that it was *secundum formam statuti* will not help it; but in a verdict, it was agreed to be good. *Harris v. Garret*, March, 76. pl. 117.

2. *A recognizance must be pleaded as enrolled, or the other [*1139] party may plead *nil debet* to it. 2 Saund. 68. n. [a].

IX. OF THE RECOGNIZANCE OF BAIL;—

(a) *How it should be, and how entered.*

1. A recognizance in an inferior court, "that if the defendant shall absent himself from execution of the judgment &c.," is good. *Read v. Charnley*, 2 Ld. Raym. 1224.

2. Though the recognizance is taken by a judge at chambers, it is the practice to enter it as taken in court. *Shuttle v. Wood*, 2 Salk. 564. 2 Ld. Raym. 966.

(b) *When forfeited.*

The recognizance is forfeited immediately after a *ca. sa.* returned. *Whitehead v. Gale*, 2 Barnes, 91, 92.

(c) *When debt lies on it.*

1. A plaintiff may proceed on the recognizance of bail either by *sci. fa.* or action of debt. 2 Saund. 71. c.

2. Debt lies upon a recognizance given in an action of debt after execution by *elegit*; otherwise, where the judgment is for damages only, as in trespass, &c. *Couper v. Langworth*, Cro. Eliz. 608.

3. Debt lies not against the bail on his recognizance immediately upon a judgment given against the principal. *Godlington v. Lee*, T. Raym. 14.

(d) *Time for bringing the action.*

1. It should not be brought till the expiration of eight days in full term after the return of the process. *Shuttle v. Wood*, 6 Mod. 133.

2. It cannot be brought if a writ of error be depending in the original action. *Newman v. Butterworth*, Ca. Prac. C. P. 112.

(e) *Parties.*

It may be brought against all the conors jointly, or each separately. 2 Saund. 72. *Williams v. Green*, 8 Mod. 295. S. P. 3 Burr. 1290.

(f) *Process.*

1. In this action it was held in C. P. the plaintiff need not sue out a special writ; a *clausum fregit* with an *ac etiam* in debt is sufficient. *Wright v. Duxon*, Ca. Prac. C. P. 18.

2. But by a subsequent rule in K. B. it was ordered, that the *ac etiam* should be of a plea of debt upon a recognizance according to the custom of our court before us. Reg. Gen. 15. G. 2.

3. The writ must be served four days at least before the return. *Morton v. Price*, Barnes, 50. Ca. Prac. C. P. 18.

(g) *In what court it should be.*

1. Debt lies in the King's Bench on a recognizance of bail taken in the Common Pleas. *Shuttle v. Wood*, 6 Mod. 133. *Anon.* 3 Salk. 55.

2. Bail in the Admiralty may be sued in that court on their recognizance there. *Wicksley v. Strat*, Comb. 320.

3. Upon a recognizance by custom in London, debt lies only in their own courts. 1 Leon. 130, 131. *Sed vide Wilford's case*, Cro. Eliz. 682. *contra*.

(h) *Venue.*

In K. B. the venue must be laid in Middlesex; but in C. P., it may be either in Middlesex, or in the county where the caption is. *Shuttle v. Wood*, 2 Salk. 600.

(i) *Declaration.*

1. The declaration must state for whom the defendant became bail, and in what

amount. *Atterbury v. Ward*, Barnes, 60. 1 Wils. 284. S. P.

2. And the manner in which the recognizance was taken and acknowledged should be correctly stated according to the facts; as where it was taken before a judge at chambers, and the declaration described it as being taken in court, it was held in C. P. to be a fatal variance upon the plea of *mul tiel record*. *Chetty v. Wood*, 6 Mod. 42. 2 Ld. Raym. 966. 2 Stra. 1171. Salk. 564. 600. 659.

3. But a recognizance in B. R., though taken at a judge's chamber, must be declared on as if taken in court. *Shuttle v. Wood*, Salk. 564. 659.

4. If it do not appear on the record, that there is a condition to a recognizance on which an action is brought, the court* will not intend that there [*1140] is any condition. *Crosse v. Porter*, Willes, 18.

5. But if it appear on the record, that there is a condition, the declaration is bad unless the condition be set forth therein. *Id.* *ibid*.

(j) *Plea.*

In debt on recognizance against bail, if the defendant plead "no *capias* against the principal," and the plaintiff reply "a *capias*, *prout patet per recordum*," a rejoinder that "a writ of error was allowed before the return of the *capias*" is a departure from the plea. *Parkins v. Woolaston*, 6 Mod. 139.

RECORD.

- I. WHAT IS A RECORD; AND GENERALLY RESPECTING THE NATURE OF A RECORD, p. 1140.
- II. RELATIVE TO THE FORM OF A RECORD, p. 1141.
- III. RELATIVE TO THE REMOVAL OF A RECORD, p. 1141.
- IV. OF CERTIFYING A RECORD, p. 1141.
- V. WHAT IS A FAILURE OF RECORD, AND CONSEQUENCE OF *FR*, p. 1141.
- VI. RESPECTING THE LOSS OF A RECORD, p. 1142.
- VII. PLEADINGS CONNECTED WITH RECORDS, p. 1142.

I. WHAT IS A RECORD; AND GENERALLY RESPECTING THE NATURE OF A RECORD.

1. Any patent or writing made in the name of the king, though without warrant, to which the king's seal is put, is matter of record presently, and shall bind the king. *Wimbish v. Willoughby*, Plow. 76.

2. A recognizance is a record, where taken. *Buxton v. Ridley*, 11 Mod. 224.

3. A judicial writ becomes a matter of record in K. B. when it emanates; and whe-

ther it issued or not, is to be tried by record. *Whitmore v. Roak*, 1 Keny. 345.

4. A deed acknowledged to the king, and delivered to the barons of the Exchequer, is a record, though not enrolled. *Pagn's case*, 3 Leon. 146.

5. An order of the sessions of peace is a record; and therefore the plea of *nul tiel* record of sessions of peace is a good plea. *March*, 121. pl. 200.

6. A grant under seal made to the king, and brought into a court of record and there left, is sufficiently of record, without enrolment, for the king to take. *Mo.* 676.

7. A conveyance delivered to be enrolled, though not enrolled, shall be accounted a record. *Combes v. Inwood*, Hutt. 1.

8. The estreat in the Exchequer is not a record, but only minutes. *Moor v. Riedell*, 1 Ld. Raym. 243.

9. Records are of so high a nature, that they are presumed to carry in themselves absolute truth. *Plow.* 491. *Floyd v. Barker*, 12 Co. 23.

10. For this reason, no averment can be made against a record. *Arundell v. Arundell*, Yelv. 34. *Ludford v. Gratton*, *Plow.* 491. 12 Co. 23.

11. Thus, it cannot be averred that the sheriff, who returned the writ, was not then sheriff, but removed; for it is contrary to the record. *Barker v. Dye*, 3 Lev. 269.

12. Errors shall not be assigned against the essence of a record. *Ball v. Cook*, 3 Mod. 141.

13. Where there was an entry of administering oaths by the town clerk to a corporator, the court refused to grant an information upon his affidavit contrary to the record, especially as there had been a long acquiescence. *Rex v. Williams*, 1 Stra. 677.

14. But an averment may be taken if it stands with, and does not impugn, any thing apparent in the record. *Hynde's case*, 4 Co. 70 b.

15. A record must be tried only by itself. *Hob.* 110.

16. The records of every court are the most effectual proof of the law in relation to the things there treated of. *Plow.* 320. 421.

17. Depositions taken in Ireland may be read on a trial in England to prove the record. *Lord Altham v. Lord Anglesea*, 11 Mod. 210.

[*1141] II.* RELATIVE TO THE FORM OF A RECORD.

1. The record is to be entitled of the term in which issue was joined. 2 Saund. 16. n. (1).

2. The record of the court of an act done by the court *in present*, ought always to be in the present tense. *Rex v. Perin*, 2 Saund. 393.

3. A record is understood to be made successively (in the present tense) as the facts are done. *Rex v. Chandler*, 1 Ld. Raym. 583.

4. A conviction of forcible entry in the preterperfect tense was held ill. *Rex v. Landen*, 1 Stra. 443.

5. Though the acts of the court should be entered in the present tense, those of the party should be in the preterperfect; so also the continuances. 2 Saund. 393.

6. Figures are not to be used in records, but Roman numerals may. *Rex v. Phillips*, Stra. 261.

7. The record of an indictment taken at sessions ought to mention that the sessions were held at one certain day. *Anon.* 4 Co. 48. b.

8. If husband and wife come into court to acknowledge a deed, the acknowledgment of the husband need only be entered on the record. *Anon.* 6 Mod. 263.

9. The record of *nisi prius* ought to be warranted by the roll, and if it vary from it, it is void. *Young v. Englefield*, Cro. Jac. 670.

10. If the justices of *nisi prius* die, the clerk of assize may bring in the records without *certiorari* to the executors, and the form of the entry shall be as usual. 2 Dy. 163. pl. 54.

11. If the record be defectively entered, it is a ground of error. *Kempton v. Bartlett*, Cro. Jac. 207.

III. RELATIVE TO THE REMOVAL OF A RECORD.

1. A *certiorari* lies from K. B. to C. B. to remove the record itself of a fine for the purpose of cancelling it for errors; but to remove a record of *nisi prius*, on which attain is brought, there must be a *certiorari de tenore recordi* out of Chancery, and it must be sent into B. R. by *mittimus*. 3 Dy. 274. pl. 44.

2. By *certiorari*, the record itself is removed in all counties except London, and not the tenor of the record. *Rex v. Alcock*, 1 Sid. 155.

3. A *certiorari* or *recordare* removes all plaints pending at the time of the return. *Smith v. Cross*, 7 Mod. 138.

4. If removed by a vicious writ of error, or before judgment given, the record is still in the first court. *Thatcher v. Dampart*, 2 Leon. 1, 2.

5. A record once filed in the court of King's Bench can never be remanded, or removed out again. *Rex v. Beihel*, 6 Mod. 33. 2 Saund. 27. n. (1).

6. Where there are several judgments in debt against two on several præcipes, and several issues, one writ of error to remove both records is bad. 2 Dy. 180. pl. 48.

IV. OF CERTIFYING A RECORD.

1. In C. B. on the issue of a *nul tiel* record of the sheriff's court, where a day is given to bring in the record, it is sufficient if a transcript be sent by *mittimus* out of Chancery; the record itself need not be removed. 2 Dy. 186. pl. 4.

2. B. R. does not send the record to the

exchequer Chamber. *Rutter v. Redstone*, Stra. 837. 1 Barnard. 196.

3. On a *certiorari* the very record is returned. *Rex v. North*, Salk. 565.

4. On error in *dem. proc.* from B. R., the chief justice carries up both the record and a transcript; but when examined, the transcript alone remains, and the record is remanded. 3 Dy. 375.

5. The writ of error was directed to one chief justice, and the record certified by a new one; this is bad, for he had no warrant to remove the record. 2 Dy. 173. pl. 16.

6. If a father bring a writ of error to reverse the attainder of his son, and a rule be obtained for its reversal on the confession of the attorney-general, the court, though in the reign of a subsequent king, and after the death of the parties, will order the record of the reversal to be made upon producing the writ, and the confession of errors thereon. *Makun's case*, 6 Mod. 59.

V. WHAT IS A FAILURE OF RECORD AND CONSEQUENCE OF IT.

1. If one pleads a record, he ought to show the record at the day appointed, [*1142] or else judgment may be entered as on a failure of record. 2 Ro. 133. 1 Saund. 92 a, b.

2. If defendant plead outlawry of the plaintiff, a variance in the day or place is a failure of record. 2 Dy. 188. pl. 8.

3. If outlawry of the plaintiff in C. B. be pleaded to an action there, and on the issue of *nul tiel record*, an exemplification of it under the seal of B. R. (into which it has been removed on error) alone be produced, it is a failure of record. 2 Dy. 227. pl. 45.

4. So, if the outlawry be reversed before the day to have the record in court; for it is no record *ab initio*; yet a *respondeas ouster* shall be awarded. 2 Dy. 188. pl. 8; 228. pl. 45.

5. Judgment of *respondeas ouster* on failure of record on a plea in abatement. *Cremor v. Wicket*, 1 Ld. Raym. 550.

6. In a general statute, if the party pleading it vary either in the year or the title of it, it is a failure of record. 2 Mod. 242.

7. Where on the issue of *nul tiel record* of a fine with proclamations in 30 H. 8., the year was omitted in the proclamations in *Trinity Term*, but in those of *Easter* and *Michaelmas* it was inserted, this was held no failure of record. 2 Dy. 188. pl. 8.

8. If defendant plead a record in bar, and the plaintiff replies *nul tiel record*, and a record is certified, varying in the day only, it is good, notwithstanding such a *petit variance*. Ori. Bridg. 536.

VI. RESPECTING THE LOSS OF A RECORD.

1. A rule was given to make up a new record where the first was lost. *Rex v. Bolton*, Stra. 141. 833.

2. Where a final judgment on a writ of inquiry, and taxation of costs is lost, it may be

supplied by a new writ of enquiry of *summe pro tunc*. *Bess v. Elton*, Andr. 12. Stra. 1077. S. C.

3. A record of *nisi prius* being lost after verdict, a new record was ordered to be made. *Darby v. Gold*, W. Kely. 106.

4. If a record be lost, it may be proved to jury by testimony. *Anon.* 1 Vent. 257.

VII. PLEADINGS CONNECTED WITH RECORDS.

1. The court takes notice of a record in the same court without pleading it, though upon other rolls. *Dinkurst v. Batt*, 3 Lev. 219.

2. A special justification must be of matter of fact and not of record; for matter of record must be pleaded even by an officer. *Anon.* 6 Mod. 40.

3. A record is not necessary to be vouched in pleading, where it is only inducement and not the principal point in the case. *Reg. v. Wyat*, Fort. 130.

4. Matter of record must be averred by the record. *Fanshawe v. Morrison*, 2 Ld. Raym. 1140.

5. If only matter of record be pleaded, the conclusion must be to the record; but if matter of record together with matter of fact be pleaded, the conclusion must be to the country. *Esplin v. Smallet*, Say. 206. *Whitmore v. Rooke*, Say. 300.

6. If a fine be pleaded, the other party cannot plead to it "*non debet nec concessit per finem*;" but the plea ought to be *nul tiel record*. *Ley v. Luttrell*, 2 Ro. 159.

7. If a record of the court of King's Bench be pleaded, "*nul tiel record*" is a complete issue. *Anon.* 6 Mod. 40.

8. It was formerly held that a record could not be pleaded with an "*inter alia*," though it was otherwise of a statute. *Hob.* 226. Comb. 253.

9. But a recital of part is sufficient where it is but conveyance to the action. *Eden v. Lloyd*, Cro. Eliz. 877.

10. The whole record need not be recited in *scire facias*. *Preston v. Perton*, Cro. Eliz. 817.

11. In pleading a record, so much of it ought to be shown as is sufficient and necessary, and no more. *Arden v. Darcey*, 2 And. 99, 100.

12. Where there are divers matters, alleged in one record, it is sufficient to plead any one of them with *inter alia*; but when the judgment is entire, as where there are forty acres recovered, one cannot plead a recovery of twenty acres, but of forty acres whereof twenty acres are parcel. *Gold v. Burket*, Comb. 253.

13. No title can be made to a record in pleading, without showing it under the great seal. *Plow.* 411.

14.* If a record be pleaded, it must be shown where it is. *Anon.* [*1143] 12 Mod. 318.

15. A record of the collage of physicians

may be pleaded without a *proferi in curia*. *Groenvelt v. Burrell*, 1 Ld. Raym. 253.

16. In escape, the plaintiff did not allege the commitment *prout patet per recordum*; but held well on a general demurrer. *Waites v. Brigga*, Salk. 565. 1 Ld. Raym. 35. S. C. *Vide* 1 Saund. 86. n. (1).

17. When a record of the same court is pleaded, the replication must be either *nul tiel record*, or oyer should be craved of it, and then a day is given: if it be of another court, he may reply *nul tiel record*, and a day is given to bring it in. *Creamer v. Wickett*, 12 Mod. 350, 351. *Sed vide* 1 Saund. 9 a. 9 c. 92 a. 1 Ld. Raym. 550.

18. On *nul tiel record* pleaded of a record of the same court, a day may be given for the party to bring it in, or for the justices to inspect it, but the defendant cannot demur. *Moor v. Bail of Garret*, 2 Salk. 566. 3 Salk. 294. 330.

19. The omission of the words "*hoc est paratus verificare per recordum*," is bad on special demurrer only. 1 Saund. 99. n. (2).

20. Pleading a record with *prout patet per recordum*, *et hoc paratus est verificare*, omitting the words "*per recordum*," yet is good. *Aldworth v. Hutchinson*, Lutw. [117.] 333.

RECORDER.

1. The recorder is bound to attend at the sessions. Holt, 444.

2. If a recorder be liable to removal at the pleasure of the corporation, the choosing another person recorder is a declaration of the pleasure of the corporation, *Rez v. Mayor of Canterbury*, 11 Mod. 403.

RECOVERY.

I. OF THE TENANT TO THE PRÆCIPLE, p. 1143.

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III. OF VOUCHER, p. 1144.

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VI. ITS EFFECT;—

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2. As to other interests, p. 1147.

VII. REVERSAL AND AVOIDANCE, p. 1147.

I. OF THE TENANT TO THE PRÆCIPLE.

1. He must have an estate of freehold by right or by wrong. 2 Saund. 42.

2 But it is enough if it be conveyed to him in the term in which the recovery is suffered. 2 Saund. 42. 42 a. Salk. 569.

3. If the tenant gain the freehold any time before judgment, it is good. *Lacy v. Williams*, 12 Mod. 261. S. P. Holt. 615. 1 Mod. 219. Hob. 282.

4. A recovery is good in which the tenant to the præcipe is made tenant of the freehold before the return of *summonas ad warrantizandum*. *Williams v. Lary*, 1 Ld. Raym. 227. 475. 477.

5. In a recovery, the tenant to the præcipe

was made by a fine which was afterwards reversed, yet it is good. *Lloyd v. Avelin*, Salk. 568.

6. If a tenant in tail, with remainder in tail, levy a fine *sur consuance*, &c. to A B and his heirs, in order to make him tenant to the præcipe, without declaring the uses of the fine, the freehold vests in A B; and therefore, if a writ of entry is brought against him, and he vouches the cognisor of the fine, the common recovery is good. *Lord Altham v. Lord Anglesea*, 11 Mod. 210.

7. At common law the writ only lay against the actual tenant in possession. 2 Saund. 42 a.

8. Tenant to the præcipe may be made without the concurrence of the lessee. 2 Saund. 42 a. b.

9. If there be a prior estate for life, there must be a concurrence of the tenant for life in making the tenant to the præcipe, or a surrender to the immediate remainder-man, which surrender* [*1144] must be after the tenant to the præcipe is made. 2 Saund. 42 b.

10. If made by bargain and sale, he may appear before the enrolment. 2 Saund. 42 b. c.

11. The bargainee has a good estate before entry, and is a good tenant to the præcipe; yet he cannot bring trespass. Carter, 78.

12. The reservation of a pepper-corn is a good consideration to raise a use to make a tenant to the præcipe. *Barker v. Kent*, 2 Mod. 249.

13. All præcipes for recoveries are to be marked with the proper prothonotary's name, and on passing to be delivered into court by one of the serjeants. *Anon. Ca. Prac. C. P. 5.*

14. A good tenant to the præcipe will be presumed till the contrary be shown. Lutw. [654. 655]. *Webber v. Monrath*, 9 Mod. 143. Stra. 1267.

15. After recovery suffered, it cannot be objected that the præcipe is of land in a parish instead of a vill. *Green v. Proude*, 1 Mod. 118.

16. If it be suffered without a good tenant, it is valid against him who suffers it, and all proves by estoppel. 1 Saund. 278 a.

17. If possession has continued from the time of an ancient recovery, the court will presume a surrender by tenant for life in order to make a good tenant to the præcipe. *Green v. Proude*, 1 Mod. 117.

II. PROCEEDINGS.

1. In the writ of entry there must be fifteen days between the teste and return. 2 Saund 42 c.

2. If a writ of entry be brought of an advowson, to the intent to suffer a common recovery, although such a writ does not lie at the common law, still such a recovery is good. 2 Ro. 67.

3. The writ of seisin should bear teste the

fourth day inclusive after the return of the writ of entry. 2 Saund. 42 e.

4. It must be sealed at the seal-office, and then returned, with the writ of entry. Ibid.

5. It must be acknowledged before a judge, or commissioners appointed by a writ of *dedimus potestatum*, and the commissioners must certify the names of the appointed attorneys under their hands and seals. 2 Saund. 42 g.

6. The arraignment of the recovery is of the term in which the writ of summons is returnable. 2 Saund. 42 k.

7. If the warrant of attorney is not taken in due time, an application must be made to the court for leave to arraign in a subsequent term, and to the master of the rolls for new writs. 2 Saund. 42 k, l.

8. Execution may be sued out, though tenant in tail die after judgment and before execution. 2 Saund. 42 n.

9. The *dedimus* is no part of a fine, but the warrant of attorney is a part of the recovery. *Wynne v. Lloyd, T. Raym.* 71.

III. OF VOUCHER.

1. Tenant in tail, and he in remainder, may be vouched jointly. *Page v. Hayward*, Salk. 571.

2. If the tenant vouches a stranger who vouches tenant in tail, and he enters into warranty, it is good. *Id.* ibid.

3. The vouchee may appear in person without any writ of summons. 2 Saund. 42 m.

4. At common law, a recovery against tenant for life, with voucher, upon a true warranty and recovery in value, would bind him in remainder. *Jenning's case*, 10 Co. 43 b.

5. If the vouchee die before its return, the recovery is void. 2 Saund. 42 m.

6. If the recovery be with double voucher, the infant must make the tenant to the *precipe* by feoffment, and deliver seisin in person. 2 Saund. 96.

7. If tenant to the *precipe* vouches tenant in tail in possession, and him in remainder jointly, and they jointly vouch over the common vouchee, this is good. *Page v. Hayward*, Holt. 618.

8. A, being tenant for life under a will, remainder to her son in tail, a *precipe* was brought against A, who vouches the son, who vouched over the common vouchee, by which means recovery was had; and held good. *Jenning's case*, 10 Co. 43 b.

9. Husband and wife seized to them and the heirs male of the body of the husband, remainder to a stranger in tail,* ['1145] with reversion to the right heirs of the husband; the husband levied a fine, and a writ of entry was brought against the conusee, who vouched the husband and he vouched over; held, that its recovery was a good bar to the remainder; for although the husband alone

was vouched, and not his wife, who had a joint estate with him, yet the husband, coming in as vouchee, the recovery barred all the estates which were ever in him. *Cuppledike's case*, 3 Co. 5 b.

10. A recovery with single voucher, by tenant in tail having discontinued and taken back an estate tail, is no bar to the right under the original estate tail. *Reg. v. Marquis of Winchester*, 3 Co. 1.

IV. OF THE PARCELS.

1. A recovery cannot be suffered of lands in one of two counties in the alternative. 2 Saund. 94.

2. A common recovery may be suffered in Wales upon a *quod ei deferreat*. 2 Saund. 38 a. n. (3).

3. A recovery of a manor with the appurtenants, will pass the manor and also the lands which have been reputed parcel. *Thin v. Thin*, 1 Sid. 190.

4. If there be a parish, and a vill within the parish of the same name, and a recovery be suffered of lands in the vill, and in the deed to lead the uses the parish is not named, yet they make but one conveyance, and the lands in the parish pass. *Addison v. Otway*, 2 Mod. 233.

5. A recovery of a moiety of land is good for a third part, where he who suffers the recovery had but a third part of the land recovered. *Cro. Car.* 110.

6. A common recovery may be of an advowson. *Cromwel's case*, 2 Co. 69 b.

7. A recovery is not good of a tenement, but ought to be of a certain quantity of acres and houses. *Mo.* 690.

8. A recovery of lands in ancient demesne, describing them as lying in Dale, is good, although there are several vills in the parish. 1 Mod. 117; 118.

9. Lands lying in the parish of Dale, but out of the vill of Dale, pass by a common recovery, describing them as lying in Dale generally, although the writ of covenant describes them as lying in the parish of Dale. *Addison v. Otway*, 1 Mod. 250.

10. A common recovery suffered of lands in a liberty passes lands in a distinct vill within the liberty. *Lever v. Horier*, 2 Mod. 48. *Jones v. Wait*, 1 Mod. 206.

V. WHO MAY SUFFER A RECOVERY.

1. Every tenant in tail may suffer a common recovery. *William v. Berkley*, Plow. 244.

2. The king cannot suffer a recovery. *Id.* ibid.

3. A recovery suffered by a sheriff of lands in his own county is erroneous. 2 Dy. 188, pl. 8.

4. The judges are not bound to examine the competency of a party suffering a recovery. *Hume v. Burton*, 1 Ridgw. 82.

5. A common recovery against an infant is not void in law. *Hob.* 196. *Jenk.* 299.

6. The ancient practice of infants suffering it was by privy seal. 2 Saund. 96. 1 Ridgw. 264.

7. The modern practice is by private acts of parliament. 2 Saund. 96.

8. If a person *non compos mentis* suffer a recovery by attorney, it is error. 1 Ridgw. 23.

VI. ITS EFFECT;—

1. As to estates tail.

1. A recovery suffered by tenant in tail passes to the recoverer an absolute fee out of the estate tail. 2 Saund. 42. n.

2. A common recovery by tenant in tail lets in all his preceding incumbrances. *Hunt v. Gateley*, 1 Co. 61 b. 2 Saund. 42. n.

3. A recovery suffered by tenant in tail by descent, with reversion in fee by descent, does not let in the incumbrances on the reversion like a fine. 2 Saund. 42. n.

4. Tenant in tail by purchase, with the reversion in fee *ex parte materna*, suffers a common recovery; the old use is gone, and it descends to his right heir.*
[*1146] *Martin dem. Tregonwell v. Strachan*, Stra. 1179.

5. Where a fine is levied to lessee for years, with an intent that he should suffer a recovery, his term is not drowned. 1 Vent. 185.

6. The remainder-man grants a rent; tenant in tail suffers a recovery, and dies without issue; the remainder is discharged. Mo. 154.

7. A recovery had against privies to the action does not prejudice privies in interest, for they are strangers to the suit. 2 Ro. 212.

8. A recovery need not be averred to be in bar of all rights. Poph. 100.

9. A recovery against the king is not good. Cro. Car. 96.

10. Where an estate tail was of the gift of the king, and the reversion granted out in fee, and reconveyed to the crown in fee, a recovery suffered by the tenant in tail barred the issue, notwithstanding the statute of 34 & 35 H. 8. c. 20. Orl. Bridgw. 402.

11. If the king had made a gift in tail, remainder in tail, before 34 H. 8. c. 20., a common recovery would have barred both the estates; so at this day it will, where the particular estates are made by a common person; though it touches not the king's remainder or estate, yet it shall touch those which produced it. Orl. Bridg. 216.

12. A recovery will bind the issue in tail where the remainder is in the crown by the provision of a subject. Mo. 195.

13. If a tenant in tail covenant to stand seised of the estate tail to the use of himself for life, with remainder to the use of his son in tail, and afterwards suffer a common recovery, in which he is tenant to the *præcipe*, with single vouchers, to other uses than those in the covenant to stand seised, the

recovery is good, and bars the issue in tail; for the covenant to stand seised makes no alteration in the estate tail, but conveys a base fee, defeasible only by the entry of the issue in tail. *Machil v. Clerk*, 7 Mod. 18.

14. Recoveries are favoured in law, especially if for a valuable consideration. *Thornby v. Fleetwood*, 10 Mod. 125. 2 Saund. 96. S. P.

15. It is a revocation of a will. 1 Saund. 278 a.

16. A recovery binds not those who are in by title paramount. *Shelly's case*, 1 Co. 93.

17. A deed, fine, and recovery, all make but one assurance, but each has its several effect. 2 Vent. 31. 9 Co. 7 b. Moore, 191. 1 And. 125. S. P.

18. A recovery suffered of a trust estate is good, and bars the remainders. C. T. Talb. 164—167.

19. A recovery by tenant in tail will not bar a rent-charge granted by him out of the estate tail. 1 Mod. 108, 109.

20. Where a fine with proclamations is levied by a tenant in tail, and the *præcipe* is brought in the same term against the conuisee of such fine, and a common recovery suffered thereupon, such fine, *præcipe*, and common recovery, form one common assurance. *Hume v. Burton*, 1 Ridgw. 204. 237. 239. 259.

21. A recovery by tenant in tail bars a contingent remainder. *Sir A. Mildmay's case*, 6 Co. 40 a.

22. A recovery suffered by tenant in tail will bar a rent by him in remainder. 1 Mod. 110. 2 Lev. 28.

23. If a man make a gift in tail, determinable on non-payment of 1000*l.*, with remainder in tail, and other remainders over, and the tenant in tail suffer a recovery, all the remainders are barred, although he neglect to pay the 1000*l.* at the day. 1 Mod. 111.

24. Rent-charge to A in tail, remainder to B in tail; A suffers recovery, and dies without issue; the remainder is barred. *Anon.* 12 Mod. 513.

25. A common recovery by one of two tenants in tail by entireties, in the lifetime of the other, is no bar to the estate tail, or those in the remainder or reversion. *Cuppledike's case*, 3 Co. 5 b.

26. Several estates tail in the same person may be barred by one recovery. *Ibid.*

27. When a common recovery is suffered without consideration, the use results to the party suffering the recovery, if nothing is proved to the contrary. *Shelly's case*, 1 Co. 93 b. *Dowman's case*, 9 Co. 7 b.

28. Recovery to the use of A, who afterwards infeoffs the recoverer, he shall be in by the recovery, and continue seised to the use of A. 1 Dy. 18. pl. 105.

29.* If the feoffee suffer a recovery to the use of himself and his heirs, he is in of his old fee-simple. *Roll v. Osborn*, Hob. 27.

2. As to the other interests.

1. A recovery suffered by a tenant in fee-simple bars and estops him, though there be no tenant of the freehold. *T. Raym.* 323. 10 Mod. 45. Mo. 255. 1 Co. 93 a.

2. A common recovery against a disseisee to an use, is good against him and his heirs. *Cro. Car.* 388. 389.

3. Tenant for life with power to make a jointure suffers a recovery; the power is extinguished. 1 Vent. 226, 227.

4. A recovery suffered by a bare tenant for life works a forfeiture. 2 Saund. 42 m. n. [A].

5. Tenant for life has a power to lease in possession, reversion, or contingency; he leases to A for a term of years, to commence after the death of the next tenant in tail without issue; a recovery by the tenant in tail bars the lease. *T. Raym.* 236.

6. Recovery by infant is at the option of the court of C. P.; if permitted, the court must examine the infant and his guardian too. *Hob.* 196, 197.

7. If suffered by husband and wife, it will bar dower or jointure. 2 Saund. 42 m.

8. A common recovery by husband tenant in tail by enticeries with his wife operates by estoppel, and is void as against the issue and those in remainder or reversion. *Reg. v. Marquis of Winchester*, 3 Co. 1.

9. A recovery by husband and wife of her trust estate held good, although the bargain and sale whereby the tenant to the *precipe* was made were enrolled within six months, but not until after the recovery was completed. *C. T. Talb.* 164—167.

10. A recovery suffered of an estate in fee-simple will not alter the nature of the descent; and therefore, if husband and wife, he being seised of lands in right of his wife by descent *ex parte materna*, suffer a recovery to themselves for life, with remainder in tail, remainder to the right heirs of the wife, with a power to the wife to dispose of the reversion in fee, and they die without issue, and without making any disposition of the reversion, the estate shall descend to the heir of the wife *ex parte materna*. *Abbot v. Burton*, 11 Mod. 181.

11. Husband and wife joint-tenants before coverture; the husband alone suffers a recovery, and dies; the remainder is bound *pro medietate*. Mo. 95.

12. But if they had been joint-tenants after the coverture, the recovery would have bound for no part, neither the issue nor the remainder. Mo. 210.

13. If baron and feme be tenants in special tail, and the baron only levy a fine and die, the feme upon re-entry is tenant in tail, and may suffer a recovery which shall bar

the reversions, not the issues in tail. *Hob.* 259.

14. Nor the connusee himself after her death. *Duncombe v. Wingfield*, *Hob.* 259.

15. A reversion expectant is barred by a common recovery. *Holt.* 615.

16. A recovery by one joint-tenant binds only his own moiety. 1 Leon. 270.

17. If there be a limitation to a use on condition, and the *cestuy que use* suffer a recovery, it will not destroy the condition. 1 Mod. 109.

18. A term is not barred by a recovery. 2 Saund. 42 d.

19. Estates held by statute-merchant, staple, or *elegit*, will not be barred by a recovery. 2 Saund. 42 d.

20. A common recovery does not bar an executory devise. *Palm.* 140.

VII. REVERSAL AND AVOIDANCE.

1. A recovery suffered by privy-seal is erroneous, and may be reversed. 1 *Ld. Raym.* 113.

2. A recovery must be commenced by an original writ; but if it be not, it is not void, but voidable. 2 Saund. 42.

3. If a recovery is suffered the first day of the return of the writ, and the tenant die afterwards, and before the fourth day, it does not avoid the recovery. *Dall.* 17.

4. The grantee of a rent-charge by a remainder-man cannot falsify a recovery by the tenant in tail, neither can the remainder-man, nor any claiming under him. *Hunt v. Gateley*, 1 Co. 61 b.

5. Infancy cannot be assigned for error by the vouchee in a common recovery after he comes of age. 1 *Ridgw.* 230.

6. An infant who suffers in person a common recovery, cannot [*1148] not reverse it after he comes of full age. 1 Mod. 49. 246.

7. A recovery may be reversed when suffered by a feme covert under age who appears by attorney. *Stokes v. Oliver*, 5 Mod. 209.

8. Suffered by infant by guardian, cannot be reversed on error. 2 Saund. 96.

9. If suffered by attorney, may be reversed at any time after the infant attains his full age. 2 Saund. 96 a.

10. A common recovery may be reversed without a *scire facias* to the terre tenants. *Kingston v. Herbert*, 3 Mod. 119. *Centra*, *Holt.* 614.

11. But there ought to be a *scire facias* against the heir and terre-tenants, when a writ of error is brought to reverse a common recovery. *Anon.* 3 Mod. 274.

12. For though it is not necessary in point of law, yet it is the course of the court, and that must be followed. 3 Mod. 274. 2 Saund. 93.

13. If a recovery of land is reversed by error, it is not so avoided as to subject the

recoverer to trespass for taking the profits in the meantime. *Plow* 107.

14. Irregularities in making the tenant to the *precipe* are cured after twenty years by *stat. 14. Geo. 2. 2 Saund. 42 c. d.*

15. Error to reverse a recovery is barred by twenty years, though the title of plaintiff accrued within the time. *Stra. 1257.*

16. The remainder-man or reversioner expectant upon an estate-tail may have error to reverse a common recovery suffered by the tenant in tail, after the determination of the particular estate, but not before, unless made a party to the record by aid prayer, &c. *The Queen v. M. of Winchester, 3 Co. 1.*

17. A recovery erroneous for want of an original is not void, but voidable by error, and till it be re-vested in the remainder has not any right in it; but the estate-tail is barred. *Marquis of Winchester's case, 3 Co. 1.*

18. If the summons be tested subsequently to the return of the *dedimus*, it is not error. *T. Raym. 70. 96. 1 Lev. 130.*

19. No error that it appears not whether there was any warrant of attorney. *T. Raym. 70. 96.*

20. A common recovery suffered in a manor court will not pass the estate, unless there is a custom to suffer such recovery; and therefore without a custom it will not work a forfeiture. *Kren v. Kirby, 2 Mod. 33.*

21. A recovery without seisin is imperfectly found, and no *venire facias de novo* shall go. *Stra. 1185.*

22. A common recovery at Westminster of lands in a county palatine is void, because out of the jurisdiction of the courts of Westminster. *Peacock v. Kendall, 1 Saund. 74.*

RECUSANT.

I. RELATIVE TO THE PROCEEDINGS AGAINST RECUSANTS; AND CONSEQUENCE OF NOT CONFORMING, p. 1148.

II. OF THE PLEA OF RECUSANCY, p. 1149.

I. RELATIVE TO THE PROCEEDINGS AGAINST RECUSANTS; AND CONSEQUENCE OF NOT CONFORMING.

1. An information upon 28 Eliz. for recusancy may be in the C. B. *Hob. 204, 205. 251.*

2. The indictment need not name the offender as of a parish, but a vill. *2 Leon. 167.*

3. An information for not coming to church, *contra formam statuti*, is good. *Perker v. Webb, 3 Lev. 61.*

4. An information for not coming to church may be brought on the statute 23 Eliz. c. 1., reciting the clause in it that refers to the 1 Eliz. c. 2. *1 Mod. 191.*

5. The quarter-sessions has no authority by 35 Eliz. c. 2. to proceed against quakers for not going to church. *Res v. Vicarell, 2 Show. 401.*

6. To an indictment for recusancy, conformity is a good plea, but not to an action of debt. *Anon. 1 Mod. 213.*

7. If tenant in tail convicted of recusancy by process die, his issue can avoid the seizure of the land; otherwise, if the conviction be by judgment, for he could not then have avoided the debt. *Mo. 523.*

8.* If a recusant confirm before [*1149] judgment on a *qui tam* action, he is discharged from the penalty. *Ogden v. Kennett, 2 Show. 179.*

9. A pardon of recusancy tolls the disability to present. *Ld. Petre v. University of Cambridge, 3 Lev. 333.*

10. The court will allow time to a recusant to conform. *Workman v. Gillard, 2 Show. 332.*

11. On a suggestion of conformity after a verdict for the plaintiff, on 23 Eliz. c. 1., the court will allow the defendant time to enter the plea. *Peters q. t. v. White, 2 Show. 238.*

12. A defendant after judgment for recusancy on a *qui tam* action, cannot have an *audita querela* on a suggestion of conformity. *2 Show. 240.*

13. Nor, after judgment on a *qui tam* action on 23 Eliz. c. 1., can he have an *audita querela* to prevent execution on a certificate of conformity. *Id. ibid.*

14. An action on the 23 Eliz. c. 1. against a wife, shall not be stayed on the husband's conforming. *Workman q. t. v. Gillard, 2 Show. 331.*

15. A conviction is not necessary to prevent the devise of lands by a papist in Ireland. *Rice v. Oatfield, 2 Stra. 1095.*

16. The judgment for recusancy is *quod convictus est*. *Stra. 1048.*

17. Recusant convict forfeits not the estate of the land, only the profits. *Hob. 73, 74.*

18. A termor was outlawed upon the statute of recusancy, whereby his term was forfeited, and sold by the lord treasurer and barons, and then the outlawry was reversed; adjudged, the termor should have his term again; otherwise, if a sheriff sells a term upon an execution, where the party shall be restored only to the money. *Eyre v. Woodfine, Cro. Eliz. 278.*

19. A recusant convict forfeits the presentation of the church to the university; if the land was seized before avoidance for the penalty of 20*l.*, the king shall have it. *Chancellor of Cambridge v. Walgrave, Hob. 126, 127.*

20. In an action of debt against baron and feme, for the recusancy of the feme, both must appear, or both must be outlawed. *Loveden's case, Hob. 179.*

21. The king shall have the two parts forfeited as a *nomine pena*, and they shall not go in satisfaction of 20*l.* by the month. *Gage's case, Cro. Eliz. 845. See Ford and Sheldon's case, 12 Co. 1.*

22. The moiety of recusants' lands shall be in the king's hands until they take the oath appointed by 1 Eliz. *Tredway's case*, Ley, 59.

23. The act of 3 Jac. 1. has a retrospective operation, and disables the recusant to make the grant from the beginning of the session of parliament, during the time of his recusancy. *University of Oxford's case*, 10 Co. 53 b.

24. Recusancy certified by the bishop in non-payment of tenths, contrary to the statute of 26 Hen. 8., is traversable; and if the jury find specially that there was no express demand to pay, or not by one having authority to demand or receive it, the incumbent does not forfeit the benefice. Mo. 541.

25. The king seized a manor for recusancy, to which an advowson was appendant, and granted the manor with the appurtenants *in tam amplio modo et forma*, and grants all the hereditaments in A; still the advowson does not pass. Mo. 872.

26. A popish recusant convict cannot prove a will. 6 Mod. 239.

27. Nor, if a recusant convict make his wife executrix, can she prove his will. *Reg. v. Ride*, 3 Salk. 133.

II. OF THE PLEA OF RECUSANCY.

1. Recusancy pleaded in abatement need not say *papalis*. *Countess of Portland v. Cole*, 3 Lev. 11.

2. It is not good to plead *papalis recusans* convict, if he does not show him to be so convicted; but it is cured by the words *secundum formam statuti*. *Recant v. Toblin*, 3 Lev. 67.

3. A plea of popish recusancy ought to allege that the convict did not render himself before the next sessions, and not that he did not render himself at the next sessions. *Ld. Petre v. University of Cambridge*, 3 Lev. 334.

4. Conviction of recusancy certified in B. R. must be pleaded there, *sub pede sigilli*. *Curwen v. Fletcher*, Stra. 523.

5. The stat. of 28 El. against popish recusants was pleaded as made 29 [*1150] El., and* therefore held ill. *Ld. Petre v. University of Cambridge*, Lutw. 452.

6. That statute is, that the recusant on proclamation, &c., shall render himself, &c., before the next sessions; and it was pleaded that he did not render himself at the next sessions, and therefore ill. S. C. Lutw. 452.

REGISTER.

1. The office of register to a bishop is within the stat. 5 & 6 Ed. 6. that prohibits the sale or deputation of any office of justice. *Lake v. Pugeon*, Nels. 28.

2. A register cannot sue in the spiritual court for his fees. 1 Mod. 168 *notis*.

REGISTRATION.

1. The statute of 6 Anne, c. 2. does not

enable a lessee to maintain an action of covenant at law for breach of a covenant for renewal contained in a lease, which had been registered pursuant to said statute, against the person claiming the reversion and inheritance of the demised premises, as assignee of the covenantor, by deed executed prior to the lease and covenant, which deed was not so registered. *Duchess of Chandos v. Brownlow*, 2 Ridgw. 345.

2. The registry act does not affect the great fundamental principles of equity; but every purchaser claiming under a registry deed is left open to any equity which a prior purchaser or incumbrancer may have. *Duchess of Chandos v. Brownlow*, 2 Ridgw. 428.

3. A purchaser with notice of a prior incumbrance is not protected by the not registering it. *Cheval v. Nichols*, Stra. 664.

4. An unregistered deed of 1728, purporting to convey the reversion of certain premises for value, held not to be valid to defeat the operation of a registered covenant for renewal in a lease of 1729. *Duchess of Chandos v. Brownlow*, 2 Ridgw. 383.

5. The registration of a deed does not extend the covenants beyond their original import. S. C. 2 Ridgw. 415.

6. Registering an assignment is not registering the lease. *Honeycomb dem. Halpen v. Waldren*, Stra. 1064.

7. The buyer of a ship not duly conveyed under the acts, acquires property sufficient to maintain trover against a stranger. 2 Saund. 47 d. n. [h.]

REJOINDER.

1. The defendant is not bound by a consent to rejoin gratis, if the replication shows a cause of demurrer. *Dewey v. Sopp*, Stra. 1185.

2. A plaintiff cannot have leave to rejoin double. *Warren v. Ivis*, Stra. 908.

RELATION.

1. Relation only makes acts good as between parties, but so as not to prejudice strangers. *Thompson v. Leach*, 3 Lev. 285.

2. On surrender of copyhold, admittance after the death of the surrenderor prevents the wife of her free-bench. *Id. ibid.*

3. Administration relates to the death of the intestate. Lutw. [430.]

4. If a man be living at the day of *nisi prius*, and dies before the day in bank, the writ shall not abate; so, if a man be living the first day of parliament, and dies before the last, yet he may be attainted, for they are but one day by relation. March, 65, pl. 101.

5. If a man be arrested by a warrant which at the time was not legal, but is afterwards made legal by act of parliament, the

killing is murder by relation of the act of parliament. *Res v. Thursten*, 1 Lev. 91.

6. A lease made by assignees of commissioners of bankrupt of the bankrupt's land, shall have relation to the time at which the bargain and sale was enrolled. *Berrie v. Bowyer*, 2 Show. 156.

7. If a trader be arrested on several actions, and give bail to them all, his not paying the debts in six months after the arrest and bail given, shall not make him a bankrupt until after six months, for the six months mentioned in 21 Jac. 1. c. 19. shall [*1151] relate to the time* of the arrest. 2 Show. 512. See also *Duncomb v. Watler*, 2 Show. 243.

8. The teste of a writ was 2 Martii, 11 Eliz.; the return in *quarta septimana quadragesima proxim. futur.*; the words "*proxim. futur.*" refer to the *quarta septimana*, not to *quadragesima*. Mo. 365.

9. There can be no averment when the king's assent was given to a statute; for it relates to the first day of the session. *Sir R. Hensley v. Jones*, 1 Sid. 310.

10. *Adhuc* in the declaration refers to the time in the plaint. *Carter v. Calthorpe*, 3 Lev. 345.

11. Judgment must relate to the essoin-day, that being the first day of the term. 3 Salk. 212. 345.

12. The defendant dies after verdict, and afterwards the judgment is entered by virtue of the new statute; the judgment by relation is a judgment against the testator, and binds the executor. *Barnett v. Holden*, 1 Lev. 277.

13. By construction of law a thing may relate *ab initio* to some intent, and to some intent not. *Menville's case*, 13 Co. 19.

RELEASE.

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IX. RELATIVE TO THE PLEADING A RELEASE, p. 1156.

I. WHAT MAY BE RELEASED.

1. A man may release a right which he cannot assign. *Marks v. Marks*, 10 Mod. 423. 425.

2. Part of a sum in obligation may be released, and not all. 1 And. 235.

3. The plaintiff may release part, and have judgment for the residue. *Jenk. 286*.

4. Where a man has several means of coming to his right, he may release one of them specially, and yet take the benefit of the other; but when he can only come to his right by way of action, a release of all actions destroys the right. *Allham's case*, 8 Co. 150 b.

5. A release of common in part extinguishes the whole. *Cro. Eliz. 590. Miles v. Etteridge*, 1 Show. 350.

6. A release is the proper conveyance for one joint tenant to pass his estate to another. *Chester v. Willan*, 2 Saund. 97.

7. A release of all the right in the land to him in reversion is good. *Plow. 157. 161*.

8. A rent reserved to the heirs, without naming the ancestor, may be released by the ancestor, though he have no estate at all in the rent; but the release must be by the word "rent," not action. *Hob. 130*.

9. A release of a next avoidance is good if the church is full, not if vacant. *Cro. Eliz. 600*.

II. WHEN IT IS SUFFICIENT BY PAROL.

1. A promise may be released by parol. 2 Leon. 76.

2. A contract to pay for a thing at a certain day cannot be discharged by parol. 1 Ro. 43.

III. WITH RESPECT TO THE TIME AT WHICH A RELEASE MAY BE GIVEN.

1. The demandant pending the writ may release to the tenant, though he hath aliened, or to the vouchee. *Hob. 222. 338*.

2. A release after judgment and before affirmance is good. *Cro. Jac. 401*.

3.* A plaintiff releases to the bail all demands, before judgment [*1152] against the principal, and then the principal is condemned; the release is a good discharge of the bail. Mo. 469.

4. A release between the verdict and day in banc cannot be received. *Cro. Jac. 646*.

5. A release by the plaintiff to the sheriff after the money levied is good. *Hob. 207*.

6. A release of all his rights by connues to a terre-tenant before execution sued is void, for the person only is the debtor, and the land in respect of the person. *Cro. Eliz. 40. 552*.

7. Release to a bargaine before enrolment is not good. *March, pl. 70*.

8. By the lessor of all his right to lessees for years before entry is void. *Plow. 423*.

9. A release in the time of vocation to the patron discharges an annuity with which the parson is charged in respect of the parsonage. *Hoe v. Marshal*, 5 Co. 70 b. *Cro. Eliz. 579. Moore, 469. Goldsb. 166. S. C.*

IV. WITH RESPECT TO THE PARTY TO WHOM THE RELEASE IS GIVEN.

1. The release of one of several obligees or covenantees is a release in law of all. 3

Salk. 298. Hob. 10. *Lacy v. Kynaston*, 12 Mod. 550.

2. To one trespasser discharges all. *Cocke v. Jenner*, Hob. 66.

3. Where twenty are jointly sued, a release to one is a discharge to all. *Noy*, 62.

4. In trover against two, if there be a verdict against one, and the other pleads a release and has a verdict, the plaintiff cannot have judgment against the other; for the trover being joint, a release to one discharges the other. *Kiffin v. Willis*, 4 Mod. 380.

5. In all cases where two or more are to recover a personal thing, the release of one shall abate the action as to the rest; but it is otherwise when they are defendants, and are to discharge themselves from a personality. *Capel v. Salenstall*, 3 Mod. 249.

6. If trespassers sever in pleas, and the plaintiffs before judgment be nonsuit, or enter a *nolle prosequi* against one, this is a discharge of all; not so after judgment. *Parker v. Lawrence*, Hob. 70. 180.

7. A with his wife and B purchase lands to them and the heirs of A and B; B releases to A only, the wife takes nothing in B's moiety, but A takes a fee, though there was no mention of his heirs, for his interest before was a fee simple; *secus*, had such release been to the wife, who had only a life estate. 3 Dy. 263. pl. 54.

8. If made to one who is but tenant by sufferance, it does not vest any estate for want of privacy. *Cro. Jac.* 169.

V. IN RESPECT OF THE PERSON GIVING THE RELEASE.

1. A release given by an executor before probate of the will is not good. *Morris v. Philpot*, 2 Mod. 108. 3 Keb. 814. S. C.

2. By an infant executor without consideration is void. *Cro. Eliz.* 661.

3. By the baron of a legacy to the feme after a divorce *causa adulterii*, is good to extinguish it. *Stephens v. Totty*, *Cro. Eliz.* 908.

4. Release by husband of his wife's suit in the spiritual court for defamation, is a good release *quoad* the costs, but not *quoad* the defamation. *Cro. Car.* 222.

5. By *cestuy que use* of a bond is not good. *Jenk.* 222.

6. By a tenant for years to him in reversion is good. 1 Lev. 145.

7. Tenant for life cannot release to him in remainder, but must surrender. 2 Dy. 251. pl. 92.

8. If there be two joint-tenants in fee, and one grants a rent-charge in fee, and afterwards releases to the other and dies, the survivor shall not avoid the rent. *Lord Abergavenny's case*, 6 Co. 78 b.

9. A release in *quare impedit* from one co-heir plaintiff does not bar the rest. *Countess Northumberland's case*, 5 Co. 97 b.

10. In all cases of things entire and in the

reality, the release of one shall enure to the benefit of the others. *Id. ibid.*

11. When judgment is given against one or two joint-tenants for life in an action of debt, and afterwards that one releases* to the other before execution, such [*1153] release shall not bar the execution of the plaintiff; but if the joint-tenant had died before execution, the survivor should have the lands discharged of any execution; and where the joint-tenant for life to whom the release is made dies, and the reversioner enters, the estate of the other who is yet living has continuance as to the plaintiff. *Lord Abergavenny's case*, 6 Co. 78 b.

12. If several recover costs jointly in the ecclesiastical court, and afterwards one of them releases, this is no bar to the others in a suit there for their costs; so where a baron and feme recover costs there in the right of the wife, and the baron releases, this shall not bar the wife. *March*, 73. pl. 112.

13. One of the defendants who made cognisance released the plaintiff after the taking of the cattle; and it was held void upon a demurrer, for he had no demand or suit against the plaintiff, having distrained in the right of another. 3 Mod. 279.

14. One grantee of a *prochein avoidance* cannot release to his companion. 1 Leon. 167. 3 Leon. 258.

15. A woman having title of dower releases to him in the reversion, and afterwards tenant for life surrenders to him, it is a good bar. *Semb. Hoc v. Marshal*, 5 Co. 70 b.

16. If the husband, seized of a rent or common in fee, releases to the terre-tenant, with regard to the wife the rent has continuance, and she shall be endowed. *Lord Abergavenny's case*, 6 Co. 78 b.

17. In replevin against six, the plaintiff had judgment; the six (who are compelled to join in the writ) bring error, and the defendant in error pleads the release of one, and upon demurrer it was held that this release shall not bar others. *Ruddock's case*, 6 Co. 15 a. *Cro. Eliz.* 648, 649. *Jenk.* 271. S. C. *Sed vide Hackel v. Herne*, 3 Mod. 135.

18. If judgment be given against four defendants, and all of them join in a writ of error, and the plaintiff plead a release of errors by one, it shall not discharge the rest; but if there had been four plaintiffs to recover, the release or death of one is a bar to all. *Anon.* 3 Mod. 109. *Palm.* 319.

19. A release of "all demands" given by the husband, will release a debt owing to the wife before coverture, for the husband only can demand it; *aliter*, if he give a release of all actions. Cited in *Miles v. Williams*, 10 Mod. 165.

20. Release by one joint-tenant for life to another, does not destroy a contingent

remainder depending upon it. *Harrison v. Belcey*, T. Raym. 413.

21. If lands be settled to the use of A and B for their lives, remainder to the use of the first son of B in tail male, remainder to the heir of A, a release made by B of "all her right and estate to A and his heirs," does not destroy the contingent remainder to the first son of B, although the release be made before such son is born. *Harris v. Belchey*, 2 Show. 92.

VI. RELATIVE TO THE CONSTRUCTION AND EFFECT OF A RELEASE.

1. A release is an absolute defeasance. *Powell v. Forrest*, 2 Saund. 48.

2. It is considered a satisfaction in law. *Noy*, 5.

3. General words therein may be restrained by the particular occasion of giving it. *Knight v. Cole*, 3 Lev. 273. 1 Show. 151. S. C. *Henn v. Hanson*, 1 Lev. 101. *Morris v. Philpot*, 2 Mod. 108 *notis*. *Morris v. Wilford*, 2 Show. 47.

4. The general words of it may be restrained by a particular recital, or other part of the instrument. 2 Saund. 47 t. n. [c]. J. Bridge. 102. *Thorpe v. Thorpe*, 1 Ld. Raym. 235, 236. 664.

5. Release of a legacy by one executor, and also of "all actions, suits, and demands whatsoever;" those general words which follow are tied up to the legacy, and release nothing else. *Cole v. Knight*, 3 Mod. 277.

6. Upon a general release, a note, &c. given bearing even date with the release is not discharged. *Cole v. Knight*, Holt, 621. *Assn*. 12 Mod. 401. *Nichols v. Ramsel*, 2 Mod. 280. *Dixon v. Terry*, 4 Mod. 182. *Newman v. Beaumont*, Owen, 50.

7. If a man be bound to pay [*1154] money at^a a day to come, a release of all actions before the day is a bar. *Middleton v. Rimot*, 5 Co. 28 b.

8. If A on the 26th make a statute to B, and B on the 27th make and deliver a release up to the making of these presents, but dates it as on the 25th, still the statute is released; *secus*, had it been up to the day of the date. *Hedley v. Jona*, 3 Dy. 307. pl. 67.

9. A defeasance is, that when the condition be performed, the thing defeasanced shall cease. 12 Mod. 550.

10. Where a release is the consideration of a promise, although it be general, the promise is not released. *Palm*. 218. *Thorpe v. Thorpe*, 1 Ld. Raym. 235. 664. *Lutw*. [88].

11. If a receipt be given for 10l., in which there was a release of "all actions, debts, duties, and demands," nothing is released but the 10l. 3 Mod. 277. 1 And. 64.

12. A general release shall not bar what is future. *Cro. Jac*. 623.

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13. By a release of all demands a warranty is extinct. *Hoe v. Marshal*, 5 Co. 70 b.

14. A release of "all demands" will not bar a future duty, or a rent not yet due. *Trevil v. Ingram*, 3 Mod. 281. 3 Mod. 278. 1 Lev. 99. 2 Lev. 210. 1 Mod. 99, 100. *Stephens v. Snore*, Salk. 578.

15. If a lessee for years assigns, and then releases all demands to his assignee, it is a release of all the rent to come. 2 Ro. 20.

16. A release of "all demands" discharges a rent severed from the reversion. 2 Mod. 282.

17. Where a thing is to be done on a condition precedent, a release of all demands given before condition performed does not discharge it, for before that it does not lie in demand. *Thorpe v. Thorpe*, 12 Mod. 455. 460.

18. Oblige in trust for another releases all demand on his own account; this does not release the obligation. *Offly v. Warde*, 1 Lev. 235.

19. A release of "all actions and demands" does not discharge a legacy; it must be by particular words. *Cole v. Knight*, 3 Mod. 279.

20. Release of all actions, quarrels, suits, and trespasses, is no bar to an action for a covenant broken after the release given. 2 Dy. 217. pl. 2. *Cro. Jac*. 487. *Hoe v. Marshal*, 5 Co. 70 b. *Mo*. 34. S. P.

21. In debt upon an obligation, the defendant pleads a release of all errors, and all actions, suits, and writs of error whatsoever; the release was held to extend only to writs of error. T. Raym. 399.

22. By a release of actions real or personal, such actions only are released in which the plaintiff should recover any thing in the reality or personality which is due to him. *Altham's case*, 8 Co. 150 b.

23. In some cases, by a release of all actions, a debt or duty is barred, although no action at the time of the release given lies for the debt. *Id. ibid*.

24. By a release of all actions, actions depending and causes of action are released. *Id. ibid*.

25. A covenant to pay money at a future day, is not discharged by "a release of all debts, dues, actions, causes of action, obligations, and writings obligatory," if such release be made before the day of payment. *Carthage v. Manly*, 2 Show. 90.

26. A release of "all actions" will discharge a *sci. fa.* or an award of execution upon a *sci. fa.* *Obrian v. Ram*, 3 Mod. 185. 187. 8 Co. 150 b. 2 Saund. 6 a.

27. A release of all actions is not a release of executions. *Altham's case*, 8 Co. 150 a.

28. Otherwise by a release of all suits. *Id. ibid*.

29. So, a release of all actions is not ef-

fectual before the day of payment. *Take v. Check*, Cro. Eliz. 897.

30. But by a release of covenants, the covenant is discharged before the breach of it. *Hoe v. Marshal*, 5 Co. 70 b.

31. The word "quarrels" extends to actions real and personal, and to causes of action and suits. *Altham's case*, 8 Co. 150.

32. A release of suits is larger and more beneficial than a release of quarrels or of actions; but a release of all demands is the most advantageous to the releasee. *Id. ibid.*

33.* A release of damages in [*1155] dower sustained *occasional detentionis donis*, is no release of the meane profits of the land, for they are two distinct things. *Harvey v. Harvey*, T. Raym. 366.

34. Where one releases his right, he cannot pursue his action or remedy. *Salk*. 422.

35. But if he has a right and several remedies, the discharge of one remedy discharges not the other. *Salk*. 422.

36. Release by the lord to the tenant of all services and customs, *salvo* 2s. rent; the suit of court and relief are discharged from the ancient demesne, but the rent remains parcel of the ancient seignory. *Mo*. 12.

37. Release to an administrator of all right to the personal estate, will not discharge a bond given by the intestate. *Topham v. Toller*, 2 Ld. Raym. 786. *Salk*. 575. S. C.

38. Release of goods in specie shall not be extended more largely than to the thing released. *Morris v. Wilford*, T. Jones, 104.

39. The lord grants the freehold of a copyhold to J S; a copyholder in possession releases to the grantee all his right; the copyhold is not extinct. *Anon*. Cro. Eliz. 21.

40. A release by the king to his debtor of all rights and titles does not discharge the land. *Hob*. 46.

41. The release of all actions real, to one having but a reversion expectant on a freehold, does not extinguish dower; but if the release be of all her right, the dower would be extinct. *Altham's case*, 8 Co. 150 b.

42. Of all right to such lands, will not release a judgment not executed. 3 *Salk*. 298.

43. If a donee release to the cognisor all her right and title to the lands of the cognisor, and afterwards sue out execution, he may extend the lands released. *Morris v. Philpot*, 2 Mod. 108.

44. So, if a debtor release to the debtor all his right and title which he has to his lands, and afterwards get a judgment against the debtor, he may extend his moiety of the same lands by *elegit*. *Morris v. Philpot*, 2 Mod. 108.

45. If a reversioner bargain and sell the lands leased, and then release his interest in the reversion, such release shall be intended to the use of the releasee and his heirs, although no consideration is expressed for the

release, nor any express uses limited therein. *Shortridge v. Lamplugh*, 7 Mod. 72.

46. By a release of *totum statum suum*, the fee-simple will pass. *Wilson v. Robinson*, 1 Mod. 101.

47. A release of all actions and demands does not release a promise before breach; *secus*, of a release of all promises. *Hob*. 216.

48. Release of covenants before any broken, discharges the bond for performance. 3 *Leon*. 69.

49. Where there are mutual promises, a release will bar an action before performance. *Thorpe v. Thorpe*, 12 Mod. 459.

50. A release of all demands does not release a covenant before breach. *Hancock v. Field*, Cro. Jac. 170. 300.

51. A defendant condemned in debt brought error, the plaintiff released to the bail and died; this is a good release to bar the administrator in a *sci. fa.* against the bail, although the record be removed. *Mo*. 852.

52. A release of actions and demands to a bail is no discharge of the recognizance before judgment and default. *Hoe v. Marshal*, Cro. Eliz. 580.

53. A release that the releasee shall pay so much money to the releasor is not good; but if the release be so made, that if the releasee shall pay so much at such a day to come, then he releases, &c., this is a good release. *Lutw.* [243].

54. A personal action once suspended is gone for ever. *W*. Jo. 345.

55. A release of a bond to perform all covenants and agreements in an indenture releases the agreements also, but is no discharge of covenants already broken. 1 *Dy*. 56. pl. 20.

56. In debt upon a bond of £200 for payment of £104, a release of a bond of £200 for the payment of £100, is not good, although it be averred there is no other bond made by the defendant. *Chace v. Gold*, Aleyn, 71.

57. If a release except one bond, all suits and actions touching it are excepted; and if a release be pleaded generally, and the deed produced have an exception, the plaintiff may plead *non est factum*. *Brook v. Wheeler*, Cro. Eliz. 726.

58.* It cannot be construed to be the intent of the party to re- [*1156] lease an agreement made to himself, when he joins another in the same release, who was not party to the agreement. *Cartledge v. Mewdlin*, T. Raym. 393.

VII. WHAT OPERATES AS A RELEASE.

1. A bond given to a woman, with condition to leave her a sum of money, is not released by intermarriage. *Cage v. Acton*, 1 Ld. Raym. 515.

2. A bar by judgment is a release in law. *Noy*, 5.

3. If one covenant not to sue generally, or not to take advantage of a deed, it amounts to a release, and may be pleaded; but if the covenant be not to sue within a particular

time, it is no release, but a covenant only. *Ayliff v. Scrimshire*, 1 Show. 47. 2 Saund. 47 t. 3 Salk. 298. Holt, 620. *Aleff v. Scrimshaw*, Salk. 573.

4. But though the covenant be not to sue only for a particular time, it may be pleaded if in the same deed. *Semb*. 2 Saund. 47 t.

5. If covenantee covenant to save covenantor harmless, it is a defeasance of the covenant. *Lacy v. Kynaston*, 12 Mod. 415.

6. Indenture made by A and B to save C harmless, is not a defeasance of a covenant wherein A is bound to pay C a sum of money. *Lacy v. Kynaston*, 12 Mod. 548.

7. If A and B be jointly and severally bound to C, and covenant not to sue A, it is not a release or defeasance. *Lacy v. Kynaston*, 12 Mod. 551, 552. Salk. 575. 2 Saund. 47 t.

8. Where it may be collected that the deed intends mutual remedies, it shall not be construed a defeasance. 12 Mod. 550.

9. One deed not to be construed as a defeasance of another without necessity. *Clayton v. Kynaston*, 2 Salk. 574. 12 Mod. 221. S. C.

10. A letter of license not to sue under pain of forfeiting the debt, is no release. *Carriell v. Edwards*, 1 Show. 331.

11. It is but a defeasance, and such an one there may be by another deed. S. C. 1 Show. 334.

12. If there be three joint-tenants for life, and one of them by his deed grants all his rights to the lands in jointure to another of the joint-tenants, it will amount to a release of his right to the grantee, and will pass to him the property of the grantor. *Chester v. Willan*, 2 Saund. 96, 97. 2 Keb. 641. 1 Vent. 78. T. Raym. 187. 1 Sid. 452. S. C. 14 Vin. 478. 18 Vin. 313. Co. Litt. 301 b. 302 a.

VIII. WHEN A RELEASE IS VOID, OR MAY BE SET ASIDE.

1. A mortgagor articles with a stranger for the sale of the lands mortgaged, and receives £50 of the money; then, pending a bill against himself and the mortgagee for a discovery and performance, &c., releases to the mortgagee all his right and equity of redemption; the release is void as to the purchaser. *Hill v. Worseley*, Hard. 320.

2. Tenant for life, remainder to his son and heir-apparent in tail, by covin between himself and A and B, made a lease for years to A, who made a feoffment to B in fee, to whom the tenant for life released with warranty; this shall not bar the son. *Fisherbert's case*, 5 Co. 79 b.

3. If an heir release to the disseisor, and afterwards his ancestor dies, it does not bind the heir. 2 Leon. 47. 56, 57.

4. A general release was set aside as to a bond, it appearing that it was not intended to release it. *Merrick v. Harvey*, Nels. 49.

5. General releases given in pursuance of

an award obtained by fraud, were ordered to be cancelled. *Norgate v. Pouden*, Nels. 6.

IX. RELATIVE TO THE PLEADING OF A RELEASE.

1. Where a deed operates as a release, it ought to be so pleaded. Lutw. [101. 243].

2. A release from one trustee after action brought, may be pleaded in bar. *Bayley v. Lloyd*, 7 Mod. 250.

3. Where a proviso goes by way of defeasance of a covenant, it must be pleaded on the other side. *Clayton v. Kynaston*, Salk. 574.

4*. But otherwise where it is by way of explanation or restriction [*1157] of the covenant. Id. ibid.

5. If a release be made to one of several obligors, the rest may plead it. 2 Saund. 47. t.

6. Upon a special verdict in ejectment, a day being given for the argument, before which the defendant procures a release of all ejectments, the defendant may at the day of argument plead the release after the last continuance. 2 Ro. 467. *Sed vide* Hob. 162. *contra*.

7. A release before acquittal, though after indictment, is no plea in a conspiracy. *Speake v. Richards*, Hob. 207.

8. Release of the lessor to the lessee after assignment of the reversion, is no bar to the assignee in an action for rent. *Harper v. Bird*, T. Jones, 102.

9. A release of actions real is no plea for the disseisor in an assise brought against him and the tenant; *secus* where the disseisor is also tenant. *Colt v. Bishop of Coventry*, Hob. 163.

10. A release of demandant made after the vouchee entered into warranty, cannot be pleaded by the tenant. Jenk. 100.

11. A release in trespass is not good without showing it was before the trespass. J. Bridg. 46.

12. The plea must show it to have been by matter as high as the instrument to be defeated. 2 Saund. 47 s.

13. Pleading that one released *reversionem suam*, is as good as if it had been pleaded that he released all his right in the reversion. Lutw. [125].

RELIEF.

1. Relief is not due upon a fee-farm. Mo 168.

2. The heir of one co-parcener is not liable to pay it, because it is an entire thing. 3 Leon. 13.

3. Executors can bring debt for a relief, but not the party himself; his remedy is by distress. 2 Ro. 370.

4. Relief on the death of every tenant in socage need not be mentioned in pleading the tenure. *Freemans v. Booth*, 3 Lev. 145.

5. Debt lies for it against the heir's executor, for the heir could not wage his law. Cro. Eliz. 883.

6. Acceptance of rent is no bar. Cro. Eliz. 885.

REMAINDER.

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I. RESPECTING REMAINDERS IN GENERAL.

1. A remainder is a future interest. *Orl. Bridg. 4, 5.*
2. The law expounds a remainder and reversion as one and the same thing in common acceptance, though not in pleading, yet in fines and grants. *Orl. Bridg. 99.*
3. Every remainder ought to have an estate precedent to support it. *Plow. 35. 83.*
4. It is a principle of law, that a remainder must vest at the determination of the particular estate, or sooner, or else not at all. *Thornby v. Fleetwood, 10 Mod. 362. Thompson v. Leach, 3 Mod. 309. 2 Co. 5 a.*
5. And therefore, before a late act of parliament, it was customary to vest [*1158] the estate in trustees for the preservation of contingent remainders. *10 Mod. 362.*
6. A possibility upon which a remainder may be limited must be a common possibility, and: *potentia propinqua*, as death, dying without issue, coverture, &c. *Cholmley v. Hammer, 2 Co. 50 a.*
7. A remainder cannot depend upon an absolute fee-simple. *Vaugh. 269. 367. 2 And. 11, 12. 23. 136.*
8. A remainder in land cannot vest as a remainder when the land is become in possession after the particular estate ended. *Plow. 155.*
9. A remainder limited upon several particular estates, shall be construed respectively. *1 Ld. Raym. 495.*
10. Every remainder by feoffment must pass out of the grantor at the time of the livery. *2 Saund. 382.*
11. Remainder of a term, after an estate for life therein, is but a possibility. *3 Lev. 265.*
12. A remainder must depend upon some particular estate, and be created at the same time with the particular estate. *Vaugh. 269.*
13. The election of tenant for life will bind the remainder-man; but if he do not elect, the remainder-man can. *Mo. 102.*

14. A forfeiture by copyholder for life does not forfeit the remainder. *Yelv. 1.*

15. He in remainder will not be prejudiced by another's waiver of the particular estate. *Jenk. 334.*

16. A remainder for years has not that dependency upon the precedent particular estate as a remainder of freehold has. *Orl. Bridg. 370.*

II. WHAT IS A GOOD LIMITATION OF A REMAINDER.

1. A man leases for life, and grants further, that after his death the land shall return to a stranger; this is a good remainder. *1 Ro. 319.*

2. Remainder to the use of such issue as he shall beget on M, and reputed his issue, though unlawfully begotten, is void to his bastard; but a remainder to his reputed son in case is good. *Cro. Eliz. 509.*

3. A remainder may be limited by will to the heirs male of a body of a person who is living. *Fort. 20. 31.*

4. Remainder for years in use is limited to the executor; the party is attained, and makes no executor; still the future remainder over is good. *Mo. 100.*

5. Remainder upon a use limited to a man's own right heirs is good; not upon an estate executed in possession. *Mo. 718.*

6. A remainder is good although the particular estate is determined. *Yelv. 1.*

7. Lease to A for life, remainder to the right heirs of B, is good, if B dies before A, otherwise not. *Holt, 623. Skin. 352.*

8. Remainder for years expectant on a lease for life is good. *Jenk. 248.*

9. Remainder devised to a corporation begun before a head chosen is good. *Hob. 33.*

10. Remainder of a rent newly created is good. *1 Lev. 144. Salk. 577.*

11. If a man by deed grant a rent to A, and the heirs of his body, with remainder to B and his heirs, this is a good remainder. *Holt, C. J. 6 Mod. 113.*

12. Limitation on a condition precedent of a contingent remainder is good. *Hardwick v. Gamball, 11 Mod. 119.*

13. A remainder in fee, limited upon an estate for years, is good. *Plow. 83.*

14. Copyholder in remainder surrenders to the copyholder for life, for his life, remainder over; this remainder is good. *1 Sid. 360.*

15. Remainder for the life of the tenant is good, because he may commit a forfeiture. *1 Saund. 151. n. (2).*

16. Where lands are limited to R D for ninety-nine years, if he so long lives, and after his death, or other sooner determination of his estate, to trustees for his life, to support contingent remainders, and after the end or other sooner determination of the said term, remainder to the first son of R D in tail, with remainders over, the limitation to the trustees is a good and vested remainder, and consequently a fine and recovery by R D and his

first son are not sufficient to defeat the remainders over. Andr. 125. 137.

17. A remainder to commence after an estate tail is good, though only for years. 1 Sid. 102.

[*1159] 18.* Conusee renders to another in tail reserving rent; remainder to another and his heirs; this is a good remainder, and passes the rent. 2 And. 131.

19. Lease for life, and that after the death of lessee the land shall return or descend to a stranger; this is a good remainder. Plow. 29. 170. 542.

20. Lease for forty years, and agreement by indenture, that at the expiration of the lease, the son of the lessee shall have it for life; this is a good remainder, if the lease and livery be delivered and executed at one time. Mo. 14.

21. A lease for life, remainder to the right heirs of J S, is good; otherwise, if at the time of the limitation there is no such person as J S, though he be afterwards born and die: so, a remainder limited by a general description, as to the right heirs of J S, who is alive, or the eldest son of B, is good; *secus*, if limited by a particular name to a person not in *esse*. *Cholmley's case*, 2 Co. 50 a.

22. *Seniori puero* is a good name of purchase by way of remainder, although not in *esse* at the time of the remainder limited; and may be taken for either male or female. Mo. 104.

23. Remainder to the "issue" would be a word of purchase, even in a deed. Fort. 136.

24. Use to himself for life, remainder to his executors for years, remainder in tail over; he makes no executor; still the remainder in tail is good. Mo. 100.

25. Feoffment to J S *et primogenito filio suo*; if the son be born after the feoffment, he shall take by remainder. 2 Leon. 15.

26. Land given to J S for eighty-one years, with remainder over to B for thirty-one years, the remainder depends on the term of eighty-one years. *Hemmings v. Brabason*, Orl. Bridg. 5.

27. Not so, if the second term be created by another deed after the term for eighty-one years. *Hemmings v. Brabason*, Orl. Bridg. 5.

28. Remainder limited upon a use, after several other limitation, though none of the other limitations take effect, is nevertheless good. Mo. 486. 494.

29. Use for life to lord P, limited upon a covenant to stand seised, remainder for twenty-four years to E and F, upon void considerations, remainder to W P, son of lord P, by name; the lord dies, the remainder to W P becomes good *instantly*. Mo. 195.

30. A copyholder surrenders to the use of himself for life, remainder to the use of A and B his wife, for the term of their lives, and of the heirs and assigns of A and B, and in default of such issue, &c. A and B

take a remainder of the fee. 2 Ld. Raym. 1144.

31. Covenant to stand seised in consideration an of intended marriage, to the use of T and A, his intended wife, for their lives, without impeachment of waste; and after their decease to the use of the first issue male, and to the heirs male of such issue lawfully begotten, and so over to the second, third, &c. issue male, remainder to the use of the heirs male of T and A, and for want of such issue to the use of B, and the heirs male of his body, remainder to the heirs of the body of T and A: the marriage took place; T died, leaving issue by A S, who afterwards died: held, T and A were seised of an estate tail, executed *sub modo*, viz. until the birth of issue male; and then by operation of law the estates are divided; viz. T and A become tenant for their lives, the remainder to the issue male in tail, the remainder to the heirs male of T and A, &c. *Bowles's case*, 11 Co. 7 a.

32. An estate limited by the *habendum* to one, not party to the deed, cannot be good, unless by way of remainder. Hob. 313.

33. Two terms being granted by the same deed, and no interrenient estate between them, it is in law one estate; or, at least, the latter is an immediate remainder. Orl. Bridg. 9.

34. Devise to R D for life, and after his decease to the heirs male of the body of R D now living, who had then a son; adjudged that he had a present remainder in tail vested in him as a purchaser; and that the words "now living" were a sufficient description of his person. Carth. 155.

35. Land granted to A for life, remainder to B for the life of A, is not only a possibility of an estate to B, but B has a present remainder, which he may [*1160] grant over during the life of A. Orl. Bridg. 379.

III. WHEN A REMAINDER IS NOT WELL LIMITED.

1. If a term be devised to A for life, with remainder to B for life, and if B die without issue upon his body begotten, then to C, the limitation over to C is too remote to take effect. *Love v. Wyndham*, 1 Mod. 51.

2. There cannot be a remainder, unless a particular estate is created at the same time, upon which it is expectant. *Right v. Hammond*, Com. 232.

3. Limitation of a term, after a particular dying seised without issue, is good by way of executory devise, though void as a remainder. *Mortimer v. Mortimer*, W. Kely. 26.

4. Lease for years, if the lease so long live, and if he die within the term, the remainder to J S, the remainder is void. *Green v. Edwards*, 1 Leon. 218. 3 Leon. 154.

5. A levies a fine to himself and wife for life, remainder to his own right heirs, with grant and render to him alone for life, remainder to B for life, remainder to A's right

heirs; the render by the wife shall not defeat her life interest, and the remainder to his own right heirs is void, the ancient reversion being in him. 2 Dy. 237. pl. 31.

6. A remainder to a corporation, not in being at the time of the limitation, is void, though it be created during the particular estate. *Cholmley's case*, 2 Co. 50 a. Hob. 33.

7. So, a remainder devised to a common person not in *esse*, is void, although afterwards he comes in *esse*. Hob. 33.

8. Remainder to commence upon the alienation of the particular tenant is void. Mo. 773.

9. A remainder cannot be limited upon dower. Plow. 25.

10. A remainder of a term of years cannot be limited over after an estate tail. 1 Dy. 7. pl. 83. 3 Dy. 253. pl. 102.

11. A devise to one and his heirs, and if he die without heirs, remainder over in fee to another, the remainder is void. 2 Ro. 216.

12. Where a tenant in tail covenants to stand seised to the use of himself for life, remainder to another, the remainder is void. *Mackell v. Clerk*, Com. 121.

13. If tenant for life grants the lands to A for life, remainder to B for the life of tenant for life, the remainder is void. Orl. Bridg. 376.

14. Where a gift in tail is made upon condition, that if the donee aliens it shall remain over, this is not a good remainder. Plow. 35.

15. One seised of lands in fee, by indenture between her of the one part and P of the other part, demised the same to P, to have and to hold to him for forty years, if she lived so long, in trust that she might receive the profits during her life; and after her decease, then the one moiety thereof to be and remain unto M C, and the other moiety to J B, and their executors, &c., for the term of 1000 years; the remainder limited to M C and J B is void. T. Raym. 150, 151.

16. But if such remainder be of a freehold, as an estate for life, the remainder to the right heirs of J S is good. Id. *ibid*.

17. If land is devised to A and his heirs, as long as B has heirs of his body, the remainder over, this is good in a devise, not as a remainder, but as an executory devise. Vaugh. 270.

18. Remainder ought to vest, or to have a possibility of vesting, during the particular estate; and for this reason, an estate limited to A for life, remainder to his right heir, seems to be void. *Semb.* 2 And. 13. 37. 104. *Creswell's case*, 1 And. 3. Ib. 289.

19. A remainder is void which cannot take effect in possession at the time appointed. Yelv. 149.

20. A remainder limited by will upon a fee determinable on failure of paying rent to a stranger, who should then have it, is void as to the stranger, but the heir may enter for condition broken. 1 Dy. 33. pl. 12.

21. An estate for life cannot support a remainder which was not created with it. T. Jones, 124.

22. A remainder cannot be limited on a fee. W. Kely. 177.

23. Lease for nine years, determinable upon death of the lessee, and if he die within the term, the remainder of the term to his wife, this is a void re- [*1161] mainder. 1 Leon. 218.

24. The render of a fine was to the donor for eighty years, if he should so long live, and after his decease to the first son of his body, none being born, remainder to his brother: all the remainders are void, because there is no particular freehold to support them. Mo. 488.

25. Lease for eighty years, if a woman so long live, and if she die, that the land shall remain to her son for the residue of the term; the remainder is void. Mo. 297.

26. Tenant in tail, remainder in tail; the remainder-man grants the land to a stranger for the life of tenant in tail, and all his estate, with remainder to the queen, by deed enrolled; the remainder is void. Mo. 344.

27. A, tenant for life, remainder in tail to B, remainder in tail to C; C bargains and sells, &c. for the life of B, remainder to the king in fee; this remainder is void. Lutw. [337].

28. A remainder to the woman a man should marry, and who should survive him, is not good; and if good, still it should be destroyed before marriage by a feoffment by the particular tenant, or by a fine by husband and wife after marriage. Mo. 554. 634.

29. If a grant be made of a term of years to A for life, with remainder to A and B his wife for life, remainder to the first son of their two bodies, and so on to their other sons successively, and if they should have no sons, then with remainder over to their daughters, the remainder is void, although A and B never have a son, but a daughter only; for such a remote contingency tends to create a perpetuity. *Burgis v. Burgis*, 1 Mod. 115.

30. If a devise be made of land to A, the eldest son of the testator, for fifty years, if he should so long live, to commence after the death of the testator, with remainder to the heirs male of the body of the said A, and for want of such issue with remainder over, the remainder to A is void, for it is a contingent remainder, and has only an estate for years to support it. *Goodrich v. Cornish*, 11 Mod. 256.

31. Lease to three, *habendum iis* during their lives, *alteri post alterum*, is not a remainder, but a joint lease. Mo. 636.

32. Devise of a term to A for life, remainder over; the bequest is absolute, and A may dispose of the whole. 1 Dy. 74. pl. 13. 140. pl. 41. 277. pl. 59.

33. A enfeoffs to the use of himself and

his wife for life, and to the heirs of their two bodies begotten, remainder to himself in fee, and has issue; the issue shall take the estate as a reversion, and not by way of a remainder. 2 Dy. 133. pl. 6.

34. A, tenant in tail, remainder to B in tail, by indenture enrolled, in consideration of a sum of money, bargains and sells the lands and all his estate, right, title, &c. to C, during the life of A, remainder to the queen, her heirs and successors, upon condition A suffers a recovery; the condition is performed; afterwards the queen by letters patent, reciting that the said grant and remainder to her were by fraud and covin, *prout nobis satis liquet*, grants her remainder to A in fee: held, that the remainder limited to the queen was void. *Cholmley's case*, 2 Co. 50 a.

35. On a grant by tenant in tail "of all his estate," nothing remains in him. *Cholmley's case*, 2 Co. 50 a.

36. Lease for life, and if lessee die within sixty years, that executors shall have it for term of sixty years, is no lease in remainder. 1 And. 19.

37. If an estate be limited to A for life, and from and after the determination of his estate, to trustees for the life of A, the remainder limited to the trustees cannot take effect upon the natural death of A, nor otherwise than by surrender or forfeiture of his estate. *Dormer v. Parkhouse*, 7 Mod. 372.

IV. WHEN A REMAINDER VESTS OR COMMENCES.

1. Rent from *auter vie* with remainder; the grantee dies, living *cestui que vie*; the remainder will commence. Mo. 664.

2. A remainder cannot vest in the right heirs of one in the feoffor's life, unless it begin first in the feoffor. 1 Leon. 101, 102.

3. If A be copyholder for life, with remainder to B for life, "to commence from* and after the death of A, or other sooner determination of his estate," and A is attainted of high treason, the copyhold is forfeited to the lord, and he in remainder may enter without any presentment, although the offender be pardoned. 2 Show. 150.

V. HOW DEVESTED OR DESTROYED.

1. Devise to the father for life, remainder to his next heir male in tail; the father made a feoffment in fee with warranty; this destroyed the remainder, because it could not vest *eo instanti* the particular estate determined. *Woodcock v. Woodcock*, 4 Mod. 284.

2. A use limited to the husband for life, remainder to the wife for life, remainder to all the issue female of their bodies, and to the heirs male of the bodies of such issue female; they have issue a daughter; the remainder is attached in her, but may be devested by the birth of another daughter afterwards, i. e. for a moiety. Comb. 467.

3. A remainder may be devested out of the king without office or *monstrans de droit*, by performing a condition. Cro. Eliz. 641.

VI. OF CONTINGENT REMAINDERS.

1. A feoffment to the use of six sons, and afterwards of the right heir male of the feoffor; after the six sons are born, it is not a tail in the feoffor, but a contingent remainder. *Waker v. Snowe*, Palm. 359.

2. Where a contingent is limited by devise to depend upon an estate of freehold, capable of supporting it, it shall never be construed to be an executory devise, but a contingent remainder. 2 Saund. 368. Ib. n. (9).

3. A, tenant for life of B, remainder to the right heirs of B; afterwards A granted his estate to B, so that he had the particular estate of the frank tenement for his life, remainder to his right heirs; yet the remainder continued a contingent remainder. Skin. 408.

4. If an estate be made to the wife for life, without impeachment of waste, remainder to the heirs of the bodies of the husband and wife, the remainder is not executed, but continues in contingency. *Lane v. Pannell*, 1 Ro. 317.

5. If a devise be to A and other children, and if any of the children die within age, or not married, his share to go to the survivors; if A dies before marriage, though he be of full age, his part goes to the survivors. 2 Vern. 368.

6. When the particular estate, upon which a remainder depends, may determine before the remainder takes effect, the remainder is contingent. *Boraston's case*, 3 Co. 19 a.

7. So, when it is limited to take effect upon a contingent determination of the preceding estate. Ibid.

8. Under a devise to A for life, and to his right and next heir, A takes an estate for life, and the remainder over is contingent, though he has a son living at the time of the devise; and if A enters and makes a feoffment in fee, the remainder is destroyed. *Baldwin v. Smith*, 1 Co. 66 b.

9. A remainder limited to take effect, if and when former limitations cease, is no contingent, but vested. *Badge v. Floyd*, Com. 62.

10. On a devise "to his wife for life, if she do not marry, and if she do marry, then to his son and the heirs of his body," with remainder over, the remainder is not contingent, but vested in the son, to take effect in possession upon the death or marriage of his mother. 2 Show. 153.

11. A contingent remainder does not depend on a reversion which comes after, but on the particular estate which precedes. 2 Saund. 382.

12. A contingent remainder cannot depend upon an estate for years or in fee, but

it may upon an estate for life or in tail. 3 Salk. 299. Comb. 254. 312.

13. A future right of entry will not support a contingent remainder; there must be a particular estate in being, or a present right of entry. *Thompson v. Leach*, Com. 46. Holt, 623. 1 Ld. Raym. 314. 316. *Zouch v. Clare*, 1 Mod. 92. 1 Co. 66 b. 2 Saund. 382.

14. Every remainder is to vest during the particular estate, or *eo instanti* it determines, and a right of entry must be presently upon the happening of a contingent remainder. Salk. 228. 577. 2 Saund. 383 a. 387. *Baldwin v. Smith*, 1 Co. 66 b.

15. A right of action will not [*1163] support* a contingent remainder. 1 Ld. Raym. 316. Salk. 576.

16. Husband and wife join in a fine of the lands of the wife to trustees, &c. for the use of the heirs of the husband begotten on the body of his wife, remainder to the right heirs of the husband; they had issue a son, who died without issue, then the wife died, and the husband survived: held, there was no particular estate to support the remainder. *Davis v. Speed*, 4 Mod. 155, 156.

17. In all cases where the particular estate is merged in the reversion, the contingent, which depended on the particular estate, is good, although there is no divesting of any estate. 2 Saund. 386.

18. Where a contingent remainder is limited, no estate afterwards limited can vest. 3 Salk. 300.

19. A lease for life to B, remainder for years in contingency, remainder over; tenant for life dies before the contingency happens; the remainder over shall take. Holt. 623, 624, 625.

20. Posthumous sons, with regard to remainders, since stat. 10 & 11 Will. 3., are considered as born. 2 Saund. 387.

21. Where a remainder in fee is devised in contingency, the reversion descends on the heir in the meantime. 2 Saund. 381 a. 382.

22. In case of a contingent remainder, created in a conveyance, under the statute of uses, the fee is in the grantor or his heir until the contingency happens. 2 Saund. 382.

23. A contingent remainder is destroyed by descent of the reversion. *Fortescue v. Abbott*, 2 Lev. 202.

24. By the conveyance of the reversion in fee to him who had the estate for life before the birth of a son, the particular estate is merged, and all contingent remainders are thereby destroyed. *Thompson v. Leach*, 3 Mod. 311.

25. The destruction of the particular estate destroys the contingent remainder depending upon it; but a contingent remainder is not destroyed by the descent of the reversion on the estate for life, where

the descent is immediately from the person by whose will the particular estate and remainder were created. *Baldwin v. Smith*. 1 Co. 66 b.

26. Where the particular estate is determined by alienation, there the contingent remainder which depended thereon is destroyed. 2 Saund. 383.

27. A remainder contingent is destroyed by feoffment and warranty. Cro. Eliz. 453. Holt, 623.

28. Or, by feoffment and fine. Cro. Eliz. 630.

29. A contingent remainder is destroyed by merger on surrender of the particular estate, as much as by a feoffment. Ori. Bridg. 395.

30. Where an interest or estate is to be reduced to certainty upon a contingency precedent, if either party dies before the contingency happens, the lease or grant is void; but on a covenant or agreement, which is perfect and certain, though to take effect upon a future matter precedent, the interest or estate is bound immediately. *Chedington's case*, 1 Co. 153 a.

31. Tenant for life, remainder in tail upon contingency, remainder over in tail *in esse*, if tenant for life and he in remainder in tail *in esse* levy a fine of their estates, it is no discontinuance or divesting of any estate, yet the same contingent remainder is destroyed thereby. *Purefoy v. Rogers*, 2 Saund. 386.

32. Feme covert tenant for life, remainder in fee to the son which she shall have, and he in reversion, before the birth of the son, bargain and sell the land, and levy a fine thereof to baron and feme, the particular estate of the feme is merged in the reversion, and the contingent remainder destroyed. 2 Saund. 386, 387, 388.

33. Sir R. Chudleigh conveyed his manor of H to trustees and their heirs, to the use of himself and his heirs on the body of Mary, the wife of J C, lawfully begotten; in default of such issue, to the use of him and his heirs, on the body of Elizabeth, the wife of R B, lawfully begotten; and in default of such issue, to the use and performance of his last will, for ten years immediately after his death, and after the term ended to the use of the feoffors and their heirs, during the life of C his eldest son, remainder to the use of the sons of C successively in tail, remainder over: C not having issue, the feoffees enfeoffed him of the lands to the use of him and his heirs, having notice of the use; and afterwards C had issue J;* and by bargain and sale conveyed [*1164] the manor to Sir J C in fee, but before the enrolment enfeoffed him in fee with a general warranty; Sir J C enfeoffed P C in fee, who granted the *locus in quo*, being customary land, by copy, to the defendant; upon whom the son of Christopher entered;

held that the destruction of the contingent estate by feoffment, before the contingent remainder came in *esse*, destroyed the contingent remainder; for contingent remainders, limited by way of use, as well as in conveyances at common law, must vest at or before the determination of the preceding estate. *Chudleigh's case*, 1 Co. 120 a.

34. A release by one joint-tenant for life to another does not destroy a contingent remainder depending upon it. T. Raym. 413.

35. A contingent remainder is not destroyed by the acceptance of a fine. 2 Saund. 386.

36. A contingent remainder or use to a wife that shall be at his death, is good, and not destroyed by her joining in a fine, because uncertain. *Wells v. Fenton*, Cro. Eliz. 827.

37. Surrender of tenant for life, being *non compos*, to a remainder-man, is void, and cannot bar a contingent remainder. Salk. 576.

38. A contingent remainder is supported by right of entry; if the right subsists at the time of the contingency it will support it, as well as if the particular estate had continued; but if subsequent to, or arising at the same time with the contingency, it is otherwise. 2 Saund. 383. 383 a.

39. A tenant for life, remainder to his wife for life, remainder to his first and second sons in tail, remainder to A's right heirs; A commits treason, and then has a son, and is then attainted; the contingent remainder to him is not discharged by vesting in the crown during his life, because the wife's estate is sufficient to support it. Salk. 576.

40. A contingent remainder is not destroyed in equity by determination of the particular estate before the contingency happened. *Reve v. Long*, 3 Lev. 408.

41. If A be tenant for life, remainder to B for life, remainder to C for life, remainder to a contingent, and A and B join in a fine, C's right of entry preserves the contingent estate. *Zouch v. Clare*, 1 Mod. 92.

42. A contingent remainder of a copyhold is not destroyed by a surrender by particular tenant. 2 Saund. 386.

43. But it is by enfranchisement. 2 Saund. 386. n. [b].

44. A contingent remainder is not destroyed by feoffment of *cestui que trust* for life. 2 Saund. 386.

45. A contingent remainder destroyed by a fine will not be revived by reversing the fine. 1 Ld. Raym. 314.

46. Although the feme, after the death of the baron, waives the estate granted by the bargain and sale and fine, and claims her former estate for life, yet the contingent remainder shall not revive. 2 Saund. 386, 387.

47. Contingent estates and possibilities
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may descend, be transmitted, granted over, or assigned. 2 Saund. 288 l.

48. Contingent remainders are not favoured in law. Skin. 208.

[See *ante*, tit. DEVISE, div. XVIII. Vol. I. p. 513.]

VII. OF CROSS-REMAINDERS.

1. Cross-remainders must be created by express words, and cannot be implied. 1 Saund. 186. 186 a.

2. Between two, the presumption is in favour of cross-remainders; between more than two, the presumption is against them; but in both cases, the presumption may be controlled by a plain intention to the contrary. 1 Saund. 185 b, c.

3. One devised his lands to his grand-daughters, C and E, to be equally divided between them, and the heirs of their bodies respectively; and for default of such issue, to his other grand-daughter, A; C dies leaving a son; E dies without issue: held that A, and not the son of C, by way of cross-remainder, took E's moiety. *Comber v. Hill*, C. T. Hardw. 22.

[See *also ante*, tit. DEVISE, div. XIX. Vol. I. p. 513.]

VIII. WHAT ESTATE THE REMAINDER-MAN HAS.

1. The particular estate and remainder^a make but one estate [*1165] together to some purposes. Hob. 71.

2. Joint-tenant for life, with remainder in fee to one of them, he cannot grant over the remainder without the estate for life; *secus* as to a tenant in tail with remainder in fee. *Wiscol's case*, 2 Co. 60 b.

3. If lessee for life and he in remainder or reversion in fee make a feoffment by deed, each of them gives his own estate; but if the feoffment be by parol, then it shall be the feoffment of him in remainder or reversion, and the surrender of lessee for life. *Trepp's case*, 6 Co. 14 b.

4. Tenant for life, remainder in fee, have but one estate, and the execution of one estate is an execution of the other. Cro. Eliz. 504.

5. If tenant in *capite* aliens for life, the remainder in fee, but one fine is due. Cro. Eliz. 504.

IX. HOW BARRED.

1. No act has been made to preserve any reversion or remainder expectant on an estate-tail, and tenant in tail has power to bar him in remainder or reversion; the statute West. 2 & 3. which gives rescuit to him in the remainder or reversion, upon default of him that holds *per donum*, must be meant of the donee after possibility of issue extinct. *Jenning's case*, 10 Co. 43 b.

2. After the statute 32 H. 8., if tenant for life had made a lease for years, and the lessee for years had made a feoffment in fee, and the feoffee had suffered a common reco-

very, in which the tenant for life was vouched, and in which he vouched over the common vouches, it was out of the said statute 32 H. 8.: the act of 14 Eliz. does not extend to preserve any reversion or remainder expectant on an estate-tail where tenant for life is impleaded, and tenant in tail is vouched. *Jenning's case*, 10 C. 43 b. 1 And. 295. *Moore*, 690. Cro. Eliz. 562. 570.

X. RIGHTS OF REMAINDER-MAN.

1. He in the remainder may have an action for forging of deeds. *Noy*, 116.

2. The remainder-man can assign the appearance of the infant by attorney for error. 1 Ro. 304.

XI. HOW A REMAINDER MAY BE CHARGED.

1. A remainder can be charged with rent charge. 1 And. 282, 283.

2. A remainder, to vest upon a contingency, may, before the contingency happens, be charged by will with the payment of money. *W. Kely*, 7.

REMITTER.

I. WHEN THERE MAY BE A REMITTER, p. 1165.

II. WHEN NOT, p. 1166.

III. HOW WAIVED OR TURNED TO A RIGHT, p. 1167.

IV. EFFECT OF IT, p. 1167.

I. WHEN THERE MAY BE A REMITTER.

1. Two things are requisite to make a remitter; an ancient right and puisne possession. *Wood v. Sherley*, 2 Ro. 35.

2. If tenant in tail enfeoff his heir within age and his wife, and die, and the heir also die, leaving the wife, his issue is remitted. 1 Dy. 68. pl. 22.

3. Tenant in tail enfeoffs his son within age, and dies, the issue is remitted. *Sherley v. Wood*, Hob. 71.

4. If a wife, tenant for life, remainder over in tail, levy a fine *come ceo* with proclamations with her husband to the remainder-man, who renders back a rent for the lives of both, on the death of the wife, and of him in remainder, the issue in tail may avoid this rent. 2 Dy. 213. pl. 41.

5. If the son and a stranger disseise the father, and the father dies, the son of full age is remitted. 2 Ro. 10.

6. Tenant in tail creates a new entail upon condition, which his issue breaks, yet he is remitted after his father's death. *Earl of Arundel v. Lord Dacre*, 1 Leon. 91.

7. A man seised of lands in right of his wife makes a feoffment, and re- [*1166] takes an estate to himself and his wife; he is remitted. 2 Ro. 336. 505.

8. Father enfeoffs his younger son, who dies, his wife *priveement* *enceine* of a son; the elder son enters; he is remitted. *Semb.* 3 Leon. 2.

9. Husband, tenant in tail, remainder to the wife for life; the husband makes a feoffment to the use of himself and his wife for the life of the wife for her jointure; the husband dies without issue; the wife is remitted. Mo. 872.

10. If baron and feme be tenants in tail, and husband alien, and take back an estate to him and his wife by way of use, the wife is remitted, notwithstanding the statute of uses, because 32 H. 8. gives an entry to her; *secus*, if the case had been after 27 and before 32 H. 8. *Duncomb v. Wingfield*, Hob. 255, 256.

11. A, seised of land to himself and his wife for life, and to the heirs of A, makes a feoffment to the use of himself and wife for life, remainder to a younger son for life, remainder to his own heirs; on his death, his wife is remitted if she please, and is in of her first estate. 2 Dy. 191. pl. 22.

12. Tenant in tail makes a feoffment to the use of himself in fee, and then makes a lease for years, rendering rent, and dies; the issue accepts the rent; still he shall avoid the lease, because he is remitted. Mo. 846.

13. If baron and feme be tenants in special tail, and the baron only levy a fine to the use of himself and his wife for life, though the entail be barred, as to the baron and the issues, yet the wife is remitted to the estate tail, as she should have been by an entry after her husband's death, and the remainders which were depending upon that estate tail are likewise remitted. *Duncombe v. Wingfield*, Hob. 257. 259.

14. Land is given to husband and wife in tail before marriage, and the baron aliens and takes back an estate to him and his wife for life; both are remitted. 1 Leon. 115. 3 Leon. 93, 94.

II. WHEN NOT.

1. A remitter cannot be until the possession and right meet. *Sherly v. Wood*, Hob. 71.

2. No one can be remitted by an act which commences by his own wrong. 2 And. 39.

3. A right remediless is in law no right, and no remitter lies upon it. *Hemming v. Brabason*, Orl. Bridg. 14.

4. No remitter against a record. 1 Dy. 5. pl. 1.

5. *Cestuy que use* in tail before the statute of uses made a feoffment to himself, remainder to his son and his wife in tail, and after the statute died; the son is not remitted. 2 Dy. 221. pl. 18.

6. Tenant in tail makes a feoffment to himself in fee, and afterwards devises to A, and dies seised, yet the heir is not remitted. 2 Dy. 221. pl. 18.

7. Tenant in tail before statute of uses enfeoffs to the use of his son in fee; he shall not be remitted to his estate tail after the statute, but his issue shall. 1 Dy. 54. pl. 21.

8. A tenant in tail in right of his wife

made a feoffment to the use of himself and his heirs, and died; the feoffees, at the request of B, the issue, made a lease for years; the wife then died, and B entered upon the termor, and made another feoffment to the use of himself and wife and his own heirs, and then died, leaving issue within age, and then the statute of uses passed: after the death of B's wife, his issue is not remitted, and A's cannot avoid the lease. 1 Dy. 54. pl. 22.

9. An office finding title for the king will prevent a remitter; but if the remitter be executed before office found, it will stand good against the king. Lord *Sheffield's* case, Palm. 355.

10. A descent of the right of the land without the possession will not, in general, work a remitter. Plow. 246.

11. Tenant in tail before the statute of uses enfeoffs to the use of himself for life, remainder to the use of the issue in tail; the issue, after the statute, and after the death of the father, is not remitted. 1 Dy. 77. pl. 39.

12. If the husband discontinues the land of the wife, and a re-feoffment is made to her and her husband, this shall not be adjudged a remitter in the wife if she dies and her husband survives her. Plow. 114.

13. If baron and feme be tenants in tail, and the husband discontinues, and take back an estate to him and his wife* at [*1167] common law, both are remitted, but the husband cannot claim by remitter. *Duncombe v. Wingfield*, Hob. 255.

III. HOW WAIVED OR TURNED TO A RIGHT.

1. Where a man is remitted to a right of entry, whether it be by act in law, or by his own act, he cannot waive his remitter; but where he is remitted only to a right of action he can waive it. *Wood v. Sherley*, 2 Ro. 34.

2. Husband and wife, tenants in special tail, the husband alone levies a fine to the use of himself, and devotes the land to his wife, paying rent, remainder over; she enters on his death, and pays the rent; it is a waiver of her remitter. 3 Dy. 351. pl. 24.

3. If baron and feme be tenants in tail special, and the baron only levy a fine to the use of himself and his wife for life, if the wife die, living the baron, now, those remainders which were remitted by the wife's remitter are by her death turned to rights again, as they should still have been if the wife had not been remitted, or had survived her husband, and died before any re-entry, where no estate was limited to her. *Duncombe v. Wingfield*, Hob. 260.

IV. EFFECT OF IT.

A remitter is an entry in law, and is to all purposes as effectual as an entry. *Duncombe v. Wingfield*, Hob. 257. 259.

REMITTIT DAMNA.

If a promise to the intestate and a promise to the administrator be joined in one action, a remittit damna as to one cures the fault. *Tate v. Whiting*, 11 Mod. 196.

[See also ante, tit. DAMAGES, div. X. Vol. I. p. 435.]

REMOVAL.

I. RESPECTING THE REMOVAL OF PAUPERS;—

- (a) *Who may be removed*, p. 1167.
- (b) *Who not*, p. 1167.
- (c) *Relative to the removal of certificate paupers*, p. 1168.
- (d) *Relative to the removal of a wife*, p. 1168.
- (e) *Relative to the removal of children*, p. 1168.
- (f) *Of the complaint*, p. 1168.
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- (i) *Where the removal should be*, p. 1169.
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- (m) *Of the direction*, p. 1170.
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- (o) *When several orders are necessary*, p. 1171.
- (p) *Relative to a second removal*, p. 1171.
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- (r) *Effect of an order*, p. 1171.
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II. RESPECTING THE REMOVAL OF A BURGESE, see ante, tit. CORPORATION, div. XVII. Vol. I. p. 378.

[Respecting other removals, see the respective titles.]

I. RESPECTING THE REMOVAL OF PAUPERS;—

- (a) *Who may be removed*.

The removal of a child of three years' old to the place of its birth is good; but it may be removed from thence to the parish in which its father was last legally settled. *St. Saviour v. Cripplegate*, 11 Mod. 267.

- (b) *Who not*.

1. If A, removed by certificate from B to C, takes an apprentice, who serves out* his time at C, and lives [*1168] two years, he cannot be removed with his master. *St. Giles v. Weybridge*, 11 Mod. 204.

2. No person who shall be bound apprentice by any deed writing or contract not indented, being first legally stamped, shall be liable to be removed from the place in which he was so bound and has been resident forty

days, by reason of such deed writing or contract not being indented only. 11 Mod. 205. n.

3. An order to remove a man where he was bound apprentice, and served as long as his master lived, is ill. *St. Albans v. St. Botolph*, 11 Mod. 205.

(c) *Relative to the removal of certificate paupers.*

1. An order for the removal of a certificated pauper must show that he was actually chargeable. *Rex v. Whiting*, 11 Mod. 65.

2. It need not state that he has gained no settlement since. Between the *Parishes of Barley and Colcoverton*, Stra. 402.

(d) *Relative to the removal of a wife.*

1. Adjudication of the husband's settlement is sufficient to send the wife with him. Between the *Parishes of Hobey and Kingsbury*, 1 Stra. 527.

2. Order to remove a married woman is good, unless it appears she is sent from her husband. Between the *Parishes of St. Michael and Nunny*, Stra. 544.

(e) *Relative to the removal of children.*

1. An order held bad where children were removed with the mother to her husband's settlement, and said to be *her* and not *his* children. *Rex v. Inhabitants of Normanston*, Burr. Sett. Ca. No. 73.

2. An order to remove a wife and children to the last settlement of the husband is ill, for the children might have another settlement. *Halstead v. Melford*, 12 Mod. 667.

3. Where an order is made by two justices for removal of a man and his children, and afterwards a sessions' order is made setting out the case specially (which relates only to the father), and then the original order is confirmed, the last order is good as to the children, though their ages be not mentioned. *Inhabitants of Fyfield Magdalen v. Westflower*, Andr. 63.

4. An order to remove one with his children is too general, if the ages of the children be not expressed. *Reg. v. Petworth*, 10 Mod. 26.

5. So, if the children be not named. *Reg. v. Manchester*, 10 Mod. 220.

6. So, an order for removing poor children was quashed, &c., because their ages were not shown. *Rex v. Trinity Parish*, 8 Mod. 337.

7. Where children are sent as actually settled, their ages need not be set out. Between the *Parishes of Heptonstall and Evingdon*, Stra. 1047.

(f) *Of the complaint.*

1. An order of removal without showing a complaint, is ill. *Rex v. Inhabitants of Hareby*, Andr. 361.

2. An order of removal ought not to be made but upon complaint of the churchwardens, &c. *Weston Rivers v. Saint Peter in Marlborough*, Holt, 510. 12 Mod. 89.

3. An order must express that it was upon

complaint of the churchwardens and overseers, or else it may be quashed. *Rex v. Wotton Rivers*, 5 Mod. 149. 12 Mod. 89. Salk. 492, 493. 3 Salk. 254, 255.

4. The order was held bad for not saying that it was made upon the complaint of the churchwardens and overseers of the poor, though it was so said in the caption. *Inhabitants of Wotton Rivers v. Inhabitants of Marlborough in Wills*, Carth. 365.

(g) *Of the examination.*

Upon making an order of removal, the examination must be by two justices, and by the same who sign the order. *Rex v. Wykes*, Andr. 238. Stra. 1092.

(h) *By what justices it should be.*

1. The complaint may be to one justice, but the order of removal must be by two. *Rex v. Inhabitants of Westwood*, Stra. 73.

2. An order to remove a poor person was quashed, because it was not said that one of the justices was of the quorum.* Between the *Inhabitants of Chiltonston and Penhurst*, Holt, 507. Salk. 473. 480.

3. An order made by two justices, though not of the division, held good. *Ashley's case*, 3 Salk. 258. Salk. 473. 480.

4. The order is bad where one of the justices removing is an inhabitant in the parish from whence the removal is. *Rex v. Inhabitants of Great Chart*, Burr. Sett. Ca. No. 68.

5. An order of removal by two justices, with the words "both justices named in the second assignment," is ill, because *non constat* that either was of the quorum. *Rex v. Inhabitants of Ray*, Andr. 67.

6. An order of removal by two justices, with the words "and whereof," instead of "one whereof," is ill. *Parish of Walthamdale v. Great Milton*, Andr. 57.

(i) *Where the removal should be.*

1. If the father of a legitimate child have not a settlement in England, the child may be removed by an order to the settlement of the mother. *Rex v. Inhabitants of Saint Botolph in Bishopsgate*, Say. 200.

2. A married woman, in case her husband have left her, and his settlement be not known, may be removed by an order to her settlement before marriage. *Rex v. Inhabitants of St. Botolph*, Say. 199.

3. An order of removal was holden ill, because the pauper was thereby sent to the master, and not to the parish where settled. *Rex v. Gravesend*, Com. 97.

4. It must appear in the order that the place to which a poor man is removed is the place of his last lawful settlement. *Trowbridge v. Weston*, 5 Mod. 325.

(j) *Relative to the adjudication.*

1. "It appears to us, &c." is a good adjudication in an order of removal. 11 Mod. 265.

2. That the pauper is come into the parish, is not a necessary part of the adjudica-

tion. *Rex v. Inhabitants of South Marston*, Stra. 189.

3. An order made on complaint that A is likely to be chargeable, is not good without an adjudication that he is likely to become so. *Between the Inhabitants of Suddelcombe and Burwash*, Salk 491. *Halstead v. Melford*, 12 Mod. 667. *Contra, Reg. v. Petworth*, 10 Mod. 26.

4. An order of removal stating that the party "might become chargeable," is bad. *Rex v. Caple*, 7 Mod. 54.

5. An order of session was quashed, being likely to become chargeable, "as we are credibly informed." *Bloxam v. Kingston*, 12 Mod. 323.

6. There must also be a direct adjudication of the place of legal settlement. *Between the Inhabitants of St. Giles in Cripplegate and Hackney*, Salk. 478, 479.

7. An adjudication that it was the place of his last legal settlement, held good. *Beaston Parish v. Scisson*, Stra. 114.

8. It is not sufficient to allege in an order for removal that the pauper is likely to become chargeable, without saying to "that parish." *Between the Parishes of Spalding and Boura*, C. T. Hardw. 122. *Contra, Parish of Maidstone v. Parish of Bething*, 1 Stra. 393. Stra. 698.

9. So, an order reciting "we are informed B is the place of legal settlement," is ill. *Between the Parishes of Paroch and Weston*, Salk. 473. Holt, 572.

10. An order was quashed, because it was not said that he was poor, or likely to be chargeable. *Scrivenham Parish v. Saint Nicholas*, 3 Salk. 255. Andr. 238. *Contra*, Carth. 222.

11. And where the complaint is that A B endeavoured to gain a settlement, without showing that he is likely to become chargeable, an information was granted against two justices for making an order thereupon. *Rex v. Wytes*, Andr. 238.

12. An order to remove one to B, because the father was last settled there, is ill. *Between the Inhabitants of Dumbleton and Bedford*, Salk. 470.

13. In an order to remove a poor man, there must be an express contract of hiring between the master and servant, and not by a third person on behalf of his servant. *Rex v. Chesterfield*, 5 Mod. 328.

14. The order for removal of a poor person, because likely to become [*1170] chargeable,* need not say, that he did not rent 10*l.* per annum. *Green v. Pope*, Holt, 507. 12 Mod. 89. Salk. 492, 493.

15. Two justices of the peace removed a poor man from H to B, which the sessions reciting, and that he had rented a farm of 10*l.* per annum at H, ordered that he should be settled at H; resolved, that the settlement at H being the place from whence he was removed,

is a reversal of the first order; per two justices, *contra* Holt, who held it should have appeared he had been settled there forty days. *Anon.* 12 Mod. 20.

16. An order for removing a woman delivered of a bastard child is bad. *Rex v. Lessey*, 5 Mod. 204.

17. It is bad where the sessions do not determine whether a marriage was by a clergyman or not. *Rex v. Inhabitants of Luffington*, Burr. Sett. Ca. No. 79.

18. When an order is made for removal of a woman to the place of her last legal settlement, setting out that her husband is a native of Ireland, and went abroad several years ago, and has continued so ever since, &c. (without showing him to be dead), it is an ill order. *Rex v. Inhabitants of Norton*, Andr. 307.

19. But if the husband's death had been showed, the order would have been good both for wife and children. S. C. Andr. 308.

(k) *The order must be certain.*

1. An order to remove A and his family, or wife and family, is bad as to the family, because too general and uncertain. *Between the Parishes of Beaston and Scisson*, Stra. 144. Salk. 482, 485, 488. *Anon.* 3 Salk. 260. *Wangford v. Brandon*, Carth. 449. *Rex v. —*, Com. 86.

2. So, an order to remove a man and his children. *Rex v. Kirkford*, 12 Mod. 398.

3. If two justices make an order for removal, and assign a cause uncertainly, it shall not be quashed for that reason, because they are not bound to assign any cause. *Rex v. Inhabitants of Lissey*, 5 Mod. 204.

4. An order is good if certain to a common intent; indentment is not to be made to destroy an order. *Ratcliffe Cely Parish v. Ezell*, Stra. 211.

(l) *It must be positive.*

1. Justices of peace cannot make a conditional order of removal. *Oakhem v. Whittlesea*, 11 Mod. 171.

2. Where, upon an appeal from an order of removal by two justices, a session's order is made for referring the matter to a judge of assize, and it concludes "if the judge shall be of opinion, &c. then, &c." this is not good. *Inhabitants of Henningham v. Finchingfield*, Andr. 208.

3. The order must say, "it appears to the justices he is likely to become chargeable," and not by a mere recital, as "whereas," *Inhabitants of Suddelcomb v. Burshaw*, Holt, 577. Ib. 21.

4. An order of removal directed to A, saying, "whereas complaint has been made by you," is good. *Rex v. Kidderminster*, 11 Mod. 265.

(m) *Of the direction.*

1. Orders of removal ought to be directed to the officers of both parishes from whence and to what place removed. *Rex v. St. Olave's*, 3 Salk. 256. 2 Salk. 493, S. C.

2. An order of removal directed to the officers of two parishes, without saying which is to remove and which is to receive is bad. *Benfield v. Banstead*, 11 Mod. 268.

3. An order directed to the constable only, and not to the overseers, is good if executed by him. *Wangford Parish v. Brandon Parish*, Carth. 449.

4. An order of removal directed to two parishes, "whereas complaint has been made by you," is good. *Rex v. Kidderminster*, 11 Mod. 235.

(n) *Of the signing and sealing.*

Where in an order of removal by two justices, their hands and seals are not set to the adjudication, nor so mentioned, but are only in the margin, the one against the adjudication, and the other against the warrant, this is sufficient. *Rex v. Inhabitants of Wedworthy*, Andr. 6.

[*1171] (o)* *When several orders are necessary.*

Two persons cannot be removed by one order, although to the same parish, if their settlements are independent of each other. *Rex v. Tutton*, 11 Mod. 356.

(p) *Relative to a second removal.*

1. After an order of removal is quashed, the party cannot be removed a second time without stating a new settlement. *Between the Parishes of Foston and Carlton*, 1 Stra. 567.

2. Where an order of removal by two justices is set aside by an order of sessions, a new order cannot be made by two justices for removing the paupers from the place where they are sent by the first order. *Inhabitants of Henningham v. Finchfield*, Andr. 73.

(q) *Of bonds conditioned for removal.*

A bond conditioned that the obligor shall remove himself and his family from a particular parish, and not return to live therein as an inhabitant without permission from the obligee is good. *Shelton v. Sere*, 11 Mod. 310.

(r) *Effect of an order.*

1. The parish on whom an original order is made cannot remove it till it be reversed. *Between the Parishes of Chalbury and Chipping Farringdon*, Salk. 488. *Anon.* 10 Mod. 84.

2. And if in fact they do remove and neglect their appeal to the quarter sessions, such original order becomes final to all the world. 10 Mod. 84.

3. An order of removal not appealed from is conclusive to all the world. *King v. Chalbury*, Com. 71.

4. An order of removal reversed is final to the parties. *Somerly v. Stretton*, 11 Mod. 309.

5. After order confirmed on appeal, if a person goes to a parish not party, he must be removed by original order. *Between the*

Parishes of Downhead and Broadchalk, Salk. 481.

6. Order of two justices to remove one from Harrow to Hendon, where he had a freehold, was quashed on an appeal; then Ruelip by an order of two justices send him to Hendon again; that order was quashed on an appeal, but affirmed in B. R.; for though the justices had executed their authority between Harrow and Ruelip, yet that shall not conclude Ruelip from sending him to a third parish where he had a freehold. *Ruelip v. Hendon*, 5 Mod. 417.

(e) *Indictment for removal.*

In an indictment for removing a pauper, it must be alleged that he was likely to be chargeable, and to the damage of the parish. *Rex v. Flint*, C. T. Hardw. 370.

RENT.

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I. OF THE NATURE OF RENT IN GENERAL.

1. That is most properly a rent which issues out of land. *Plow.* 132. 139.

2. A reservation of rent upon a wine license lease is but a personal contract. *James v. Blusack*, *Hard.* 88.

3. A debt due for rent upon a lease (whether parol, or by indenture), and a debt upon bond, are equal in degree. *Gage v. Acton*, *Com.* 67. 3 *Salk.* 161. *Carth.* 511. *S. C. Anon.* *Nels.* 191.

4. A debt for rent is payable by an executor before bonds, because it savours of the reality, and is maintained in respect of the profits of the land received. *Newport v. Godfrey*, 2 *Vent.* 184.

5. By a recognizance acknowledged the rent is presently bound. *Lillington's case*, 7 *Co.* 39 a.

6. If lessee for years grants a rent to another, it will only be a chattel. 1 *Ro.* 249.

7. Rent reserved by a lease for years becomes seck if it be granted over. 1 *Leon.* 315.

8. In debt by an administrator for rent, as upon an assignment of a term for years by deed, adjudged no rent but a sum in gross. *Thickurst v. Minus*, *Aleyn.* 57.

9. A rent payable out of the land cannot properly be called a rent but a sum in gross. *Kidwelly v. Brand*, *Plow.* 71.

10. Upon lands coming to the king by the statute 1 *Ed.* 6., rent-service is thereby changed into a rent-seck. *W. Jo.* 235.

11. It is in the election of the grantee to make a rent granted to him either a rent-charge or annuity. 1 *And.* 254, 255.

12. A rent granted out of three acres cannot be seck as to two, and a rent charge as to the third. *Butt's case*, 7 *Co.* 24 b.

13. There can be no occupancy of a rent. *Holden v. Smallbrooke*, *Vaugh.* 200.

14. Rent reserved out of land is of the nature of the land. *Mo.* 168.

II. RESPECTING A RENT-CHARGE.

1. A rent-charge to one and his heirs during his and two others' lives is good. *Bowles v. Peere*, *Cro. Jac.* 282.

2. A rent-charge is always construed strictly. 1 *Saund.* 113 b. n. [a].

3. A rent-charge may be parcel of a manor by prescription. *Mo.* 190.

4. An estate in a rent-charge may be enlarged, diminished, or altered, and no new attornment or privity is requisite. *Dixon v. Harrison*, *Vaugh.* 44, 45, 46.

5. A rent-charge is extendible under an *elegit*. 2 *Saund.* 68 f.

6. If a rent charge be granted in fee, without saying *pro se et heredibus*, this cannot charge the heir at all by way of annuity; but while the grantor lives, a writ of annuity may be brought, and then^a the rent is turned into an annuity [*1173] for life. *Foster v. Jackson*, *Hob.* 58.

7. A rent-charge was granted to A by B; B levies a fine to the use of himself and his heirs, and if the rent were not duly paid, then to the use of A and his heirs; A granted the rent to C; and it was held that if the rent was not paid to C, C should have the lands. 2 *Ro.* 427.

8. A man seised in fee grants a rent-charge in fee, and that if the rent be behind, the grantor his heirs and assigns should enter and hold the lands until they shall be satisfied, &c.; such grant is good, and after entry an ejectment lies for the lessee of the grantee. *Dean and Chapter of Bristol v. Guyse*, 1 *Saund.* 112.

III. RESPECTING SEISIN OF A RENT.

1. A payment of a bailiff would be a sufficient seisin if it was not to the prejudice of the lord. *Brediman's case*, 6 *Co.* 59 a.

2. If the tenant of the freehold avows the payment by the tenant at will, the payment is a good seisin. *Id.* *ibid.*

3. If a rent be issuing out of a town, and payable by those dwelling and resident within the same town, the seisin need not be alleged by the hands of any person in certain, but may be alleged generally by the hands of those who were dwelling and resident within the same town. *Id.* *ibid.*

4. He who has a rent has not taken the explees thereof until he has seisin by the hands of the tenant of the freehold. *S. C.* 6 *Co.* 58 b. 59 a.

5. If the terre-tenant of the land out of which the rent-charge is issuing be disseised, and he who has the rent grants it over, the disseisee cannot attorn. *S. C.* 6 *Co.* 69 a.

6. Rent-seck cannot be recovered without seisin had of it. 1 *And.* 316.

7. Rent-seck granted, and 6d. delivered in name of seisin thereof, is good. *Smith v. Smith*, *Cro. Car.* 508.

IV. HOW THE RESERVATION OF RENT SHOULD BE; AND ALSO AS TO THE CONSTRUCTION OF IT.

1. A reservation of profits is void. *Plow.* 153.

2. The reservation of a pepper-corn is a good consideration to raise a use. 2 *Mod.* 249.

3. Avowry for the third part of a penny rent was held good. *Edgcombe v. Burnsford*, T. Jones, 138.

4. A reservation of rent *secundum ratam* upon a demise at will is not good, because no time limited when it shall be paid. *Parker v. Harris*, 4 Mod. 79. Carth. 234, S. C. Skin. 307.

5. In a lease for years, lessee covenants to pay so much rent, without any words of reservation; it is a good rent. *Athowe v. Heming*, 1 Ro. 80.

6. A rent may arise out of the estate of *cestuy que use* upon a recovery. *Dixon v. Harrison*, Vaugh. 52.

7. A rent may be reserved upon a bargain and sale. *Cholmley's case*, 2 Co. 50 a. *Wykes v. Tyllerd*, Cro. Eliz. 595.

8. Lessee for life makes a lease for years, lessee for years surrenders to the reversioner, rendering rent; this was held to be a good reservation, it being a duty by way of contract. *Winton v. Pinkney*, T. Raym. 222.

9. A rent may be granted to one for life, the remainder in tail, the remainder over. *Smith v. Farmly*, Carter, 52, 53.

10. A rent, properly so called, may be reserved on a lease derived out of a power. T. Jones, 35.

11. A rent granted out of the land by him in reversion shall be good. *Throckmerton v. Tracy*, Plow. 161.

12. A rent cannot be reserved out of a thing incorporeal. 2 Vent. 69.

13. A rent cannot be granted or reserved of any estate of freehold out of any hereditament which is not manurable. *Butt's case*, 7 Co. 23 b.

14. Every rent-service ought to be reserved by the donor or lessor, and by apt words for the same. *Browning v. Beston*, Plow. 132. 139.

15. The rent must be reserved to the heir or heirs of the lessor by that name. *Oates v. Frith*, Hob. 130.

16. It may be reserved to the heirs first, without naming the ancestor. S. C. Hob. 130.

17. A rent granted for equality of partition may be in fee-simple, without the word "heirs." *Browning v. Beston*, Plow. 134.

18. A man may reserve a rent [*1174] to himself* for life, and a different one to his heirs. 2 Saund. 371.

19. The king cannot reserve a rent to an officer removable at will. 1 Ld. Raym. 36.

20. If tenant in fee-simple join in a lease with a stranger, reserving rent to the stranger, this is void to the stranger and to the lessor too. Hob. 130.

21. Lease by tenant in fee, and rent reserved to the lessor executors administrators and assigns; the words "executors and administrators" are void. *Sacheverell v. Frogate*, 1 Vent. 162.

22. If upon a joint lease by the father and the son and heir apparent, the reservation be to the son by that name, it is not good, though by the event the son fall out to be heir. *Oakes v. Frith*, Hob. 130. 151.

23. Reservation in a lease of the ancient rent, not mentioning what in certain, if it reserves or excepts any part anciently demised, it makes it a void reservation. *Owen v. Thomas ap Rees*, Cro. Car. 95, 96.

24. A manor was entailed by a special act of parliament, which contained a proviso that the donee should do no act to the prejudice of their issue, unless for jointures or for term of life, &c., or for years or at will, according to the custom of the manor, rendering the true and ancient rent of the lands, &c., so demised, and that all other acts should be void; one of the donees accepted a fine of a stranger *sur consens de droit come ceo*, &c., of the moiety of the said manor, &c., and by the same fine granted the said moiety for three hundred years rendering rent; among the lands, &c., so granted was an acre of waste parcel of the manor, of the value of 12d., but which had never been demised before, nor had the free rents, nor the copyhold rents, heriots, &c., parcel of the manor, which were included in the same grant, ever been demised before; the rent reserved amounted to the rent formerly reserved upon the demesne lands, the free rents, the copyhold rents, &c., 1s. 6d. more, and 12d. for the acre of waste, and was made payable at two feasts of the year, the old rent having been reserved payable at four; after the death of the said donee the lessee brought an *ejectione firme* against the heir to the entail, and on special verdict, stating the above facts, judgment was given for the defendant; and resolved, 1st, although it is provided by the said act that all estates, &c., restrained by the said act, &c., shall be void, yet by construction of law they are not void as to the tenant in tail himself, but voidable by the issue; 2nd, in respect of the acre of waste, which was never demised before, the rent which is entirely reserved out of the whole cannot be called the true and ancient rent; 3rd, the rent reserved issues out of the lands held by copy, which were never charged with any rent before, and since the demesnes only have been demised for rent, the whole manor cannot be demised within the said act; in this case, all by the grant and render are put in hotchpot; whereas the copyholds ought to have been granted by copy, according to the custom of the manor, and not by fine or deed; 4th, the reservation of the rent at two days, instead of four, makes the grant and render void; 5th, a reservation of silver in lieu of gold is not good, nor under such a proviso can two farms be joined in one demise, reserving one and the same rent, nor can a parcel of a farm be let reserving rent *pro rata*; but a reservation of eight bushels of wheat instead of one

quarter, is good. *Shepherd v. Blackatter*, 5 Co. 3 b. Moore, 197. S. C.

25. Held, that no apportionment in the above case could make the render good, for the casual profits cannot be reduced to a certain value. *Id. ibid.*

26. A reservation of rent shall be construed most strongly against the lessor himself. *Lanyon v. Carne*, 2 Saund. 166. 368.

27. A reservation shall be expounded according to the reasonable intention of the parties, to be collected by the words of their deed. *Lafeld's case*, 10 Co. 106 a. 1 Brownl. 61. S. C.

28. A rent reserved at Lady-day and Michaelmas, upon a lease in April for a year, cannot be diminished in payment. *Hob. 172.*

29. A lease for years was made by the father, rendering during the term (if the father lived) £30 at Lady-day and Michaelmas, by equal portions, and rendering to his heirs and assigns twenty marks *ad terminum* [*1175] *non predictos*; twenty* marks only are payable for the whole year, and not twenty marks for each half year. *Smith v. Newsam*, Yelv. 189.

30. D, by indenture, in consideration of rent reserved, demised to Q a cellar, to have and hold to him, his executors, &c. for one year, and if at the end of said one year, both parties should agree that the present demise should be renewed and continued for a longer time, then to have and to hold the said premises for three years more, rendering annually during the said term 40*l.*, at the four usual feasts; the reservation of the rent was held to extend to the first year, for the proper place of a reservation is to come after the limitation of all the estates. *Lafeld's case*, 10 Co. 106 a.

V. WHEN IT SHOULD BE BY DEED.

1. Rent may be reserved by contract without a deed. *Wilsten v. Pilkney*, 1 Vent. 242.

2. It may be reserved upon an assignment of a term without deed. *Brownlow v. Hewley*, 1 Ld. Raym. 82. Lutw. 368. S. C.

3. It cannot be reserved upon a lease to one who is not a party to the deed. 1 And. 9.

VI. WHEN THE RESERVATION AND RENTS ARE SEVERAL, AND WHEN NOT.

1. Where the donor reserves the three first years a rose, and afterwards 20*s.*, this is but one reservation, and not several. *Plow. 154.*

2. A rent of 10*l.* reserved, 5*l.* at Michaelmas, and 5*l.* at Lady-day, is but one rent. *W'herewood v. Shaw*, Yelv. 24.

3. Rent of 10*l.* reserved thus: 3*l.* from acre A, and 3*l.* from acre B, &c.; this is one rent, and not several. 1 And. 174. Mo. 52. S. C.

4. Where several houses are let at a certain rent, *scilicet*, one house at so much, and

another at so much, it is one entire lease, with one entire reservation of rent, and the *scilicet* is no severance of it; but by apt words on one lease several yearly rents may be reserved. *Knight v. Breach*, 5 Co. 54 b.

5. One seised of lands in fee, and also of lands held by copy of court-roll in fee, made one entire demise of the said lands for years, rendering one entire rent; afterward the lessor surrendered the copyhold to the use of C and his heirs, and at another time granted the reversion of the freehold lands to C in fee, and the lessee attained; afterwards the rent being in arrear, C brought an action of debt for the whole rent: held, he might well do so, although he came to the reversion by several conveyances and at several times. *Collins v. Harding*, 13 Co. 57. Cro. El. 606. S. C.

6. Several reservations for the several parcels make the demises, rents, and conditions all several. Mo. 98.

7. One lease of three manors, rendering for A 5*l.*, for B 5*l.*, for C 5*l.*, creates several rents, for which there must be several avowers. 3 Dy. 308. pl. 75.

VII. WHENCE THE RENT ISSUES.

1. If freehold land and copyhold land are demised together, rendering rent, all the rent will issue out of the free land. Mo. 544. 1b. 50. *Collier v. Harding*, Cro. Eliz. 606. 622.

2. Rent reserved upon a lease of house and goods goes with the reversion, and issues out of the house only. 1 And. 4.

3. If a lease be made of land and tithes together, reserving rent, the rent is issuing out of the land and not out of the tithes in point of remedy, but it is issuing out of both in point of render. *Dean and Chapter of Windsor v. Govers*, 2 Saund. 303, 304.

4. If a lease of land be made in two counties, reserving one entire rent, although the livery be made at several times, first in one county and then in the other, yet the rent issues out of the lands in both counties. *Fitzherbert's case*, 5 Co. 79. b.

5. If lease for twenty years leases part for two years, and afterwards the whole to another, rendering rent, so that this enures as a lease in reversion for the part leased, and a lease in possession for the residue, yet the rent shall issue out of the whole. *Rawlynge's case*, 4 Co. 52 a. 7th res.

6. If a man demises A and B for so much* rent, and has no- [*1176] thing in A, the whole rent shall issue out of B. *Croon v. Talbot*, Comb. 238.

7. If a man grants rent out of a manor of D, and further grants that if the rent be behind, the grantee shall distrain for the same rent in the manor of S, it is but a penalty in the manor of S, not a rent issuing out of it; grant that one and his heirs shall distrain for

a certain rent within the manor of S, is a grant of a rent out of S. *Butt's case*, 7 Co. 23 b. 24 a.

VIII. WHO IS ENTITLED TO THE RENT.

1. The common law has annexed the rent to the reversion. *Thursly v. Plant*, 1 Saund. 238.

2. The rent shall follow the reversion, and the heir shall have it although reserved to executors. 2 Leon. 214. *Sacheverell v. Froggatt*, 2 Lev. 13. 2 Saund. 367. S. C.

3. But on a reservation of rent on a lease for years to the lessor his executors and assigns, the heir shall not have the rent. *Ingram v. Tothill*, 2 Mod. 93. 1 And. 261. S. P.

4. A man seized of land *ex parte materna* makes a gift in tail, rendering rent, this new rent goes with the reversion to the heir *ex parte materna*. *Sym's case*, 8 Co. 54 b.

5. A rent to a man and his heirs issuing out of gavelkind land shall go according to the customary descent of the land, and not according to the course of the common law. *Randal v. Jenkins*, 1 Mod. 97.

6. If rent is granted to two during the life of J S to his use, and they die, the rent is vested in J S by 27 H. 8. of uses. *Crawley's case*, Cro. Eliz. 721.

7. Rent payable at Michaelmas, or within fifteen days afterwards; the reversioner grants the reversion for life, remainder over; lessee for life dies after Michaelmas, and within the fifteen days, the rent not being paid; it shall be paid to the remainder-man. Mo. 726.

8. A rent reserved to the heirs, omitting the ancestor, is so far in the ancestor, that though he cannot demand it, he may release it. *Oates v. Frith*, Hob. 130.

9. Where a lessor demises the reversion expectant on an estate for years to a stranger for life, reserving rent *cum reversione acciderit*, the lessor shall have no rent during the continuance of the term for years. *Lanyon v. Carne*, 2 Saund. 166.

10. Rent granted to baron and feme for their lives is in arrear; baron dies, and rent arrear again; feme dies intestate; administrator brings debt for both; and held good, for all survived to the feme. *Temple v. Temple*, Cro. Eliz. 791.

11. A rent-charge is granted to husband and wife, arrears incur in the life of the husband, and afterwards the wife dies intestate; the administrator of the wife shall have them, and not the executor of the husband. *Wood v. Atkinson*, Lutw. [470.] 1157.

12. Where rent is reserved to the lessor, his heirs and assigns, the heir and not the executor, is entitled to it. 3 Dy. 362. pl. 15.

13. If a reservation be of an heriot or 40s. to the lessor and his assigns, at the election of the lessor his heirs and assigns, yet the

devisee of the lessor shall not have either the heriot or the 40s. 1 Mod. 216.

14. Where a man reserves a rent to a stranger, neither the heir nor the stranger shall have it. *Pinkney v. Inhabitants of the East Hundred in Rutland*, 2 Saund. 379.

15. Where the baron, being possessed of a term by indenture, to which the feme was made a party, but did not seal it, assigns all his term to the assignee, yielding rent to the said baron and feme, and the survivor of them, and dies, neither the feme nor the administrator can have the rent. *Sacheverell v. Froggatt*, 2 Saund. 368.

16. If a man seized in fee demises an acre, reserving rent to him and his heirs, and also demises another acre, reserving another rent to himself, without saying "and to his heirs," the heir shall not have the latter rent. 2 Saund. 368. S. C.

17. A rent may not be devised, and, being but a chattel, shall go to executors. 1 Dy. 56. pl. 1.

18. If lessee for one hundred years lease for twenty years, rendering rent, and the great term is conveyed to the reversioner* in fee, he cannot [*1177] have the rent. Mo. 94.

19. An executor of a landlord, where rent is due, shall have the same benefit of the act against an execution, as the testator might have had if living. *Chace v. Chace*, Fort. 359.

20. If a lessee for years grants a rent-charge to a stranger, and after surrenders his term to the lessor, the stranger shall have the rent during the term. *Deavenport's case*, 8 Co. 144 b.

21. Where the father (seised in fee) and his son and heir apparent make a lease for years to commence on the death of the father, yielding rent to the son by his proper name, the son shall never have this rent. *Sacheverell v. Froggatt*, 2 Saund. 370.

22. A surviving joint-tenant is not entitled to rent reserved on a lease by his companion, nor the reversioner to rent reserved on an under lease by tenant for life previous to his surrender, though in both cases the lease continues. *Shelly's case*, 1 Co. 93 b. J. Bridg. 44.

23. If a man, to take advantage of a condition of re-entry, demands the rent at sunset, yet if he die before midnight his heir shall have the rent, and not his executor. *Duppa v. Mayo*, 1 Saund. 287.

IX. AT WHAT TIME IT BECOMES DUE.

1. Rent is not due until the last minute of the natural day; namely, at midnight. *Duppa v. Mayo*, 1 Saund. 287. *Stafford v. Wentworth*, 9 Mod. 21.

2. Tenant for life makes a lease reserving rent, and dies some time before the rent day is come; the tenant may detain the rent, and yet a small matter will make him ten-

ant at will of the reversion. *Harding v. Brook*, Comb. 255.

3. If he in reversion grants a rent to commence after the term ended, and the lessee surrenders, the rent shall be paid presently, and, as to the grantee, the term shall be said to be determined. *Wrotlesley v. Adams*, Plow. 198.

4. Rent payable by devise at the usual feasts, shall be intended at the usual feasts for payment of rent in the same town. 2 Andr. 122.

5. Where a rent is reserved payable at H, a place out of the land, and if it be behind by forty days, then, &c., it shall be paid at H the last of the forty days, as well as it should the first day on which it was due. *Ridwelly v. Brand*, Plow. 70.

6. Rent upon a lease for fifty years, if the lessor should so long live, was reserved payable at the four usual feasts, or within thirteen weeks after Lady-day, but within the thirteen weeks the lessor died; her executor brought debt against the lessee for the rent due at Lady-day, held, upon demurrer, the action is not maintainable. *Clun's case*, 10 Co. 127. Cro. Jac. 309. 4 Leon. 247.

7. Where rent is reserved on two feasts yearly, it shall be paid on that which comes first, though named last. 2 Dy. 130. pl. 69.

X. HOW LONG THE RENT CONTINUES PAYABLE.

1. A reservation of rent during the term shall be intended during the whole term. *Plow. 30*.

2. And though the lease do not say to whom, the law makes the construction, that it shall be paid *durante termino* to them whom it shall belong to. *Sacheverell v. Friggatt*, 2 Saund. 369.

3. Agreement by articles, "and the lessor doth demise for twenty-one years to the lessee, provided the lessee pay 120l. rent annually;" this is a good reservation, and the rent is to be intended payable during the term. *Mo. 459*.

4. A man seised in fee demises the land for years, reserving rent *durante termino* to the said lessor, his executors, administrators and assigns, and the lessee covenants to pay it accordingly, and the lessor devises the reversion and dies; the reservation is good to continue the rent during the whole term, and the devisee shall have an action of covenant for non-payment thereof. *Sacheverell v. Friggatt*, 2 Saund. 369, 370, 371.

5. A husband makes a lease rendering rent for his life, and the life of his wife; this is to be intended during the life of the husband and wife, and the longer liver of them. *Mo. 876*.

6. A reservation of a journey [*1178] on a demise,* to be performed yearly, shall be intended during the term only. 2 Saund. 168.

7. An abbot makes a lease, yielding rent

to him and to his successors; adjudged that the rent shall continue during the whole term. 2 Saund. 369.

8. A reservation in a lease for years, of rent during the term to one or his successors, is good, and the rent shall continue during the whole term; but a feoffment to A or his heirs is but an estate for life. *Pain v. Mallory*, 5 Co. 111 b. Cro. El. 832. S. C.

9. A enfeoffed B upon condition; A and B by deed granted a rent-charge to C; the condition is broken; A re-enters, C distrained, and A brings replevin: held, that the rent remained good, the grant of A enuring to C by way of confirmation. *Anne Mayowe's case*, 1 Co. 146 b.

10. If a man seised in fee grants a rent, it will be for the life of the grantee, for the grantor has power to grant it so. 1 Ro. 370.

11. Tenant for life, and remainder to the eldest son and his heirs, both join in a lease, reserving rent to the tenant for life and his heirs; the rent is determined on his death. *Huntley's case*, Palm. 485.

12. One seised in fee by indenture demised, rendering annually to himself and his assigns a certain rent, payable half yearly; the lessor died; held, the rent was determined, and should not go to the heir. *Wootton v. Edwin*, 12 Co. 38.

13. If termor grants a rent-charge, and after surrenders, yet the rent shall be paid during the term, and as to the grantee, the term shall be said to have continuance. *Wrotlesley v. Adams*, Plow. 198.

XI. HOW IT SHOULD BE PAID OR TENDERED.

1. Rent payable at two feasts is to be paid by equal portions. *Brewin v. Mansfield*, 3 Leon. 235.

2. It is payable by the executor before obligations. *Newport v. Godfrey*, 3 Lev. 267.

3. A demand or tender of rent on the last moment of the day of payment is good. 2 Dy. 130. pl. 69.

4. If the king makes a lease without appointing any place, or into whose hands the rent should be paid, the lessee may pay it either at the Exchequer at Westminster, or into the hands of the king's bailiffs or receivers authorised for that purpose. *Borough's case*, 4 Co. 72 b. Cro. Eliz. 462. S. C.

5. Where it is reserved to the king, and he grants the reversion, the rent ought to be tendered upon the land. *Burrough v. Taylor*, Cro. Eliz. 462.

6. Payment of rent does not of itself estop the party from disputing the title of him to whom it was paid. 1 Saund. 326.

7. On a lease in which rent was reserved to be paid "without any deduction or abatement whatsoever," it was resolved, that as the land-tax act enables the tenant to deduct this tax out of his rent, he has, in all cases, a right to stop it, unless there is an

express agreement to the contrary. *Cranston v. Clark*, 11 Mod. 240. n.

8. But where there is an express agreement "to pay all taxes, land-tax only excepted," the lessor is only bound to allow at the rate of and in proportion to the rent at the time of the demise, and not for any increase on account of the improvement of the estate. *Hyde v. Hill*, 11 Mod. 240. n.

XII. RESPECTING THE DEMAND OF RENT.

1. Rent of 40*l.* per annum, payable weekly as the lessor requires, although it be not even required, he can have debt after the year is finished. *Bayly v. Baxter*, Lat. 128.

2. If the lessee be bound by obligations to pay the rent, there needs no demand, yet it must be tendered upon the land. Hob. 8. *Contra*, Cro. Car. 76, 77.

3. If rent be in arrear ten days, being lawfully demanded, it shall be lawful for the grantee to distrain, he can distrain without demand, for the distress is a demand. Mo. 883.

4. A rent-service, though not demanded at the day, may be distrained for without a personal demand; *secus*, of a rent-*seck*, or service tendered at the day to the person of the lord. *Cranley v. Kingswell*, Hob. 207.

5.* The assignee need not demand the rent at the day, to enable him to distrain; a man who has a rent-*seck* payable yearly at the feast of Easter, and has once seisin of the rent, and the feast passes, and no tender or demand made of the rent, may after the day come to the land and demand it, and although the tenant be not there, if none be ready to pay the rent, he shall have an assize. *Maud's case*, 7 Co. 28 b.

6. Otherwise if the tenant were on the land at the last instant of the feast, ready to pay the rent; for in such case, he ought to demand the rent of the person of the tenant of the land, and if he cannot be found there, he should make the demand on the land at the next feast of Easter. Id. *ibid*.

7. Lessor is not bound to demand the rent before the lessee is bound to pay it. *Hill v. Grange*, Plow. 172.

8. A condition of re-entry, if rent be in arrear for a certain space of time after being demanded, and no distress on the premises, is not broken, if no demand be made within the time, though the goods are removed from the premises before the time for making the demand ultimately expires. *Worcester v. Stone*, Cro. Eliz. 63.

9. Rent payable *sue cesset* at another place is demandable before the estate ceases. Mo. 598.

10. Upon a lease for years from 24th June, rendering rent "at Michaelmas St. Thomas, Lady-day, and Midsummer, or within twenty days after," a demand of a year's rent as due on the 25th December, is bad. *Thom-*

kins v. Pincen, 7 Mod. 97. 1 Salk. 141. 2 Ld. Raym. 819 S. C.

11. When a lease reserves 7*l.* rent, and there is one year's rent and 3*l.* more in arrear, the lessor cannot demand 10*l.*, whereby to take advantage of a condition, because it is an entire sum. *Anon.* Aleyn, 95.

12. Condition that a lease for years shall be void for non-payment of rent; it is not void till demand. Hob. 67. 313, 371.

13. Rent ought to be demanded upon the land to take advantage of a condition of re-entry. Hob. 8. 1 Dy. 51 b.

14. Though the rent be payable out of the land, it ought to be demanded. *Burkys v. Edmunds*, Cro. Eliz. 536. *Contra*, 1 Dy. 51 b.

15. Rent-*seck* is only demandable on the land. T. Jones, 120.

16. If a rent-*seck* be granted out of Dale, payable at Sale, a demand thereof at Dale is good. Cro. Car. 508.

17. If a lease be made of a wood only, demand of rent must be made at the most open and notorious place in the wood. 3 Dy. 329. pl. 12.

18. Lease of a house rendering rent, and for non-payment, &c.; if the door be open, the lessor must enter into the house and demand it. *Lord Crommel v. Andrews*, Cro. Eliz. 15.

19. Rent paid before the day will not save the condition of re-entry, if on demand it be not paid at the day. Id. *ibid*.

XIII. RESPECTING THE ACCEPTANCE OF RENT AND ITS EFFECT.

1. Acceptance of rent by the lord does not make him lose a relief, &c. incurred before acceptance. 2 And. 178.

2. Acceptance of rent by the wife confirms the lease of the husband. 3 Leon. 271.

3. The like by issue in tail of a lease not warranted by the statute. 3 Leon. 271. 1 Keb. 778. pl. 20.

4. The like by an infant at his full age. 3 Leon. 271.

5. So also of a lease by a predecessor, and the successor accepts the rent. *Ibid*.

5. But acceptance of rent by the master of a corporation aggregate, and acquittance given under his hand, does not make a voidable lease good, unless he had authority under the common seal to do so. 1 Ro. 172.

7. Acceptance of rent incurred after condition broken, bars entry for breach of condition, as well collateral as inherent, and the making an acquittance for rent is a bar of the arrearages. *Harry v. Onould*, Moore, 426.

8. Acceptance of rent after notice of breach of condition bars entry. Cro. Jac. 398. Moore, 456.

9. Acceptance of rent is a dispensation with forfeiture of a copyhold, &c. 1 Keb. 15. pl. 4. 1 Saund. 288 s.

10. Tenant in tail makes a [*1180] feoffment in fee* to the use of himself and his heirs, and then makes a lease for years and dies; the issue accepts the rent; still he shall avoid the lease, because he is remitted. *Anon.* Moore, 846.

11. Acceptance of rent of a new tenant does not bar distress for relief due from the old tenant, but was a bar of the arrearages of a rent before the statute 21 H. 8.; *quare* if so since the statute. *Carham v. Norton*, Moore, 643.

12. Acceptance of the husband will bind the wife for ever. 2 Ro. 132.

13. Where the issue of him in remainder accepts the rent of tenant for life, it is a good affirmation of his estate. 1 Leon. 243.

14. By acceptance of rent by the lessor from the assignee, the privity of contract between the lessor and first lessee is extinguished, and the action of debt against the first lessee is gone. 1 Saund. 240. 2 Saund. 302, 303, 304.

15. But after such acceptance, the lessor or his assignee can maintain an action of covenant against the first lessee upon his express covenant for payment of the rent. 1 Saund. 240, 241. 1 Sid. 401.

16. Acceptance of rent from the assignee of the lessee dispenses with a condition not to assign. 1 Saund 288. n. [s].

17. A lessor may refuse to accept the assignee to be his tenant at one time, and yet may accept of him afterwards when he pleases. *Devereux v. Barlow*, 2 Saund. 182.

XIV. RESPECTING THE APPORTIONMENT AND DIVISION OF RENT.

1. A rent shall be divided into halves, according to the halves of the reversion. *Swinerton v. Miller*, Hob. 177.

2. If a lessee for years grants part of the land during the term, the rent is apportionable. Moore, 93.

3. If the lessor grant part of the land, the grantee shall have no rent. 1 Leon. 252. *Anon.* 3 Leon. 1.

4. An apportionment cannot be made of a rent-charge by act of the parties. *Roll v. Osborn*, Hob. 25.

5. Rent may be apportioned by the act of the lessor and the assent of the lessee. *Collius v. Harding*, 13 Co. 57. Cro. El. 606. 632. S. C.

6. Rent shall be apportioned upon a descent of the reversion of a parcel, but not on the sale of parcel. 1 And. 22, 23. 175.

7. If a grantee of a rent-charge purchase part of the lands, the rents shall be apportioned in equity, especially if he was ignorant of his title to the rent when he made the purchase. Mosel. 257.

8. One lessee alone cannot come into Chancery for an apportionment. *Stafford v. City of London*, Sir. 95.

9. A rent-charge is divisible by a fine to

uses or devise, without the assent or attornment of the party. *Colborne v. Wright*, 2 Lev. 240.

10. Rent is apportionable upon a grant of the reversion of a parcel, surrender of parcel, or eviction of parcel. Moore, 114. *Swinerton v. Miller*, Hob. 177.

11. Rent may be apportioned in the king's case, which cannot in the case of a common person. *Knight and Beech's case*, 3 Leon. 124—127.

12. If a man seized in fee of a manor holden in moieties by socage and knight's service, and of a parsonage appropriate, leases them for an entire rent, and on his death devises the manor for life, remainder in tail, the remainder-man, on a surrender to him of the estate for life, may distrain on the lessee for an apportionment of the rent; and a bar to his avowry must show the value of all the premises, and answer the rate of the apportionment. *Ever v. Moyie*, Cro. Eliz. 771.

13. If in a lease the *habendum* be for years, yet the rent may be apportioned according to the *reddendum*. *Tompkins v. Pincoust*, Salk. 141.

14. A leased for years, and then devised the land to B and his sister, and to the heirs of every of their bodies; they have several inheritances; and the sister dying leaving issue, on the death of B without issue, the rent shall be apportioned to the issue. *Huntley's case*, Dy. 326 a.

15. On a lease at will 12th of January, debt lies not for half a year's rent due at Lady-day. 1 Keb. 135. pl. 63.

16. So of a lease for years at 20l. *per annum*, it lies not for any. [*1181] less term than a year. Salk. 65.

17. Tenant by chivalry having made a lease for years, rendering rent, devises two parts of the reversion; no rent passes; so, if the lessor enter into parcel, and make feoffment, all the rent determines. Moore, 281.

18. If one lease a warren, which extends into three villa, rendering rent, and the reversion in one vill be granted, the rent is not apportionable but extinct. Moore, 115. *Vide Anon.* 3 Leon. 1.

19. Copyholder leases for sixteen years, rendering rent, the lessee leases part for ten years without rent, the last lessee assigns his term to first lessor, he shall have the whole rent without extinguishment or apportionment. *Hodgson v. Thornborough*, 2 Lev. 134. 3 Keb. 500.

20. The lessor of land and implements with it, entered on his lessee, and made a feoffment thereof, and the lessee re-entered upon him; the feoffee may now bring debt for the whole rent, and there shall be no apportionment. 2 Dy. 212. pl. 37.

21. A lessee who is evicted in consequence of a statute acknowledged by a former owner of the estate, cannot be sued by his lessor for

an apportionment of the rent on an indenture to perform covenants, &c., and a plea of a performance need only answer the indenture substantially, and to a common intent. *Ematt v. Cole*, Cro. Eliz. 255.

22. A lease for years was made, rendering rent, with condition for re-entry; a moiety of the rent was extended upon an *elegit*, by which the whole condition was suspended. *Moore*, 22. 91.

XV. RESPECTING THE SUSPENSION OF RENT.

1. Rent is suspended by the entry of the lessor. Hob. 8.

2. And by entry into that which passed not by particular but only general words. Hob. 190.

3. If there be a lease of land in which there are trees, and some not being timber are blown down by the wind, though the lessor take them away, it does not suspend the rent. 2 Ro. 399. 415.

4. Entry of the lessor is no suspension of the rent, unless the lessee is evicted. 1 Ld. Raym. 307. Hob. 326.

5. Suspension of rent shall not be where the tenant has an action of trespass. *Roper v. Lloyd*, T. Jones, 148.

6. The rent is not suspended by an extent made of the land before the rent-day, if the *liberate* were executed after. Hob. 82.

7. Where the lessee is excused from repairs in case of loss by fire, yet the rent is not suspended while the tenements remain unbuild. 2 Ld. Raym. 1477. 2 Saund. 422. a.

8. Rent is suspended by union with the crown. Ley, 1.

9. If the lessor makes a lease, reserving rent, and afterwards accepts a demise of part of the premises so demised by him, such demise conferring a present interest, the rent is suspended, and that although the lessor does not enter. *Rawlyngs's case*, 4 Co. 53 a. 3d res.

10. A remainder in tail, or for life, expectant upon an estate for life, or in tail, shall never suspend a mesnalty, seignory, rent, &c. *Ascough's case*, 9 Co. 134 a.

11. A rent, though suspended, is grantable. 3 Leon. 154.

XVI. RESPECTING THE EXTINGUISHMENT OF RENT.

1. By destroying a reversion a rent which followed it is extinguished. *Anon.* 3 Leon. 261.

2. Rent is granted *pur auter vie*, the grantee dies; the rent is thereby determined. *Holden v. Smallbrooke*, Vaugh. 200, 201.

3. Two joint-tenants in fee, one of them makes a lease to a stranger yielding rent, the joint-tenancy of the inheritance is not severed, and the other joint-tenant, if he survives, shall have the reversion, but not the rent. *Latw.* [477, 478].

4. Lessee for years assigns his term to him in reversion, rendering rent; the render is

good, though the term is surrendered. *Winston v. Pinkney*, 2 Lev. 80.

5. Where rent is in arrear, and afterwards it is granted over in fee, and an attornment thereupon, the grantor thereby loses his arrears, and cannot afterwards distrain. *Dixon v. Harrison*, Vaugh. 40.

6. A man made a lease to A for life, and to B for years, rendering rent, to commence at A's death, who surrenders to his landlord; he before the death of A enfeoffs C; A dies, the rent is not extinguished. 1 Dy. 31. pl. 210.

7. If the land be evicted, the rent is gone, and also the bond and covenant for payment. 1 Ro. 198.

8. If the land out of which the rent is granted be recovered by *eigne* title, all the rent is extinct; but if only the land in which the distress is limited be evicted, the whole rent remains. *Butt's case*, 7 Co. 27 b.

9. If a man lease the profits of a court for years, rendering rent, and the lessor release all the services, the rent is discharged. Hob. 43.

10. A rent newly created on condition may cease without entry; *secus* as to a rent in case. *Cholmley's case*, 2 Co. 50 a.

XVII. RESPECTING THE REVIVAL OF RENT.

1. A rent newly created may cease for a time and revive again. *The Prince's case*, 8 Co. 17 b.

2. If the grantee for life of a rent-charge takes a lease of the land, or part of the land, and afterwards surrenders it, the rent which was thereby suspended shall be revived. *Peto v. Pemmerton*, Hutt. 94. Cro. Car. 101.

3. Rent suspended by union with the crown is revived by a grant to the subject. *Long's case*, Ley, 1.

XVIII. OF THE ASSIGNMENT OF RENT.

1. A rent-charge granted to one and his assigns *pro consilio impendendo*, may be assigned over. *Maud v. Gregory*, 7 Co. 28 b.

2. Rent of leases for years may be granted without the reversion. *Goodman v. Packer*, T. Jones, 1.

XIX. RESPECTING THE REMEDIES FOR NON-PAYMENT OF RENT;—

(a) *By re-entry.*

1. Where land is devised or limited to one till he raises a certain sum of money, and the heir enters upon the devise and puts him out, it is in the election of such devisee either to bring his action and recover the means profits which are to be accounted parcel of the sum, or he may re-enter and hold the land over until he levies the whole sum; but if a stranger occupies the land, though the devisee has not notice of the devise, yet he must take notice at his peril; so it is of tenant by *elegit*, statute-merchant or staple, or guardian holding over for the double value. *Sir A. Corbet's case*, 4 Co. 81.

2. A rent-charge was granted to Sir R. B. and his heirs, and in the deed of grant was this clause: "that if the rent be behind, &c., then it shall be lawful for the grantee to enter and retain till he be satisfied;" resolved, the grantee by virtue of this clause may maintain an ejectment. *Jemot v. Cooley*, T. Raym. 137, 138, 158, 159.

3. But in such case, after his entry, he has only a pernaney of the profits, for he cannot cut down trees, or pull down houses; if he does, trespass lies against him, as against him who abuses a distress. S. C. T. Raym. 159.

(b) *By distress.*

1. Rent may be distrained for by tenant at will. Comb. 255.

2. The power to distrain may be lost by a perpetual union, suspension *pro tempore*, dying without heir, granting of it upon condition, and by a granting over. *Dixon v. Harrison*, Vaugh. 39.

3. Seizure of some goods as a distress for rent, in the name of all the goods in the house, is a good seizure of all. Holt, 416.

4. If a landlord make a distress for rent, he must remove the goods within the time mentioned in the statute: by 11 Geo. 2. c. 19., a landlord after making a distress for rent, shall not be considered as a trespasser *ab initio* for any subsequent irregularity, but the distress shall be good, and the party recover damages for the special injury he receives. *Dod v. Monger*, 6 Mod. 216. 1b. note.

[*See ante*, tit. DISTRESS, Vol. I. p. 534.]

[*1183] (c) * *By seizing goods unlawfully removed.*

1. It is not necessary to allege expressly in an order upon the 11 Geo. 2. c. 19., when the rent became due, or that it was due at the time the tenant carried off his goods. *Rex v. Bissess*, Say. 306.

2. Nor is it necessary to allege expressly in an order upon that statute, against the person who assisted the tenant in carrying off his goods, that the tenant did carry off his goods. S. C. Say. 307.

(d) *By demanding a year's rent, where the sheriff seizes the goods under an execution.*

1. When the landlord gives notice to the sheriff in possession under a *fi. fa.* that a year's rent is due, who afterwards removes the goods and sells them, he may on a summary application to the court, founded on an affidavit of the facts, be ruled to pay over such rent to the landlord. *Darling v. Hill*, C. T. Hardw. 255.

2. An action lies at the suit of a landlord against the sheriff for neglecting to pay him a year's rent on an execution against the goods of his tenant. *Pain v. Womansel*, 7 Mod. 257.

3. The landlord has no remedy against the sheriff if he does not make his demand before removal of the goods. *Waring v. Dewberry*, Stra. 97.

(e) *By action;—*

1. *Assize.*

1. If tenant in tail makes feoffment in fee, and the donor obtains seisin of his rent by the hands of the discontinuee, it is sufficient to have an assize, and yet he cannot avow on the discontinuee. *Brediman's case*, 6 Co. 58 a.

2. If such rent be by will, it is remediless. S. C. 6. Co. 58 b.

2. *Assumpsit.*

1. It was formerly held that assumpsit lay not for rent. *Green v. Harrington*, Hutt. 34.

2. Assumpsit for rent does not now lie where there is a lease under seal. *Brett v. Read*, W. Jo. 329. Cro. Eliz. 786. Hob. 284. *Munday v. Bailey*, Aleyn, 29.

3. The lessor must declare on the lease. *Read v. Johnson*, Cro. Eliz. 242. Yelv. 18.

4. Though assumpsit will not lie for rent reserved upon a demise by deed, yet where an express promise is made to pay rent (in consideration of occupying the premises, it will lie. *Shuttleworth v. Garnet*, 3 Mod. 240. *Mason v. Welland*, Skin. 238, 242. *Chapman v. Southwicks*, 1 Lev. 205. Hard. 366.

5. But without such promise, it was held that debt only lay, and not assumpsit; and that the plaintiff must show what right he had. *Clark v. Palady*, Cro. Eliz. 859.

6. So, an assumpsit laid in consideration that the arrears of a rent-charge for life (though by deed) were unpaid, was held good. *Anon.* 1 Leon. 293.

7. Now, by 11 Geo. 2. c. 19., "landlords, where the agreement is not by deed, may recover a reasonable satisfaction for the premises occupied, in an action on the case for the use and occupation; and if on the trial any parol demise, whereon a certain rent is reserved, shall appear, it shall be evidence of the quantum of damages to be recovered." 3 Mod. 240. *notis.*

3. *Covenant.*

1. Where there is a covenant to pay rent, an action lies, though the lessee has no enjoyment by the default of the lessor. *Monk v. Cooper*, 2 Stra. 763. 2 Ld. Raym. 1477.

2. A lessee who covenants to pay rent, and to repair, with express exception of casualties by fire, is liable upon the covenant for rent, although the premises are burnt down and not re-built by the lessor. *Chesterfield v. Bolton*, Com. 633, note 3.

3. The lessor or his assignee, notwithstanding acceptance of rent from the assignee of the lessee, may maintain an action against the first lessee upon his covenant for payment of the rent. 1 Saund. 240, 241.

4. A grants a lease for years to B and C, who covenant for themselves and their assigns to pay the rent to A and his assigns according to the reservation; B, with the consent of A, assigns* [*1184] the remainder of his interest in the term to C; A receives the whole rent

from C, and afterwards assigns his reversion to D; D, as assignee of the reversion, may maintain covenant against B for rent accrued after the assignment of his interest in the term to C; for no act of the lessee can discharge him or his assigns from the special covenant. *Askurst v. Mingay*, 2 Show. 134.

5. If the grantor of a rent-charge covenant for him his heirs and executors, to pay, &c., an action of covenant lies against the executor for rent accruing after the death of the grantor, although the grantee entered pursuant to a clause in the deed, for rent-arrear previous to the death of the grantor. *Fountain v. Guavere*, 2 Show. 333.

4. Debt.

1. Debt or covenant lies upon the word "*reddendo*." 1 Sid. 401.

2. Debt lies for two quarters' rent of an annuity. *Pitten v. Darby*, Comb. 57.

3. Debt for rent lies pending a writ of error on a judgment in ejectment and bail given to prosecute and answer the *mesne profits*. *Badger v. Flood*, Holt, 199, 200.

4. The lessee is liable without entry or occupation, for the rent is due by the contract, and not by the occupation. 1 Saund. 202 a. 233 a.

5. And so is the assignee. 1 Saund. 203, n. [b.] 233 a.

6. If a lease for years ceases for non-payment of rent, and the lessee continues in possession afterwards, still debt does not lie for rent afterwards incurred. Mo. 87.

7. If the lessee enter before the day, he is a disseisor; and if he continue in possession after the day, though by the lessor's consent, he is liable to debt for the rent-arrear, for no act of the lessee shall hurt the contract, &c. *Macdonel v. Weldon*, 8 Mod. 54, 55.

8. After acceptance of rent from the assignee of the lessee, the lessor cannot maintain an action of debt for rent against the first lessee. *Thursby v. Plant*, 1 Saund. 440. 2 Saund. 304. S. P.

9. Lessee for life makes a lease for years, who surrenders to the reversioner, rendering rent; adjudged an action of debt will lie for the rent, because it is a duty by way of contract. *Winton v. Pinkney*, T. Raym. 222.

10. Rent reserved upon a re-demise of a term of years by the original lessee to the original lessor, cannot be recovered in an action of debt, for the re-demise of the whole term operates as a surrender of the original lease, but relief may be had in equity. *Lloyd v. Langford*, 2 Mod. 174.

11. But debt will lie for rent reserved, where a lessee for years makes an assignment of his whole term to a stranger. S. C. 2 Mod. 176.

12. Debt on a lease for life or lives did not lie at common law during the continuance of the estate: but it does by statute 8 Anne, c. 14, and the law is made the same as in case of a lease for years. 2 Saund. 303. n. (8.)

Bp. of Winchester v. Wright, 2 Ld. Raym. 1056.

13. The statute only contemplates the case of rent due from a tenant holding by lease from his landlord, and not annuities and the like. 2 Saund. 304. n. [d.] See also 1 Saund. 282. n. [b.]

14. Debt lies for the arrears of an annuity in fee, although for rent, which continues on an estate of freehold, whether rent-service, rent-charge, or rent-seck, it would not lie. *Ognell v. Underhill*, 4 Co. 48 b. 1 And. 178. 4 Leon. 115. S. C.

15. A proviso in a grant of a rent for life, that it shall not charge the person, is good, yet if the rent is arrear, and the grantee dies, his executors shall charge the person of the grantor in an action of debt. *Sir A. Midmay's case*, 6 Co. 40 a.

16. Debt lies for rent against the original lessee of a term, though he have granted over parcel of the land, and his grantee have made a feoffment of that parcel. 1 Dy. 4. pl. 1.

17. But not for rent accruing after the assignment of his whole term. 2 Dy. 247. pl. 77.

18. Debt lies against the original lessee for rent accrued after assignment of his term, for the privity of contract remains notwithstanding the assignment; otherwise after acceptance of rent from the assignee. *Walker v. Harris*, 3 Co. 22 a.

19. Debt lies not for the arrears of a rent-charge as long as the estate of freehold* continues. 1 Saund. [*1185] 281. n. [b.] 304. n. [d.]

20. An executor may bring debt for rent in the *debet* and *detinet*, against the administrator *de bonis non* of the under-tenant of a term, for rent incurred in his own time. *Prattle v. King*, 1 Mod. 185.

21. Debt for rent lies not against an executor after he has assigned his term, but only against an assignee. 2 And. 133.

22. Executors of tenants for life of a rent-charge, might bring debt for rent at common law, or they may distrain by statute 32 Hen. 8. 1 Saund. 281, 282.

23. Grant of a rent-charge for life, the rent in arrear, and the grantor enfeoffs A, and the rent is again in arrear, A enfeoffs B, and the rent is behind in his time; the grantee dies; his executors shall have an action of debt against each for the rent behind in his time. *Duncomb v. Lillingston*, 7 Co. 39 b. 4 Leon. 235. 239. S. C.

24. If tenant *pur autre vie* of tithes in gross makes a lease for years, rendering rent, and dies, his executors cannot bring debt for the rent. *Semb. Tippin v. Grover*, T. Raym. 18.

5. Ejectment as for a forfeiture.

1. If a lease be forfeited for non-payment of rent, yet upon bringing in the arrears with costs, the proceedings in an ejectment

shall be stayed. *Smith v. Parks*, 10 Mod. 383.

2. But where an affidavit was made, that the lessee was a soldier, and consequently a privileged person, the court ordered he should give security for the future payment of his rent. *Id. ibid.*

XX. RELATIVE TO THE PROCEEDINGS IN ACTIONS FOR RENT;—

(a) When several actions are necessary.

1 Every quarter's rent is a several debt, and distinct actions may be brought for each quarter's rent; not so for part of the money due upon bond, or contract, unless the plaintiff shows that the rest is satisfied. *Wallie v. Phillips*, 2 Vent. 129.

2. If lessee for thirty years lease for twenty-eight years, the rent may be divided by a devise, and several actions will lie for the several rents by the devisees. *Popham, contra*, Mo. 549.

(b) Of the Parties.

An action of debt for arrears of rent ought to be brought against all the parsons of the profits of the lands liable. *Duppa v. Mayo*, 1 Saund. 284. *Brediman's case*, 6 Co. 58 b. [See also div. (c) 2. (e) 3. and (e) 4.; *ante*, p. 1183, 1184. *passim*.]

(c) Venue.

1. Actions for arrears founded on privity of estate are local, and must be laid where the land lies. *Pine v. Countess of Leicester*, Hob. 37.

2. Debt by devisee of the reversion must be brought where the lands lie, and not where the lease was made. *Trea v. Cleabrooke*, 2 Ro. 382.

3. But covenant by the assignee of the reversion for non-payment of rent is not local, and need not be brought where the lands lie. *Thursby v. Plant*, 1 Saund. 239, 240.

(d) Declaration.

1. The grantee of a rent-charge must plead the grant to have been by deed, but the omission is cured by verdict, though not by judgment by default. 1 Saund. 288 a.

2. He may plead the deed without a pro-fert, i. e. if the land itself be conveyed to another in the same deed. 1 Saund. 9 a. n. (1.) 276.

3. Where the plaintiff declares on a lease *habendum a rigillatione, virtute cuius* he entered, and does not show the day of the sealing, still it is good, for it is to be intended the day of the making at the least. 2 Ro. 479.

4. Where an action of debt was brought for 15l. rent, and the declaration was upon two demises for 22l., it was held bad, and that it could not be helped by a *remititur*. *Stafford v. Beneath*, 10 Mod. 69, 70.

5. Rent payable at the four usual feasts, viz. the Annunciation, &c., and plaintiff declares *pro uno anno integro, scil. a festo An. 40., usque festum An. 41., a festo, was held*

bad, for a excluded the first feast, and usque the last. *Umable v. Fisher*, Cro. Eliz. 702.

6.* In debt upon a bond for performance of covenants, &c., [*1186] and breach assigned in non-payment of rent, the plaintiff ought to shew a demand; but if upon special covenant, or particular condition of a bond, the tenant should plead the tender. Mo. 636.

7. It must not be for part of the rent, unless it show the rest satisfied. 1 Saund. 201 a.

8. Where part of it became due pending an action of debt against an administrator, held that the plaintiff could not have judgment. 3 Salk. 4.

9. The entry of lessee (or assignee of lessee) need not be shown, though the plaintiff be assignee of the reversion. 1 Saund. 208 a. 233 a. 1b. n. [b].

10. The entry if stated is not traversable. 1 Saund. 202 a.

11. Debt for rent lies, although in the declaration it be alleged that he entered before the commencement of his lease. *Alexander v. Dyer*, 2 Leon. 99.

12. Alleging the entry of lessee prior to the commencement of his term, will not vitiate the demand of rent. *Macdonnel v. Welder*, Stra. 550.

13. In debt for rent on a lease at will occupation must be shown. *Belasie v. Burbrick*, 1 Salk. 209. 1 Ld. Raym. 170. S. C.

14. But a declaration for rent for the third year upon a lease *de anno in annum*, without averring the possession, is good after verdict. *Gostwick v. —*, 1 Sid. 423.

15. In debt for rent, against an assignee, plaintiff need not show the mesne assignments to defendant. *Coats v. Wade*, 1 Sid. 297. *Ryder v. Hill*, T. Raym. 389, 390.

16. Attornment never need be stated. 1 Saund. 234. b.

(e) Pleas.

1. In debt for rent, a suspension of the rent may be given in evidence on *nil debet* pleaded. *Anon.* 1 Mod. 35. 118.

2. *Nil habuit in tenementis* cannot be given in evidence when the plaintiff has been in possession. 1 Ld. Raym. 746.

3. To a declaration in debt for rent, a plea of *nil debet* as to part, and *nil habuit in tenementis* as to other part, makes the plea double. *Coombe v. Talbot*, 4 Mod. 254.

4. A stranger is bound that lessee for years shall pay his rent for his farm; it is a good bar that the lessor entered. 3 Leon. 150.

5. Eviction of tithes is a good plea to covenant for non-payment of rent. 1 Ld. Raym. 77.

6. Entry without expulsion is a void plea in bar of rent. *James v. Bodingham*, Com. 11.

7. In debt for rent, entry and seisin by a third person is no good plea. *Cooper v. Young*, Fort. 360.

8. He must show an elder title. Fort. 360.
 9. In debt upon an obligation of 10*l*, recited to be for rent, entry and suspension is no plea, because it only answers a recital in the condition which is not material, and not the condition itself. *St. John v. Digge*, Hob. 130.

10. It is no plea for the lessee to say the land was extended before the rent-day, if the *liberate* were executed after. *Sir R. Grobham v. Thornborough*, Hob. 82.

11. In debt for rent upon a lease for years, defendant pleaded eviction by extent upon a statute prior to the lease; and held bad for not showing an inquisition taken upon the extent. Mo. 891.

12. In debt for rent of four rooms, the defendant pleads a lease of five rooms, and eviction of the fifth; it is not good without a traverse. *Salmon v. Smith*, T. Raym. 175.

13. In covenant for rent, defendant cannot plead that plaintiff has assigned over; but whoever first brings the action bars the other. *Semb. Thurstaby v. Plant*, 1 Sid. 462.

14. In debt for rent by the assignee of a reversion, the defendant pleads, that before any rent arrear, he had assigned to another; held bad on demurrer. *Knight v. Barkley*, T. Raym. 162.

15. Debt for arrears of rent reserved by deed is not within the statute 21 Jac. 1. c. 16. of limitations. *Jones v. Pope*, 1 Saund. 32. 2 Saund. 65 a.

16. So, if created by act of parliament. 2 Saund. 65 a.

17. In debt for rent on a lease for years, it is a good plea, that on Christ-
 [*1187] mas-day* (being the quarter-day) he was at the said message by the space of an hour before sun-rising until sun-setting of the same day, and that neither the plaintiff, nor any other on her behalf, came or was ready there to receive it, and that always since the said day hath been and yet is ready to pay the same. *Crouche v. Fastolfe*, T. Raym. 418, 419.

18. In such a plea, the defendant need not allege a tender; but it is otherwise where there is a condition, the breach whereof is to be saved thereby. Id. *ibid*.

19. A release of all demands, is a good bar to debt for growing rent. *Hew v. Hanson*, 1 Keb. 499. pl. 53.

20. If the profits of a court be leased rendering rent, in debt for that rent, it is no plea for the lessee to say he received no profits that year but it is a good plea that the lord discharged or released all. *Coeper v. Andrews* Hob. 44.

21. If one give an acquaintance for rent due at Michaelmas, he is estopped from claiming all rent due before; otherwise of an avowry. *Pemer v. Stabick*, 1 Sid. 44.

REPAIRS.

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VI. INDICTMENT FOR NOT REPAIRING;—

(a) *Relative to the form of it*, p. 1188.

(b) *Plea*, p. 1188.

I. RESPECTING THE PARTY LIABLE TO REPAIR, IN GENERAL.

1. He who has the use of a thing is bound to repair it. 1 Saund. 322 a. n. (3).

2. An action of covenant does not lie against the grantor for not repairing the thing granted; for the lessor or grantor is not liable to repair without an agreement for that purpose. 1 Saund. 322. 323. n [a]. 323. 323 b.

3. When a man is bound well and sufficiently to repair and maintain a house, though it be so weak that it cannot be repaired, the party is not excused, but is bound, if necessary, to build it *de novo*. *Wood v. Avery*, Sav. 97.

4. The tenant must rebuild though the house be burnt by accident, or thrown down by enemies or tempest, or the like, unless there be an exception in the lease of casualties by fire, &c. 2 Saund. 422. 423 a.

5. He who has the upper chamber is not bound to repair the roof, though his neglect to do so be to the damage of him who has the under chamber, unless by custom. 1 Saund. 322. *Anon.* 11 Mod. 7.

6. The inhabitants of a parish are bound by the common law, to repair the highways within the parish; except prescription bind any particular persons to it. March, 26. pl. 62.

7. The occupier of lands in a parish living in another parish, is liable to the repairs of the parish where his lands lie. *Jeffrey v. Kenshley*, 5 Co. 66 b.

8. The charge is not on the lands but on the person in respect of the land. Id. *ibid*.

9. The lessor who receives rent for his lands from his lessee shall not be charged in respect of such rent. Id. *ibid*.

10. A man is compellable in the ecclesiastical court to repair a way which leads to the church, but not a highway. March, 45. pl. 70.

11. Every occupier of land in the parish must contribute to the repair of the church, although he live in another; but if he lets the land, his farmer shall, and the quantity of land is inquirable in the court christian. Cro. Eliz. 659. 843.

12.* The church-wardens and majority of parishioners may, on [*1188] notice given, make a rate for the

repairs of the church. *Jeffrey v. Kenahley*, 5 Co. 66 b.

13. If one be bound by prescription to repair the river bank, yet on a commission awarded, the commissioners of sewers ought to tax all who are in danger of being damaged by the nonrepair. *Rooke's case*, 5 Co. 99 b.

II. OF THE NATURE OF THE REPAIRS.

A tenant from year to year is not liable to general repairs. 1 Saund. 323 b. n. [A].

III. TIME FOR REPAIRING.

If waste is brought for reparations which are amended pending the writ, that will not excuse the party. Cro. Jack. 658.

IV. PLEA OF REPAIRS DONE.

In an action of covenant for not repairing, the defendant must show by whom the house was repaired. 2 Saund. 422.

V. REMEDY FOR THE LESSEE, BY RECOVERING HIMSELF OUT OF THE RENT.

If the lessor covenant to repair the house and do not, the lessee may do it, and recoup out of his rent, by retaining a sum equal to that expended. *Beale v. Taylor*, 1 Leon. 237.

VI. INDICTMENT FOR NOT REPAIRING;—

(a) *Relative to the form of it.*

1. An indictment against a borough, for not repairing a way to church, must state how bound, as by reason of tenure, prescription, &c.; because, of common right, the obligation of repairing a way lies on the parish or the county. *Rez v. Mayor, &c. of Warwick*, 2 Show. 201.

2. Indictment for not repairing a highway *ratione tenure*, without saying *sua*, is good. *Rez v. Carroll*, 11 Mod. 302.

3. An indictment for not repairing a bridge, alleging, that the defendant ought to repair, because he now is, and for divers years last past was, lord of the manor, &c., is insufficient; for he is not liable as lord of the manor, and therefore it ought to have shown that he was liable by reason of tenure, or by prescription. *Rez v. Bucknell*, 7 Mod. 55.

4. Indictment against a township for not repairing a cart-way, without showing that they have from time immemorial repaired it, is ill. *Rez v. Inhabitants of Marton*, Andr. 276.

5. Indictment against one for not repairing the pavement before his house, was quashed, for not showing that he was obliged to repair it. *Reg. v. Scott*, 2 Ld. Raym. 922.

6. An indictment for not repairing, "a common bridge, situated in a certain common foot-path," is good, without stating it was in the king's highway. *Rez v. Saintiff*, 6 Mod. 255.

7. In an indictment for not repairing a highway, it need not be described as a highway, to be used in any particular manner. *Rez v. The Inhabitants of Halfeld*, C. T. Hardw. 315.

8. An indictment for not repairing a certain part of the stairs leading to the Thames,

"in the parish of Limehouse aforesaid," is good, although Limehouse is not mentioned in the former part of the indictment. *Rez v. Inhabitants of Limehouse*, 2 Show. 455.

9. An indictment for not repairing a way, without alleging it to be out of repair, is bad. *Rez v. Inhabitants of Morton*, Andr. 276.

10. An indictment for not repairing a highway, stating that it was "so narrow, dirty, and clayey, that people could not pass," is sufficient. *Rez v. Stratford Inhabitants*, 11 Mod. 56.

(b) *Plea.*

To an indictment for not repairing a road, the defendant to discharge himself must plead, that such a one *ratione tenure*, or that such a part of the parish, was bound by prescription to repair it, for it cannot be given in evidence on the general issue. *Rez v. St. Andrew's*, 1 Mod. 112, 113. 1 Show. 279.

*REPLEADER. [*1189]

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I. WHEN A REPLEADER WILL BE AWARDED.

1. If an impertinent, futile, immaterial, or any other species of issue be joined, or an issue be ill joined, on which the court cannot give judgment, or on which, if judgment be given, the right between the contending parties will not be thereby determined, a repleader shall be awarded. *Staple v. Heydon*, 6 Mod. 2. *Anon.* 11 Mod. 46. Holt, 413. 3 Salk. 305. *Parkam v. Norton*, Cro. Eliz. 886. 2 And. 24. Mo. 867.

2. The court might have awarded a repleader at common law on an immaterial issue. *Staple v. Heydon*, 6 Mod. 2.

3. In debt on bond, payable 5th December, if the defendant plead payment on that day, and the plaintiff reply non-payment on that day, and the verdict find non-payment on 25th December, a repleader shall be awarded. *Tryon v. Carter*, 7 Mod. 231.

4. So, in debt on bond against the defendant as executor, if issue be joined, whether he had assets on a particular day, it is an immaterial issue, and on verdict for the defendant a repleader shall be awarded. *Read v. Dawson*, 2 Mod. 139.

5. Or, where the defendant pleads, that he did not undertake, to an action upon the

V. APPEARANCE.

1. In replevin, the plaintiff, though absent, may make an attorney. *Moor v. Watts*, Holt. 627.

2. In a *pluries* replevin there is a day in court. S. C. 12 Mod. 430.

3. Where there are two avowants, and one is an infant, his appearing by attorney is no error, for they making conuance as bailiffs are in law but as one bailiff. *Coan v. Bowles*, 1 Show. 169.

VI. OF THE SECURITY TO BE TAKEN ON GRANTING A REPLEVIN.

1. Upon a replevin of goods, the sheriff ought to take sureties, and not money or a pawn. *Anon.* W. Jo. 378. 1 Ld. Raym. 278.

2. Pledges must be given therein, whether it be by writ or plaint. *Dorrington v. Edwin*, Comb. 1, 2.

3. And the sheriff cannot make deliverance without taking pledges. *Dorrington v. Edwin*, 3 Mod. 58.

4. Pledges taken by the sheriff, (at common law, or where the distress was not for rent,) must be to prosecute, and return the cattle. 1 Saund. 195. 3 Mod. 58.

5. The pledges are liable after removal by *certiorari* or *pone*. *Dorrington v. Edwin*, Comb. 1, 2.

6. If insufficient, they are the same as none in law. 1 Saund. 195 b.

7. The sheriff usually takes a bond to prosecute, and to make a return, which is instead of pledges, and the better way. *Lane v. Foulk*, Comb. 228. 1 Ld. Raym. 278.

8. The bond to the sheriff in case of distress for rent is from the plaintiff and two responsible sureties. 1 Saund. 195 f.

9. And in double the value of the goods ascertained upon oath, conditioned to prosecute with effect, and to make a return of the goods. *Ibid.*

10. The bail must be in a sum certain, and in nature of a gage deliverance. *Morr v. Watts*, 12 Mod. 416.

11. Apparent responsibility is sufficient to protect sheriff. 1 Saund. 195 f. n. [h].

12. The sureties may prove their own sufficiency. 1 Saund. 195 g.

13. A replevin bond is good, although it do not appear to have been taken by the sheriff in his name of office. *Morgan v. Griffith*, 7 Mod. 380.

14. If the sheriff neglect to take one, it is no contempt, but the remedy is by action on the case. 1 Saund. 195 g.

15. The bond is assignable to the defendant. 1 Saund. 195 f.

16. The avowant may sue the sheriff after he has taken an assignment, and sued upon it. 1 Saund. 195 g.

17. A replevin bond can only be discharged by a successful prosecution of the suit. 7 Mod. 381.

18. And therefore defendant may sue the

sureties after taking his judgment, and executing a writ of inquiry. 1 Saund. 195 g. n. [m].

19. Where in a replevin bond the condition was to appear in the county court and then and there prosecute with effect, the removing the cause by *recordari* into the C. P. and being there nonsuited, is a breach of the condition, for which an action of debt upon the bond lies; the words "then and there" relate* to so much of the prosecution as shall be in the county [*1193] court, but do not restrain the bond. *Vaughan v. Norris*, C. T. Hardw. 137.

20. It is not a double breach in declaring on the bond, to allege that plaintiff did not prosecute with effect and did not return. 1 Saund. 195 g. n. [m].

VII. RELATIVE TO THE REMOVAL OF THE REPLEVIN.

1. The replevins may be removed out of inferior into superior courts; in the county court which is not a court of record, by *pone* or *recordari*, but not by the defendant without cause. *Woodcroft v. Kynaston*, 9 Mod. 305.

2. In the hundred court, or court of any private lord not of record, by *accedas ad curiam*, but not either by plaintiff or defendant without cause. S. C. 9 Mod. 306.

3. There is no method of removing proceedings out of courts of record, but by *certiorari* before judgment, or writ of error after. *Id. ibid.*

4. *Certiorari* must be to remove the record itself where the action commenced in the inferior court is to be proceeded upon; but where an action in an inferior court is brought on a judgment in a superior, and *nil tiel record* pleaded, a *certiorari* to remove the tenor of the record is sufficient. S. C. 9 Mod. 307.

5. If the *re. fa. lo.* be filed after the four days, notice thereof ought to be given, and a declaration demanded in writing. *Taylor v. Walker*, Ca. Prac. C. P. 55.

VIII. RELATIVE TO THE DECLARATION.

1. Replevin in the *detinet* is now obsolete. 1 Saund. 347 b. n. (2.)

2. The present action is in the *detinuit*, and lies when the goods have been delivered to the party by the sheriff under a writ of replevin. 1 Saund. 347 b.

3. Both actions are in fact in *rem*. 1 Saund. 347 b. n. [b].

4. Where the writ is against several, the plaintiff must declare against those who appear, and continue process against the others. *Morr v. Watts*, 12 Mod. 431.

5. In replevin the declaration is not good without naming the *locus in quo*, besides the parish, town, or vill; otherwise in trespass. *Ward v. Savile*, Cro. El. 896. Mo. 678. *Say v. Smith*, Plow. 269. *Read v. Hawks*, Hob. 16. 1 Saund. 347. 2 Barnes, 281.

6. The omission is cured by pleading over. Hob. 17. 1 Saund. 347.

7. It must be certain; a declaration for eighty *aces*, without saying how many *services* and *matrices*, is bad. Carter, 218.

8. A declaration in replevin for taking a gross number of different articles, without specifying how many of each, was held good on motion in arrest of judgment, because the avowant had avowed the taking. *Bern and Wife v. Matlaire*, C. T. Hardw. 119.

9. The price of the cattle, &c. taken should not be inserted. 2 Saund. 320.

10. On removal of replevin by *certiorari* out of the inferior court into B. R., the declaration cannot be changed. *Anon.* 12 Mod. 453.

IX. OF PLEAS IN BAR.

1. If the defendant avow at a different place to have a return, he may plead in abatement, and traverse the place laid in the declaration. *Crosse v. Bilson*, 6 Mod. 102.

2. The place, as well as the town assigned, is traversable in replevin; not so in trespass. *Read v. Hawke*, Hob. 16.

3. If the plaintiff allege the taking at A, and they were taken at B, the defendant may plead *non cepit modo et forma*, but then he can have no return; for if he would have a *retorno habendo*, he must deny the taking to be where the plaintiff has laid it, and allege another place in his avowry. *Anon.* 2 Mod. 199.

4. If a plea acknowledge the taking in *predicto loco*, it is good, without saying *tempore quo*. *Wilcox v. Skipwith*, 2 Mod. 5.

5. A plea that an execution was taken out, and that a term of years was extended, and an assignment thereof made by the sheriff, is good, although no place where the assignment was made be alleged; for it shall be intended to have been assigned* [*1194] where the land lies. *Blackthorn v. Consett*, 2 Mod. 304.

6. In replevin, "property in a stranger" may be pleaded either in bar or in abatement. *Pregrave v. Saunders*, 6 Mod. 81. 2 Ld. Raym. 984. 1 Salk. 3. 5. 3 Salk. 307. 2 Lev. 92. *Parker v. Miller*, 12 Mod. 122. Cro. El. 47. *Loveday v. Mitchell*, Com. 247.

7. So also property in the defendant. *Semb. Pregrave v. Saunders*, 2 Ld. Raym. 984. 2 Lev. 92. Com. 247.

8. And in either case, he may have a return without avowing for it. *Parker v. Mellor*, 1 Ld. Raym. 217. 2 Ld. Raym. 985. 2 Lev. 92. *Sed vide Crosse v. Bilson*, 6 Mod. 103.

9. Where a plea in abatement goes to the point of the action, there needs no avowry to have a return. *Fletcher v. Porter*, Comb. 196.

10. But in all other cases, on pleas in abatement, there ought to be an avowry

to have a return. *Long v. Kelsal*, Comb. 333.

11. As if he pleads in abatement *prisel en autre lieu*, he shall not have return without making avowry for it. *Crosse v. Bilson*, 2 Ld. Raym. 1017. 1 Salk. 3.

12. It seems that all pleas in abatement in replevin (except property) must suggest matter for a return. *Foot's case*, Salk. 93, 94.

13. After *elongata* returned, and *withernam* awarded, the defendant may plead *non cepit*. *Moor v. Watts*, 2 Salk. 581. 12 Mod. 416. S. C.

14. The pleas of *non cepit* must be followed by an avowry, if a return is wanted. 1 Saund. 347.

15. A distress cannot be pleaded in bar (instead of an avowry) to a declaration in replevin. 2 Saund. 284 c.

16. *Non cepit* is a plea in bar. 1 Saund. 347 a.

17. *Cepit in alio loco* is to be considered as a plea in bar, and not in abatement. *Smith v. Walgrave*, Com. 122. in note. Willes, 477. *Sed vide* 6 Mod. 103, *contra*.

18. In replevin, if the taking is averred in another place in the freehold of the defendant as damage-tenant, and the plea traverse the place in the declaration, and conclude with praying judgment and a return, this is a plea in bar. *Crosse v. Bilson*, 6 Mod. 102.

19. A justification by replevin that the defendant *cepit et imparcavit* is ill, without giving colour; otherwise of *cepit et detinuit*. *Hallet v. Birt*, 1 Ld. Raym. 219.

20. It is an anomaly in pleading, to plead "soil and freehold" generally. 1 Saund. 347 d. n. (6).

21. If it is said that defendant is seised, without saying of what estate, it is bad on special demurrer. 1 Saund. 347 e.

22. "Not guilty of the taking within six years," is not a good plea in replevin, for it ought to be applied to the detaining. *Arun-del v. Trevill*, 1 Sid. 81.

23. In replevin *de duos spadonibus*, a former judgment *de duobus equis* pleaded in bar, was held well. *Feild v. Jeticus*, 3 Lev. 124.

X. RESPECTING AVOWRIES;—

(a) In general.

1. An avowry is in the nature of a declaration. 1 Saund. 347 b.

2. The avowant is in nature of a plaintiff; *Coan v. Bowles*, Carth. 122. 179. 1 Show. 170. S. C. *Cross v. Bilson*, Holt, 627. *Anon.* 3 Salk. 53.

3. A man who distrains for one cause, may avow the taking for another. *Groenvelt v. Burnell*, Com. 78. 1 Ld. Raym. 466. 3 Co. 25 a.

4. The avowant ought to make a good title in omnibus. *Goodman v. Hill*, Yelv. 148. 1 Saund. 347 b. S. P.

5. Cognizance made for all the matter, and justification only for part, is not good. *Johnson v. Adams*, 5 Mod. 77.

6. In replevin for taking *bona catalla et averia*, if the defendant make cognizance for taking *averia* only, which does not answer the whole, it is void. *Hunt v. Brainer*, 4 Mod. 402.

7. An avowry ought to contain sufficient matter upon which the avowant may have judgment to have a return. *Butt's case*, 7 Co. 24 b. *Potter v. North*, 1 Saund. 347 b.

8. In an avowry at common law, the avowant is forced to set out and deduce his title. 2 Saund. 284 c, d. n. (3). 314. n. (3).

9. But so much strictness is not required in an avowry as in a declaration.
[*1195] *Macdonald v. Weldon* 8 Mod. 54.*
Riccards v. Cornforth, 5 Mod. 364.

10. In an avowry for a sole and separate pasture in a manor, if the right be not claimed as a prescription in the tenants, but as a custom in the manor, it is not necessary to show special title. 1 Mod. 75. *notis*.

11. If the defendant avows under a lease made by the dean and chapter, he ought to show of what estate they were seised. Lut. 121.

12. Whenever title is made under a particular estate, the commencement of it, and the original whence it is derived, must be set forth in pleading. *Silly v. Dally*, 12 Mod. 190, 191. 1 Ld. Raym. 334. *Reynolds v. Thorpe*, Stra. 796.

13. In an avowry, the particular day of entry, &c. was not set forth, yet held good. *Sheers v. Lammas*, 8 Mod. 52, 53.

14. The quantity of the thing is not traversable in an avowry, but the quality only. Plow. 94.

15. Though the declaration assign no place, yet the defendant must allege a certain place in his avowry before he can have a return. *Read v. Hawke*, Hob. 16.

16. If the defendant avow at a different place to have a return, he may plead in abatement, and traverse the place laid in the declaration. *Crosse v. Bilson*, 6 Mod. 103.

17. It is not necessary in an avowry to show the quantity or quality of the place where. *Saunders v. Hussey*, Lutw. [513.] 1231. 5 H. 7. 28. pl. 11.

18. Replevin of a taking in Eastfield, avowry that he was seised of three acres in Eastfield in *quibus*, &c., held well. *Silly v. Dally*, 1 Ld. Raym. 332.

19. When the defendant in replevin makes consuance, or avows that the property is in himself, it seems to be sufficient without a traverse. *Loveday v. Mitchell*, Com. 247.

20. In an avowry for cattle seised for a heriot, or distrained for rent, it need not be shown that the cattle were levant and couchant. *Jordan v. Masters*, 1 Mod. 63.

21. The plea justifying the taking goods fraudulently removed must be special, under

8 Ann. 2 Saund. 284 a. See 3 Esp. 15. 4 Campb. 136.

(b) *By an executor.*

An executor avowant under 32 H. 8. c. 37. need not aver that the land was in the seisin of the plaintiff, &c. when the arrears incurred. *Hool v. Bell*, 1 Ld. Raym. 174.

(c) *By tenants in common, or joint-tenants.*

1. Tenants in common cannot join in an avowry. *Ward v. Everet*, 1 Ld. Raym. 422. 3 Salk. 207.

2. Thus, an avowry *sur matter en le terre*, by one of the two tenants in common, for the third part of a penny rent, was held good. *Edgcomb v. Burdell*, 2 Show. 26.

3. They must, however, join where the rent is entire, and cannot be divided, as a horse, &c. Litt. Sect. 314.

4. But joint-tenants must join; and therefore, if one joint-tenant avow in his own right, without making consuance as bailiff to the rest, it is bad. *Pullen v. Palmer*, 5 Mod. 150. 3 Salk. 207.

5. Nor can one coparcener avow singly for a moiety of the rent before partition; for parceners must join in avowries, &c. *Stedman v. Page*, Comb. 347. 5 Mod. 141. 1 Ld. Raym. 64. S. C.

(d) *For an amercement.*

1. In an avowry for an amercement in a leet, it is not sufficient to say *presentatum fuit* at the leet, that the plaintiff did such an act, but he must aver the thing, and not rely upon the presentment. *Barbridge v. Bates*, T. Raym. 337.

2. In avowry for an amercement in a leet, the avowant must aver that the plaintiff was guilty; *aliter* in trespass. *Stephens v. Haughton*, Stra. 847.

(e) *For a heriot.*

1. The avowry for a heriot must show what it is, whether beast or other thing. Hob. 176.

2. That the best beast was due to defendant for a heriot, and therefore that he took a beast, without saying the best beast, held good. *Major v. Brandwood*, W. Jo. 300.

3. A justification in avowry for taking a distress by virtue of a lease for ninety-nine^a years if A B and C [*1196] should so long live, rendering a heriot after the death of each of them, successively as they are named in the deed, must aver that one of them is alive; and if it state the death of one of them, it must also aver that he died seised. *Ingram v. Tet-hill*, 2 Mod. 93. 1 Mod. 216. S. C.

(f) *For services.*

1. In an avowry for services, he must make out his title in *omnibus*, because the plaintiff in replevin is to have a return, and if found for the avowant, it will be a perpetual charge on the land. *Riccards v. Cornforth*, 5 Mod. 365.

2. The avowry must be special where part

of the services are extinct by king's purchase. *Broker v. Smith*, 1 And. 160.

(g) *For damage-feasant.*

1. If *cestui que use* take cattle damage-feasant, he cannot avow in his own name, but as servant of the feoffees. *Lord Sheffield's case*, 2 Ro. 316.

2. It shall not be allowed to defendant to treat it like a declaration in trespass *de bonis asportatis*, and plead as a plea of justification that he took the cattle damage-feasant, being possessed, &c. 2 Saund. 284 e.

3. In an avowry for a distress damage-feasant, the avowant must set out his title. 2 Saund. 284 d. *Contra*, Comb. 23. 473.

4. He must set forth in whom the fee is, and how the particular estate is derived. *Freeman v. Jugg*, 3 Salk. 307.

(h) *For rent.*

1. Tenant by statute-staple may avow for a rent-charge. 3 Dy. 205. pl. 7.

2. By the regress of the second lessee, those in reversion by force of the feoffment shall avow for the rent. *Finch's case*, 6 Co. 69 a.

3. The grantee or surrenderee of the moiety of the reversion of a copyhold, may avow for the moiety of the rent. Hob. 177.

4. If there is lord and tenant by fealty and rent, and the tenant make a lease for years, and the lessor has done fealty, and paid the rent continually, and the lord distrains the cattle of the lessee for the rent, when none is in arrear, and avows upon a stranger who never had any thing, as upon his very tenant, for the arrearages of the rent, the lessee, upon special matter pleaded, may have aid of his lessor, and shall abate the avowry made upon him who has nothing. *Case of Avowry*, 9 Co. 20 a.

5. If there is lord meeme and tenant, and the lord avows upon a stranger and not upon the meeme, the tenant cannot plead any plea, as, nothing in arrear, &c., nor can he by special pleading pray in aid of the meeme; but in such case, if the meeme pays the rent and does the services, and yet the lord distrain the tenant paravail for them, and impound his cattle, the meeme, upon request by the tenant, may put his own cattle in the pound in lieu of the cattle of the tenant, and bring replevin, and compel the lord to avow upon him; and if the meeme will not do it on request, the tenant shall have a writ of meeme, and recover his damages. *Case of Avowry*, 9 Co. 20 a.

6. An avowry for rent must state a good title to the premises on which the distress was made; but if the avowry state a deed indented, "by virtue of which the party was seized in his demesne as of fee," the want of stating the consideration on which the deed was made is helped after verdict by the replication of nothing in arrear. *Light v. Heeper*, 2 Show. 19.

7. In an avowry for a rent-charge granted to himself, defendant need not allege a seisin within the time limited by the statute of limitations. Mo. 31.

8. Seisin of more rent than ought to be shall bind in an avowry; but not in *ne injuste vexes*, *cessavit*, *assize*, *rescous*, or trespass. *Bucknal's case*, 9 Co. 33 a.

9. For rent due in respect of a seignory, it is good without alleging seisin within fifty years, and without alleging that all was due in the time of the avowant, although he allege the death of his ancestor in the avowry. *Harwood v. Paramour*, 1 Ro. 50.

10. By the common law, there ought to be an attornment to enable the distrainer to make a good avowry upon a distress for rent. *Dixon v. Harrison*, Vaugh. 39.

11.* In avowry for a rent-charge, all the particular lands must be set forth. 1 Ld. Raym. 155. *Sed vide Horner v. Lewis*, 1 Ld. Raym. 644. *contra*.

12. For the form of an avowry for a rent-charge, see *Mounson v. Redshaw*, 1 Saund. 196, 197.

13. If a defendant before the 11 G. 2. avowed the taking for rent arrear, it was sufficient to say that he was seized, without saying of what estate. *Pullen v. Palmer*, 5 Mod. 151. *Simons v. Pashley*, Com. 27, 28. 473.

14. An avowry under a distress for rent, alleging a possession under a term of years, held sufficient. 2 Show. 484.

15. But an avowry for rent under statute 11 G. 2. may be general, without setting forth the grant or title, &c. 2 Saund. 284 d. 5 Mod. 150. n. (a.)

16. The statute is confined to distress for rent. 2 Saund. 284 d.

17. The contract on which the rent becomes due, must be truly stated, or it is a fatal variance. 2 Saund. 312. n. [a.]

18. The lease must be directly averred to be made, and not laid under a *testatum existit*. 2 Saund. 318. n. [f.]

19. An avowry for rent under 25 G. 2. c. 13. need not state by whom the demise under which the premises are held was made. 1 Ridgw. 341. 353.

20. The avowry for distraining after the term is expired, under statute 8 Ann. c. 14. s. 6., must be special. 2 Saund. 284 a.

21. One having avowed for rent at Michaelmas, is not estopped to distrain and avow for arrearages at Ladyday before, otherwise it is of an acquittance. *Palmer v. Slavick*, T. Raym. 21.

22. An avowry cannot be for part, without showing that the residue is paid. *Johnson v. Bane*, Comb. 346. 12 Mod. 84. S. C. 1 Saund. 201.

23. The avowry may be as for a distress for parcel of the rent, when the whole rent is stated to be in arrear. 1 Saund. 201.

24. Where one avows for the whole rent, as having title to it, when only two parts are due to him, he shall not have a return for any; but if he had avowed for the two parts, alleging it to be more in quantity than it is, he should have had return for so much as he proved to be due. *Moore*, 281. *Lutw.* [477.] *Duppa v. Mayo*, 1 Saund. 285.; 285 b. 286. 2 Saund. 312. n. [a.]

25. And if he avows for more than he has title to, the whole avowry shall abate. *Duppa v. Mayo*, 1 Saund. 286.

26. Avowry for rent where part is not yet due is error, but may be cured by abating the avowry as to that, and taking judgment for the rest only. *Richards v. Cornforth*, Salk. 580. 1 Saund. 285 b. n. (8.)

27. But he must so abate it before judgment, for afterwards it is too late. S. C. Com. 42. 1 Saund. 285 b.

28. An avowry for so much taken for rent-service, and so much for rent-charge, is good; but not for rent-charge and rent-service together. 1 Ro. 35.

29. The avowry may be part for rent and part for a penalty, and a return may be awarded, if either of the causes be just, both being several. *Howell v. Sanback*, Hob. 133. 1 Saund. 285.

30. On an avowry under a tenure by fealty and 12s. rent, a verdict finding it to be by fealty and 3s. rent is good, for the substance is found. *Wilcox v. Skipwith*, 2 Mod. 6.

31. A landlord may avow taking cattle on a distress for rent without showing them levant and couchant. *Jordan v. Martin*, 1 Mod. 63.

XI. RESPECTING COGNIZANCES.

1. If a defendant avows where he ought to make cognizance, as by saying he "well avows," instead of he "well acknowledges," it is but form. *Marriott v. Shaw*, Com. 276. 1 Saund. 347 e.

2. Cognizance as bailiff to a corporation, without showing how incorporated, or that he had a precept in writing, is good. *Manby v. Long*, 3 Lev. 107.

3. In a cognizance as bailiff to the lord, it is not necessary to allege a warrant or precept from the steward. *Matthews v. Cary*, 1 Show. 62.

4. Cognizance by an infant bailiff is good and well made where the other party admits them to appear and answer. *Coan v. Bowles*, 1 Show. 170.

5. If two make cognizance generally, and not as bailiffs or servants, judgment will be reversed. *Owen v. Williams*, Yelv. 108.

XII. PLEAS TO AVOWRIES.

1. To an avowry for rent the plaintiff pleaded, that he was ready on the land and on the day of payment till sunset, &c., and concludes *et petit iudicium et damna*; it should be *de damnis*. *Horne v. Levin*, 3 Salk. 344.

2. Avowry for rent due at a later day is no bar in avowry for rent due at a former day, nor is a recovery in debt for rent due at a later day any bar in debt for rent due at a former day, though an acquittance is. *Palmer v. Stanhope*, 1 Lev. 43. *Deighton v. Greenwill*, Comb. 78. 59.

3. The plaintiff to an avowry for rent cannot plead that the defendant *nil habuit in tenementis*. Comb. 473. 476.

4. To an avowry for rent, it is a good plea in bar that defendant by deed acknowledged to have received it. *Moreton v. Hopkins*, 1 And. 14.

5. Avowry for rent created by specialty, as a deed or act of parliament, is not within the statute of limitations. 2 Saund. 65 a.

6. On avowry that the plaintiff held certain lands by fealty rent and suit of court, the plaintiff, if he agree with the avowry in the quality of the tenancy, may confess the tenure by fealty and rent, and as to the rent plead nothing in arrear, and traverse the tenure *modo et forma*; viz. "*absque hoc*, that the tenancy was held by fealty, rent, and suit of court, in manner and form, &c.;" and if, upon issue joined, it is found that the land was held by fealty and rent, and not by suit of court, although the avowry was for rent arrear, the avowant shall not have a return. *Buchna's case*, 9 Co. 33 a. Cro. Eliz. 799. S. C.

7. At common law, a stranger could not plead any thing to the lord's avowry for rents of services, but *hors de son fief*, or what was tantamount. *Johnson v. Grant*, T. Raym. 254.

8. He could not plead tenure by less services, *riens arriere*, or a release. *Id. ibid.*

9. The plaintiff in replevin, since the statute of 21 H. 8. c. 19., may plead nothing arrear, or any other plea, although he be a stranger, and does not make any title to the land. T. Raym. 251.

10. When the lord varies in the nature and quality of the service, the tenure is traversable when the tenant confesses tenure in part, but he cannot traverse the whole tenure. 9 Co. 33 a.

11. The seisin is not traversable, but only of that for which the avowry is made, unless seisin be alleged of a superior service, for which the avowry is not made, which in law is a seisin of the inferior. 9 Co. 33 a.

12. By the statute of 21 H. 8. c. 19., the avowant is not tied to avow upon any person in certain, but upon the land within his seignior; so the tenant of the land by the equity of the statute is allowed to plead any plea to save and discharge his goods from the distress. *Johnson v. Grant*, T. Raym. 255.

13. He who denies seisin within time of limitation ought first to acknowledge a tenure; as, if the lord alleges the tenure by fealty rent and suit of court, and alleges

seisin within time of limitation, and avows for suit arrear, the tenant may confess the tenure by fealty and rent, and plead to the rent arrear "never seised after the limitation." 9 Co. 33 a.

14. If the lord avow for services, and alleges seisin by the hands of the plaintiff, or any other in the replevin, as by the hands of his very tenant, the tenant may plead that the avowant was never seised of his hands, &c. 9 Co. 33 a.

15. In avowry, the tenant shall not plead "never seised of the service generally;" but if he be tenant in fee-simple, he ought to disclaim or to plead out of his fee, and so traverse the tenure. 9 Co. 33 a.

16. When the lord in his avowry varies from the truth of the quality of the service by colour of seisin and possession, which he has got from his tenant, the tenure is traversable; but where he varies from the truth of the quantity of the services by reason of seisin which he has got of more than he ought to have of the same nature, the seisin and not the tenure is traversable. *Bucknall's case*, 9 Co. 33 a.

17. When the lord avows according to the statute, the plaintiff in the replevin* may have every plea that the very tenant might have had, though he be a stranger to the lord. *Johnson v. Ornt*, T. Raym. 255.

18. Tenant for years is within the statute 21 H. 8. c. 19. S. C. T. Raym. 256.

19. At common law, the tenant might plead any plea in bar to an avowry for a rent-charge. *Id. ibid.*

20. Under statute 2 G. 2., the plaintiff cannot plead in bar *de injuria sua propria*, &c. 2 Saund. 284 d.

21. *De injuria sua absque hoc quod fuit in error* amounts to the general issue. *Salk.* 583.

22. In plea of tender of rent on an avowry, *obtusit* is necessary, and *paratus* only is not sufficient. *Horn v. Lucius*, 12 Mod. 353.

23. Plaintiff cannot traverse matter in the avowry for a return on *non cepit* pleaded. 1 Saund. 347.

24. The lord avows for suit of court due upon the land; servant cannot plead any plea out of the fee, or a disclaimer. *Brown v. Goldsmith*, Moore, 870.

25. In avowry upon the land by the statute 21 H. 8., it is not traversable what estate the tenant had. Moore, 883.

26. The defendant pleaded *cepit in alio loco*, and avowed taking the goods in such other place, whither they had been fraudulently conveyed within thirty days, &c., from the demised premises, as a distress for rent; the plaintiff in his plea in bar traversed the avowry, and took no notice of the plea; and on demurrer, it was holden ill, the avowry being in the nature of a suggestion to entitle

the party to a return of the distress and not traversable. *Willes*, 477.

27. If the defendant avow under a grant of a manor and a grange from the king, containing a clause, that if the grantee shall be legally charged on account of the grange by distress, or with any rent, he may enter and distrain, a plea in bar to the avowry, with a traverse *quod defendens est legitimo modo oneratus*, is bad. *Calthorp v. Heyton*, 2 Mod. 54.

28. Avowry for damage feasant in copyhold lands leased to the avowants; the plaintiff pleads a prior title to the manor in fee; it is ill, for he ought to have said, he was seised until the avowant entered *prætextu* of the lease. *Anon.* 1 Leon. 288. 2 Leon. 80.

29. The defendant in his avowry stated that by lease and release, he in consideration of an annuity therein mentioned, conveyed certain premises, containing the place where, &c., to the plaintiff in fee, subject to a rent-charge payable to the defendant during her life, with power of distress for non-payment of the annuity, and that by virtue of the lease and release, and by force of the statute, &c., the plaintiff became seised in fee, &c.; and then she justified as a distress for non-payment of the annuity: pleas in bar; 1st, that the plaintiff never was seised in fee; 2dly, (admitting that the defendant did by the lease bargain and sell, &c., to the plaintiff for a year), that at the time of making the bargain and sale the defendant was only seised, &c., for her life, the reversion in fee then belonging to another, traversing that the defendant was seised in fee of the reversion: both these pleas were holden bad on demurrer; the first, because it denied what was before admitted, and because it traversed only a consequence of law; the second, because it admitted that the defendant had an estate sufficient to justify the distress. *Gills v. Mannell*, *Willes*, 378.

30. In an avowry, the defendant showed that A B was seised in fee, and made a long lease rendering rent, and conveyed the reversion to the plaintiff, and for rent arrear he distrained; the plaintiff replied that A B was seised of one moiety, and C D of the other before this lease; that C D died seised, and this moiety descended to his son, and that the plaintiff had conveyed the other moiety to J D by lease and release, and traversed *absque hoc* that the plaintiff was seised in fee *ad aliquod tempus* after the said conveyance; the avowant demurred, and the traverse was held ill, for he ought to have traversed *absque hoc* that A B was seised in fee *tempore dimissionis*. *Fuller's case*, *Skin*, 402.

31. If the defendant plead that he was seised of the place where, and justifies the taking damage feasant, the plaintiff may allege that he was seised of* a third part of the place where, and tra. [*1200] verse the sole seisin of the defendant. *Gilbert v. Parker*, 6 Mod. 158.

32. If the defendant justify the taking for a heriot due upon every alienation without notice, the plaintiff may deny the heriot being due upon alienation. *Wilcox v. Skipwith*, 2 Mod. 4.

33. On an avowry for a heriot showing tenure by fealty and 12s. rent, the plaintiff may admit the tenure, and traverse the prescription, and then, if the jury find a tenure by fealty and 3s. rent, this variance is not particular. *Wilcox v. Skipwith*, 2 Mod. 5.

34. When the taking is alleged in a place different from that in declaration, the latter must be traversed; otherwise in trespass. 1 Saund. 247 a. 347 a.

35. Distress for the same duty in other lands, &c., is no plea in bar to an avowry, but it ought to be that a former replevin is pending (if so it be), or (if determined) levied by distress. *Scilly v. Arundel*, Comb. 375.

36. A plea in bar to an avowry, denying that any rent is in arrear, must conclude to the country. 1 Saund. 103 c.

XIII. PLEAS TO COGNIZANCES.

1. In a cognizance, the being bailiff may be traversed. 1 Saund. 347 c, d. *Trevillian v. Pine*, 11 Mod. 112. *Trevillian v. Paine*, 12 Mod. 97. *Contra, Goudier's case*, 12 Mod. 321. *Britton v. Cole*, 1 Salk. 409.

2. A cognizance by a bailiff is no bar to another cognizance for the same matter, if it be not averred that the first cognizance was made by consent of the master. *Ingram v. Bray*, 2 Lev. 210.

XIV. REJOINDER.

1. If the defendant justifies the taking damage feasant on his freehold, and the plaintiff replies in bar that the place where, &c., is common field, in which he has a prescriptive right as appendant to two acres in another place, the defendant may rejoin a custom for every freeholder, who has lands lying together in the said common field, to enclose them against him who has right of common, and he need not aver in such rejoinder, that the lands he inclosed did lie together, for that shall be intended, or otherwise he could not enclose them; but *quære*, if he ought not to confess the plaintiff's right of common, and avoid it by alleging the custom to enclose. *Hickman v. Thorne*, 2 Mod. 104, 105.

2. To replevin for taking six cows, if the defendant avows the taking damage feasant, and the plaintiff replies a seisin of certain lands, and a right of common of pasture for beasts *levant et couchant*, a rejoinder, with an *abeque hoc* that those were the proper cattle of the plaintiff *levant et couchant* on those his lands, is good. *Manneton v. Trevillian*, 2 Show. 329.

XV. DEMURRER;—

(a) *To a plea in bar.*

Where the defendant pleads *prised en auter lieu*, and avows for rent arrear, if the plaintiff traverses the avowry, and the defendant de-

murs, it is a discontinuance. *Crosse v. Bilson*, 2 Ld. Raym. 1017.

(b) *To a replication.*

In replevin, if a demurrer to a replication to a plea in bar conclude "wherefore as before he prays judgment, and that the declaration may be quashed," the last words are surplusage. *Crosse v. Bilson*, 6 Mod. 102.

XVI. NEW ASSIGNMENT.

There can be no new assignment in replevin. 1 Saund. 347 a.

XVII. WHEN THE PLAINTIFF MAY DISCONTINUE.

The plaintiff cannot discontinue without leave of the court. *Beare v. Underwood*, 1 Leon. 105.

XVIII. WHEN PROCEEDINGS MAY BE STAYED.

In replevin, no stay of proceedings on bringing in what is due for damages. *Anon.* 8 Mod. 379.

XIX. EVIDENCE.

On avowry for rent-charge devised, as he was not entitled to the will be produced* the ordinary's register [*1201] ter of the will and former payments; and held good evidence. *Anon.* 12 Mod. 375.

XX. RELATIVE TO THE JUDGMENT.

1. The judgment for the avowant is not to recover the rent or thing distrained for, but only to be restored to the beast as a lawful distress, not to be replevied. *Foster v. Jackson*, Hob. 61.

2. If the defendant plead in bar, and demur to the replication in abatement, the plaintiff, after joinder in demurrer, shall have final judgment on the demurrer being over-ruled. *Crosse v. Bilson*, 6 Mod. 102.

3. The defendant may either proceed and enter up judgment under the statute Car. 2, or at common law. 1 Saund. 195 b. n. (3). n. [d].

4. It is sufficient, if it appear on the record, that the avowant has just cause to distrain, though not *modo et forma*, as he has set forth; for the court must judge by the whole record. *Foot v. Berkley*, Orl. Bridg. 539.

5. Although the title by which the plaintiff claims in his bar to the avowry is destroyed, yet he shall have judgment, if the defendant gives him title. *Fraunce's case*, 8 Co. 92 b.

6. An avowry may be abated for what is not due, and judgment given for the residue. *Richards v. Comford*, 1 Ld. Raym. 236.

7. Judgment for an avowant for more rent than can be due, must be reversed for the whole. *Id. ibid.*

8. Avowry for rent in money and hens, and more hens inserted than due; the avowant had leave to release the damages for the hens. *Morris v. Gelder*, 1 Ld. Raym. 317.

9. If the plaintiff is demanded and will not declare, he shall be nonsuited. *Morc v. Watts*, 12 Mod. 431.

10. After a nonsuit in replevin, it is too

late to object that the avowry states a particular estate, without showing its commencement, or a seisin in fee. *Anon.* 6 Mod. 223.

11. Defendant is not entitled to move for judgment, as in case of a nonsuit under 14 Geo. 2. 1 Saund. 195 a. n. [f].

12. The reason is, that the defendant may carry down the record to trial without a proviso (being considered actor). 2 Saund. 336 c. 336 a.

13. Where there is a plea in bar to an avowry and issue joined, the court will not give leave to the plaintiff to confess the avowry *relicta verificatione*, because it may be a prejudice to the defendant. *Anon.* Skin. 594.

14. In case of verdict for the defendant, the jury who try the issue find the value and arrears, judgment for the arrears in case, &c., and cost; execution by *fi. fa.* or *elegit* under stat. Car. 2. 1 Saund. 195 b.

15. Where the avowant in replevin obtains a verdict, and the value is subsequently ascertained by inquiry under stat. 17 C. 2. c. 7., he cannot proceed against the sheriff for the purpose of compelling him to deliver up the replevin bond, in order to sue the sureties thereon; but ruled, that the avowant must either pursue the stat. C. 2. c. 7., or the old remedy under stat. Westm. 2. c. 2. *Comber v. Cole*, C. T. Hardw. 352.

16. In case of nonsuit before issue joined, there must be a suggestion in nature of an avowry, writ of inquiry into the value and arrears, judgment for arrears in case, &c., and costs; execution by *fi. fa.* or *elegit* under stat. Car. 2. 1 Saund. 195 c. d. 11 Saund. 286.

17. In case of nonsuit after issue joined under stat. Car. 2.; the same proceedings as in case of verdict, &c. 1 Saund. 195 b.

18. In case of demurrer found for defendant, a writ of inquiry issues to inquire into the value, &c., judgment for arrears alleged in case, &c. and costs; execution by *fi. fa.* or *elegit*, under stat. Car. 2. Ib. 2 Saund. 286.

XXI. WHEN THE DEFENDANT IS ENTITLED TO A RETURN OF THE CATTLE, &c.

1. A return will be awarded, where it appears the defendant was in possession of the beasts, &c. which have been delivered by replevin. *Salkeld v. Skelton*, Cro. Jac. 519.

2. Defendant may either avow, and have a return, or justify, and have no return. 3 Lev. 104.

3.* If the taking be alleged at [*1202] A, the defendant may plead *non cepit modo et forma*; but then he can have no return; for if he would have a *retorno habendo*, he must deny that the taking was where the plaintiff has laid it, and allege another place in his avowry. *Anon.* 2 Mod. 199.

4. Upon pleading *non cepit*, or claiming property, the defendant shall have his goods again. *Moor v. Watts*, 2 Salk. 581.

5. If the place of taking is traversed, and found for the avowant, he shall have return, though the cause of taking is not found. 1 Ld. Raym. 504.

6. If the defendant plead property in a stranger, he shall not have a return without avowing for it; otherwise where he pleads property in himself. *Croase v. Bilson*, 2 Ld. Raym. 1017. 6 Mod. 103. S. C.

7. In a replevin in the county, the plaintiff does not declare, and the avowant removes the cause to the King's Bench, and the plaintiff is nonsuited without declaring; it seems, in that case, the defendant may suggest what cattle he took, and he shall have a return of them. *Anon.* T. Raym. 33, 34.

8. If the replevin is bad, and the avowry is ill, the defendant shall have no return. *Allen v. Darty*, 1 Show. 99.

9. The avowant having return irreplevisable on the second deliverance, may again impound the cattle, and if they die may take a new distress. 3 Dy. 280. pl. 14.

XXII. RELATIVE TO THE SHERIFF'S RETURN.

1. If the sheriff cannot find the cattle he will return an *elongatus* of course. *Sir P. Pindar's case*, Comb. 309.

2. The sheriff cannot return *non cepit*, and therefore an action does not lie for a false return of *elongatus*. *Moor v. Watts*, 1 Ld. Raym. 613. 2 Salk. 581. S. C.

3. To a *pluries* replevin to the sheriffs of London, a return of a custom ratified by parliament to replevy in the sheriffs' court there, and not by the king's writ, is bad; and an attachment was granted against the sheriff's. 2 Dy. 246. pl. 67.

XXIII. OF THE WRIT OF INQUIRY.

1. If the plaintiff be nonsuit, the court may assess damages without a writ of inquiry, if the avowry be for rent. *Ognes's case*, 3 Leon. 213.

2. Where there has been no avowry, the defendant can have no writ of inquiry in replevin, though *non cepit* has been pleaded, the avowry being the ground of the writ of inquiry for the defendant. *Durham v. Price*, Ca. Prac. C. P. 42.

3. A writ of inquiry cannot be had to supply the omission of the jury to find damages for defendant, if the proceedings are under the statute of Car.; but in all other cases it may. 1 Saund. 195 b, c. 1 Lev. 255.

4. The writ of second deliverance is a *superedeas* to the *retorno habendo*, but not to the writ of inquiry. *Pratt v. Rutledge*, Salk. 95.

XXIV. OF THE WRIT OF PROPRIETATE PROBANDA.

To a *pluries* replevin returnable in C. B., the sheriff returned a claim of property; the proprietate probanda issued out of that court. 2 Dy. 172. pl. 14.

XXV. OF THE CAPIAS IN WITHERNAM.

1. Withernam is the process on the *elongatus* returned. 12 Mod. 425.

2. A *capias* in withernam can issue but into one country at once. *Stratford v. Overbury*, Comb. 28.

3. Where defendant claims property he does not gage deliverance, but the plaintiff must be of a withernam. 2 Dy. 189. pl. 14.

4. If appearance be entered before *elongatus* returned, no withernam should go. *More v. Watts*, 12 Mod. 425.

5. On *elongata* returned, if he pleads *non cepit*, no withernam shall issue. S. C. 2 Salk. 582.

6. There may be a new *capias* in withernam after the defendant has been bailed on the first. Id. *ibid*.

7. For a withernam is only mesne process, and not an execution. *Moor v. Watts*, 2 Salk. 582. 1 Ld. Raym. 614. S. C.

8. The withernam is superseded [*1203] by a^a plea of *non cepit*. *Moor v. Watts*, 1 Ld. Raym. 614.

9. After withernam awarded, the writ of second deliverance does not lie for the beasts taken in withernam, but for the first distress. 1 Dy. 59. pl. 16.

10. The plaintiff is demandable on return of the withernam, and may be nonsuited for not appearing. *Moor v. Watts*, Salk. 582.

11. By appearing and pleading on the withernam, all proceedings stay till issue determined. S. C. 12 Mod. 428, 429.

12. The withernam will be stayed on tender of damages assessed. 1 Ld. Raym. 720.

13. If the issue be against one who is bailed in withernam, he is to be again in custody. S. C. 12 Mod. 428.

14. If cattle be taken in withernam by way of execution in replevin, the plaintiff has property in them, but not where it is only a process. Id. *ibid*.

XXVI. RESPECTING DAMAGES AND COSTS.

1. A defendant in replevin need not pray damages, either upon an avowry or a plea. 6 Mod. 103.

2. On a nonsuit in replevin for damage-fessant, the avowant shall have costs and damages by 21 H. 8. c. 19. 2 Dy. 141. pl. 46.

3. Costs and damages were adjudged to an avowant for an amercement in a leet. Moore, 893.

4. Damages in avowry are not given in respect of the rent for which the distress was made, but for taking the cattle. *Riccards v. Cornforth*, 5 Mod. 366.

5. Plaintiff in replevin shall not pay costs when the writ abates. *Smith v. Walgrave*, Com. 122.

XXVII. EFFECT OF DEATH.

After issue one of the defendants dies, the writ is good against the other. *Wythers v. Rooke*, Cro. Eliz. 574, 575.

XXVIII. ERROR.

No writ of error lies upon a judgment in the Exchequer Chamber. 2 Saund. 101 c.

XXIX. REMEDY AGAINST THE SHERIFF;—

(a) *If a replevin is refused.*

If a person distrain for the same rent, the remedy is recaption, and if the sheriff refuse a replevin, an action lies against him. *Anon*. 7 Mod. 118.

(b) *For not taking sufficient security.*

1. The best method is on a return of *elongata* to the *retorno habendo*, to bring an action on the case against the sheriff, if he has taken no pledges, or insufficient ones. 1 Saund. 195 a.

2. The sheriff may justify by grant of a replevin, without showing the property of the goods to be in the plaintiff in replevin. *Milles v. Davies*, Com. 590.

REPLICATION.

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III. WHEN THE PLAINTIFF MAY EJECT TO HAVE ONE OR SEVERAL REPLICATIONS, p. 1204.

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VIII. CONSEQUENCE OF THE REPLICATION BEING BAD IN PART, p. 1206.

I.* RESPECTING THE TIME FOR [*1204] REPLYING.

1. The plaintiff is not bound to reply the same term the plea is entered. *Anon*. Lat. 129.

2. But the replication, rejoinder, sur-rejoinder, &c., are supposed to be of the same term as the precedent pleading. 2 Saund. 2. n. (2).

II. WHEN SEVERAL REPLICATIONS ARE NECESSARY.

To two bars there must be several replications or demurrers. *Reg. v. Bp. of Canterbury*, 1 Leon. 139.

III. WHEN THE PLAINTIFF MAY EJECT TO HAVE ONE OR SEVERAL REPLICATIONS.

1. Where an administrator pleads several judgments in bar, the plaintiff may reply to every one of them severally, and conclude

to the country. *Ashton v. Sherman*, Comb. 443.

2. This is an anomalous case, and out of the rules of double pleading. *Id. ibid.*

3. Or he may reply generally that they are all kept on foot by fraud, &c. *Beake v. Kent*, 1 Show. 290.

IV. GENERAL RULES RESPECTING THE FORM OF REPLICATIONS.

1. Where the plaintiff replies full age of the defendant, it is not necessary to lay a venue as it is of a release. *Brett v. Minter*, Stra. 8.

2. In debt upon bond, plaintiff cannot vary the day in his replication from that alleged in the declaration; but it is otherwise in trespass. *Cole v. Hawkins*, 10 Mod. 252.

3. If the replication and bar may both be true, it cannot be an avoidance of the bar. *Hickins v. Basset*, 1 Show. 546.

4. It is not necessary to set forth in a replication what is admitted by the defendant's plea. *Vincem v. Atwood*, 10 Mod. 257.

5. In an action of debt upon an obligation, if the plaintiff make a replication as certain as the words of the condition, though not so certain as the case seems to require, yet it is good. *Gold v. Death*, Hob. 92, 93.

6. A contradiction to the declaration in a part not material, does not vitiate a replication or verdict. *Harris v. Ferrand*, Hard. 42, 43.

7. Every replication ought to be directly contrary to the bar, and ought to traverse, or else confess and avoid it. *Plow. 56.*

8. A replication which maintains a lawful seisin in fee in the lessor, and traverses that which destroys it, is good. *Houn v. Laxton*, Cro. Eliz. 891.

9. Where the plea contains matter of excuse, it is enough that the replication meets it, except in cases of awards. *Rez v. Gill*, Stra. 191, 299.

10. In debt upon bond to perform an award, and no award pleaded, the plaintiff ought to show the award, and assign a breach of it in his replication. *Hayward v. Gerrard*, 1 Saund. 102, 103, 317.

11. If the defendant plead an award made of three things, the plaintiff cannot reply that it was made of the said three things, and of another; but he ought to reply that it was made of four things, and traverse the award made of three things only. *Salmon v. Smith*, 1 Saund. 207.

12. In debt on bond to stand to an award, so as it be made ready to be delivered, and no award pleaded, a replication showing the award in scriptis, without averring it ready to be delivered, is good. *Romly v. Manning*, 1 Show. 98.

13. If the condition of a bond is to do a collateral act, and not to pay money parcel of the bond, a good breach ought to be assigned. *Rosell v. Rosell*, Lutw. [148]. 422.

14. In debt on a bottomry bond, the de-

fendant pleads the ship was lost, the plaintiff replies it was not, without showing any breach of condition; and held good. *Meredith v. Allen*, 1 Show. 149.

15. Where, in trespass, the defendant claims an interest in the place where, &c., the plaintiff cannot reply *de injuria sua propria*. *Dean and Chapter of Windsor v. Gever*, 2 Saund. 295. 1 Lev. 307.

16. Upon a plea of misnomer of a corporation, if they have a power to sue by that name, the replication must show it. *Gillb. 253*

17.* An immaterial traverse does not preclude the other party [*1205] from taking a traverse upon it. *King q. t. v. Bolton*, Stra. 117.

18. Whatever is necessarily understood, intended, and implied in a plea, is as much traversable as if it were expressly alleged, 2 Saund. 9 c. n. (14).

19. A replication that puts in issue only the immaterial part of the defendant's plea is bad. *Reg. v. Blagden*, 10 Mod. 211, 212, 297.

20. Where the statute of gaming is pleaded, the replication must not take issue upon the particular sum. *Colborne v. Stockdale*, Stra. 493.

21. Where to an action upon a promissory note it is pleaded that it was "corruptly agreed," &c., the plaintiff may reply that the security was given for a just debt, and traverse that it was agreed *modo et forma* as defendant pleads. *Cock v. Ratcliffe*, C. T. Hardw. 287.

22. If a devise to A and his heirs, and if he die without issue that it shall remain over, be pleaded as a devise in fee generally, the other party may either traverse the devise generally, or show the addition. *Wright v. Gerrard*, Hob. 310.

23. Where an administrator pleads several judgments against him, and that they were for just and true debts, and the plaintiff replies that they were obtained by fraud, he is at liberty to traverse the special matter, or to rely on the fraud generally at his election. *Trethewy v. Ackland*, 2 Saund. 50.

24. If a gift in satisfaction is pleaded, the acceptance in satisfaction is traversable as well as the gift. *Young v. Rudd*, 1 Ld. Raym. 61.

25. Where the plaintiff confesses and avoids, he ought not to traverse, for that would make his replication double. *Bradburn v. Kennerdale*, 3 Mod. 3. 8.

V. RELATIVE TO THE CONCLUSION;—

(a) Generally.

1. Where a matter of fact is pleaded in abatement, and the plaintiff replies and traverses the matter of fact, he may conclude either judgment *si actio* or *quod respondeat oster*. *Bennet v. Hill*, Comb. 479.

2. If issue be taken on a dilatory plea, it must conclude with *judicium et damna*; but

if it confess and avow, the conclusion must be in maintenance of the writ. *Davenant v. Rafter*, 6 Mod. 236.

3. In *assumpsit* for money had and received, if the defendant plead an attainer in abatement, and the plaintiff reply a pardon, concluding in bar *petit judicium et dampna sua*, it is a discontinuance. *Bisse v. Harcourt*, 1 Show. 155.

4. The defendant concludes in bar judgment *et actis*, where it should have been judgment *de billa*; the plaintiff may reply *billam cassari non debet*. Mo. 692.

5. Where the conclusion is "*petit judicium et debitum*," omitting "*dampna*," yet judgment may be for the damages, because incident; and "*petit judicium*" includes the whole. *Pit v. Knight*, 1 Lev. 222.

6. *Petit judicium et dampna*, without *debitum* is good. *Barnes v. Gladhousan*, 2 Lev. 19.

7. If a plaintiff declare as a clerk in court, and the defendant plead that he is an attorney, traversing that he is a clerk in court, the plaintiff may reply that he is a clerk in court as appears by the record, without demurring it to be brought in. *Cockcroft v. Smith*, 6 Mod. 263.

(b) *When it should conclude with a verification.*

1. The replication must conclude to the country, where there is an affirmative on one side and negative on the other. 1 Saund. 103 a, b, c.

2. Where a material part of the plea is denied, the replication must conclude to the country. *Wilkins v. Brown*, Stra. 1220.

3. Whenever the replication would induce a traverse, with a repetition of the declaration, the best plan is to deny the facts of the plea, without a formal traverse, and conclude to the country. 1 Saund. 103 c.

4. To a bond conditioned to preserve game, defendant pleads that he had done so; plaintiff replies, showing a particular breach; he ought not to conclude with an averment, but to the country. *Hayman v. Gerrard*, 1 Sid. 341.

5.* The defendant pleads that [*1206] no goods came to his hands; the plaintiff replies that a silver bowl came to the defendant's hands; the plaintiff ought to conclude to the country. *Semb. Hayman v. Gerrard*, 1 Saund. 102, 103.

(c) *When it should conclude to the country.*

1. Where new matter is offered in a replication, the plaintiff ought not to conclude to the country, but to aver his plea. *Nichols v. Powell*, 4 Mod. 285, 286. 1 Saund. 103 a, b, c.

2. If an executor plead judgment recovered or the like, and the plaintiff reply assets *ultra*, this should conclude with an averment. 1 Saund. 388. n. (7).

3. Where there is a traverse, the replication should conclude with an averment. *Baynham v. Matthew*, 2 Stra. 871.

4. Replication *non est attornatus* must not conclude to the country. *Parker v. Forrest*, Stra. 532.

VI. EFFECT OF A REPLICATION.

1. Want of giving colour is aided by a replication, but not by a general demurrer. 1 Ld. Raym. 551. *Anon.* 12 Mod. 316.

2. If plaintiff traverse the matter of the plea, he thereby admits the trespass justified to be the one he complains of. 2 Saund. 5 c.

3. Though the defendant's plea appear to be false of his own showing, yet if such matter be pleaded in the replication as supposes and admits it for true, the plaintiff is not at liberty to take exceptions to it afterwards upon a demurrer to the rejoinder. *Potter v. Pinkney*, 10 Mod. 265.

VII. CONSEQUENCE OF THE REPLICATION, OR ONE OF THE SEVERAL REPLICATIONS, BEING BAD.

1. If the replication be not good, yet if the bar be ill in substance, judgment shall be for the plaintiff. *Hamond v. Dod*, Cro. Car. 5. *Ridgway's case*, 3 Co. 52.

2. If it be insufficient, and the plea be also bad, yet if upon the whole record no cause of action appears for the plaintiff, he cannot have judgment. *Norton v. Stames*, Hob. 14.

3. If there are three replications, and one of them is superfluous, and the other two sufficient, the plaintiff may have judgment upon those which are sufficient. *Hawcocke v. Prowd*, 1 Saund. 338.

VIII. CONSEQUENCE OF THE REPLICATION BEING BAD IN PART.

1. A replication being entire, and ill in part, is ill in the whole. *Webber v. Twill*, 2 Saund. 27. n. (2).

2. If the defendant pleads an entire plea to an *indebitatus assumpsit*, and an *inimul computasset*, and the plaintiff makes an entire replication to the plea, and the replication is insufficient to one of them, it ought to be adjudged wholly against the plaintiff, although it is sufficient as to the other. *Webber v. Twill*, 2 Saund. 127.

REQUEST.

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II. WHEN NOT, p. 1207.

III. HOW IT SHOULD BE MADE AND ALLEGED, p. 1207.

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V. CONSEQUENCE OF NEGLECTING TO MAKE IT, OR ALLEGED IT, p. 1208.

[See also *ante*, tit. DEMAND, Vol. I. p. 475.]

I. WHEN A REQUEST IS NECESSARY TO BE MADE AND SHOWN IN PLEADING.

1. Upon a promise to pay a penalty or a collateral sum, there ought to be an actual

request before the action brought. *Birks v. Trippet*, 1 Saund. 33.

2. An action for keeping a passage stopped up, so that the plaintiff could not cleanse his gutter, will not lie until a request has been made to have the passage opened. 1 Mod. 27.

3.* Where the request is to do [*1207] a collateral thing, and not to pay money, there it must be averred. *Fitzhugh v. Dennington*, 3 Salk. 309. 2 Ld. Raym. 1094, S. C.

4. The request is traversable in covenant, where the covenant is to be performed upon request. *Nevil v. Cook*, 2 Leon. 5.

5. Where a bond is given for doing a thing which requires a demand, the bond is not forfeited till demand, and the defendant must take advantage of want of demand by pleading *semper paratus*. *Levin v. Randall*, 12 Mod. 413, 414.

II. WHEN NOT.

1. A request is not necessary where there is a present duty. *Capp v. Lancaster*, Cro. Eliz. 548. 721.

2. Upon a promise to pay a precedent duty upon request, there is no need of an actual request. *Birks v. Trippet*, 1 Saund. 33.

3. A request need not be made where one is bound to do a thing by bond. *Norton v. Simmes*, Hob. 14.

4. Upon a promise to pay money at a certain day, no request is necessary. *Byne v. Playne*, 1 Leon. 221.

5. So, on a promise to deliver before such a day. *Bernard v. Bernard*, 1 Lev. 289.

6. Promise to pay him 40l. if he would, at his request, procure himself to be made a knight; action lies without request; for the request is intended to be executed and made at the time of the promise. *Tupps v. Rand*, 2 Lev. 198.

7. *Assumpsit* in consideration that the plaintiff such a day and year had promised the defendant that he would permit the defendant to collect his tithes of such a meadow for six years then last past; the defendant promised to pay 6s. for each year, &c.; a special request to pay, &c. is not requisite. *Coningsby v. Rodd*, Lutw. [80, 81]. 229.

8. On a promise to pay if another did not pay, plaintiff need not allege a special request. *Masters v. Marriott*, 3 Lev. 363.

9. On a covenant to make a lease of part of a house, if he pulls down that part, no request is necessary, because he has disabled himself to make the lease. *Lambert v. Lane*, Lutw. [112]. 308.

10. If a man seized of lands in fee, covenants to enfeoff J S of them upon request, and afterwards makes a feoffment in fee of the said lands to another, J S shall have an action of covenant without request. *Sir A. Main v. Scot*, 5 Co. 20 b.

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III. HOW IT SHOULD BE MADE AND ALLEGED.

1. The condition of a bond was to assure certain land, and upon refusal thereof, and request made, to have 100l. the obligor may request at any time. *Boylton v. Andrews*, Cro. Eliz. 136.

2. Condition to do an act at the end of seven years on request; request must be made on the last day. *Fitzhugh v. Dennington*, Salk. 585.

3. A thing being to be done at or before such a day, the request ought to be the last instant of the day before the last day; one bound to make assignment to another by assurances to be made by the other, the other by implication is bound to make request. Mo. 143.

4. Condition to repair upon notice given, without saying to whom, or at what time; it shall be intended to the person, not the land, and only during the time the person has the land. Mo. 680.

5. If husband and wife be bound to levy a fine upon reasonable request, if request be made while the wife is *enccinte* or ill, it is not reasonable; nor is a request good to the husband alone without the wife. Mo. 124.

6. Where a request makes the duty, it ought to be laid precisely as to time and place. *Manury v. Strong*, Palm. 390.

7. In *assumpsit*, the plaintiff declares that he had expended for the defendant 25l. which she promised to repay; the plaintiff must allege the day and place of the request. *Preston v. Tboley*, Cro. Eliz. 74.

8. In an action on the case, when a request is laid in the declaration, a request at another time may be given in evidence. *King v. Bray*, 1 Sid. 268.

9. Where there is a precedent duty before a demand made, there *licet sapius requisitus* is sufficient. 3 Salk. 30.

IV.* CONSEQUENCE OF MAKING A [*1206] REQUEST.

When a thing to be done is to be done upon request, the time when the person requires it to be done is the time of the performance. *Harrison v. Hayward*, 3 Mod. 295.

V. CONSEQUENCE OF NEGLECTING TO MAKE IT, OR ALLEGE IT.

1. When a thing is to be done upon request within six months, or else money to be paid, if the request be not made within the time, it is a dispensation of one part of the condition, and the law discharges the other part. 2 Mod. 203.

2. Want of alleging a request is bad on special demurrer only. 1 Saund. 33 a. n. [b]. *Sed vide* 1 Sid. 268. *contra*.

RESCUE.

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V. OF THE CONCLUSIVENESS OF THE RETURN,
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VI. REMEDY AGAINST THE RESCUER;—

(a) *By attachment*, p. 1209.

(b) *By indictment*, p. 1209.

(c) *By action*, p. 1209.

[*Respecting the remedy against the sheriff, see post, tit. SHERIFF.*]

1. WHAT CONSTITUTES A RESCUE.

If a landlord distrain goods for rent, and before replevin quit them for two or three intervening nights, the taking of them is not a rescue contrary to 2 W. & M. c. 5. *Dod v. Monger*, 6 Mod. 215.

II. WHEN A RESCUE MAY BE LAWFULLY MADE.

1. Where the distress was unlawful, the owner may rescue before the impounding, but not after. *Anon.* 3 Salk. 310.

2. If the lessee, or if the tenant paravail in the case of the mesnalty, is present when the lord or his bailiff come to distrain, if nothing is in arrear, he may make rescue. *Case of Aowry*, 9 Co. 20 a.

III. WHEN IT IS A GOOD RETURN TO A WRIT.

1. Rescue cannot be returned on a writ of execution, or *capias utlagatum*, after judgment. *Anon.* 12 Mod. 10. *Holt*, 623, 629. 1 Barnes, 307. 2 Saund. 344 a. n. [a]. 2 Dy. 241. pl. 47. *Anon.* 1 Vent. 21.

2. For in these cases the sheriff is liable, unless the rescue be by the king's enemies. 2 Dy. 241. pl. 47.

3. But it is a good return upon mesne process. *Cro. Jac.* 419. *Prac. Ca. K. B.* 193. *Sed vide Waldo v. Lambert*, *Cro. Eliz.* 868.

IV. HOW THE RETURN SHOULD BE.

1. If the sheriff returns a rescous, it ought to appear by his return to be within his county. *Wolffreston's case*, *Yelv.* 51. 2 Saund. 345.

2. Great certainty necessary in it. 2 Saund. 344 a. n. [a].

3. Return of a rescous, without mentioning the place where it was made, is bad. *Mo.* 412. *March.* 25. pl. 57. *Prac. Ca. K. B.* 24.

4. The return is good without naming the day of taking. *Cane's case*, *Palm.* 532.

5. So, though he does not show the time or place of the warrant made. *Webbe v. Withers*, 2 Ro. 255.

6. A return thereof *extra custodiam*, not saying that he was in *custodia*, is ill. *Rex v. Sims*, 1 Lev. 214.

7. *Extra custodiam suam*, or of the bail, is good. 1 Lev. 214.

8. Held, that if the sheriff returns a rescous as done to his bailiff, he being a bailiff itinerant only, and not the bailiff of a franchise, it is bad; and that he should return

the rescous as done to himself.* *Anon. Jenk.* 231. *Prac.* [*1209] *Ca. K. B.* 206. *March.* 92. pl. 153. 3 Dy. 241. pl. 47. 2 Ro. 78. *Anon. T. Raym.* 161.

9. But afterwards held to be good either way. *Rex v. Clapham*, 2 Lev. 28. *Anon.* 3 Salk. 310.

10. The return of a rescous may be quashed for repugnancy. *Rex v. Weeks*, 6 Mod. 220.

11. A return that the bailiffs had him in custody of the sheriff, and that A rescued him out of the custody of the bailiffs, is ill for repugnancy. *Anon. Salk.* 586. 1 *Ld. Raym.* 589. S. C.

V. OF THE CONCLUSIVENESS OF THE RETURN.

1. If a sheriff return a rescous, it is not now traversable, though formerly it was. *Anon.* 2 Vent. 175. 1 Barnes, 307. *Lady Russell's case*, *Cro. Eliz.* 781. *Tracy's case*, 12 Mod. 356, 357. 2 Saund. 344 a. n. [a]. *Rex v. Howe*, *Comb.* 295.

2. The return cannot be falsified by affidavit. *Taylor v. Brook*, *Comb.* 255.

VI. REMEDY AGAINST THE RESCUER;—

(a) *By attachment.*

1. The sheriff's return of a rescous is of itself a conviction, and an attachment and *capias* issue of course without motion. *Anon.* 12 Mod. 247. *C. T. Hardw.* 112. 6 Mod. 141. *Ca. Prac. C. P.* 88. *Budger v. Coley*, *Ca. Prac. C. P.* 126. *Rex v. Pember*, *C. T. Hardw.* 112.

2. An attachment cannot issue for a rescous till the sheriff has returned his writ. *Cesar v. Holt*, 8 Mod. 110. 342.

3. Attachment lies not for a rescous upon mesne process. *Anon. Prac. Ca. K. B.* 31.

4. The court will not grant an attachment for a rescous, if it appear that the party was not legally arrested. *Genner v. Sparks*, 6 Mod. 173.

5. Nor will they grant an attachment in the first instance, on mere affidavit of a rescous, without the sheriff returns it. *Anon.* 6 Mod. 141. *Prac. Ca. K. B.* 31. *Salk.* 586. *Str.* 531.

6. The fine for a rescous was formerly four nobles on each offender; but this rule is exploded. *Anon. Salk.* 586. *note. Holt*, 629.

7. A small fine, as a shilling, may be imposed upon the rescuer. *Rex v. Vaux*, 11 Mod. 287. *Rex v. Pember*, *C. T. Hardw.* 112.

8. If the sheriff takes a man under a *capias* directed to him, and he is rescued, the rescuer may be punished for it, though there was no original on the file; for the *capias* alone was a sufficient warrant to the sheriff. *Anon. Dall.* 1.

9. If the rescuers are taken, they must be brought into court to be fined. *Rex v. Phillips*, 1 Barnes, 307.

10. And the party may be fined, without being examined on interrogatories; and, if injured, may have his action against the sheriff. *Rex v. Phillips*, *Ca. Prac. C. P.* 88.

11. A rescuer may be discharged on affidavit. *Rex v. Bell*, Salk. 586.

12. Rescuers were admitted to bail and respited until the determination of an action against the sheriff for a false return. *Rex v. Tirtell*, Ca. Prac. C. P. 90.

(b) *By indictment.*

1. In an indictment for a rescous committed by a wife, there must be an addition to the defendant's name, pursuant to the statute. *Rex v. —*, 2 Show. 84.

2. The whole proceedings, viz. the *fieri facias*, &c., are to be set forth at large. *Rex v. Westbury*, 8 Mod. 357.

3. An indictment for rescuing goods from a sheriff's officer must lay the property in some person, and show the judgment and execution under which they were taken. *Rex v. Lilly*, 7 Mod. 63.

4. In the indictment it must appear for what the party was committed to the house of correction. *Rex v. Freeman*, Stra. 1226.

5. An indictment was quashed because it was not shown where the arrest was. *March*, 67. pl. 105.

6. The indictment is good without *vi et armis*. *Cro. Jac.* 345. 473. *Contra*, *March*, 67. pl. 105.

(c) *By action.*

1. In an action on the case for rescuing a person arrested on mesne process at the plaintiff's suit, the writ and warrant may be proved by producing sworn* [*1210] and examined copies of them; evidence must also be given of a legal arrest, and of the original cause of action; and evidence ought also to be given that the plaintiff thereby lost the opportunity of recovering his money. *Wilson v. Gray*, 6 Mod. 211.

2. In an action on 2 W. & M. c. 1. for rescuing a distress, if the plaintiff state that he was seized in fee of the premises, and demised them by parol for a year, and so from year to year, he must prove the seisin in fee, but need not prove that he gave the tenant warning. *Dod v. Mongar*, 6 Mod. 215.

RESERVATION.

1. If, upon a conveyance to uses, a general power be reserved to limit uses to any body, this is void for the generality. *Hob.* 151.

2. A man cannot reserve to himself a less estate than he had before. *Plow.* 155. 197. [See also ante, tit. *RENT*, div. VI. p. 1175.]

RESIGNATION.

1. Resignation to a proctor does not make the church void, without the acceptance of the bishop. *Sanders v. Owen*, 5 Mod. 388.

2. If a resignation be made to the ordinary, and the patron afterwards present, the presentation is void if the ordinary did not accept the resignation. *Thompson v. Leach*, 3 Mod. 297. *Cro. Jac.* 198. 1 Sid. 387.

3. A general bond for resignation of a benefice is good. *Peele v. Earl of Carlisle*, Stra. 227.

4. A bond to assign a benefice upon request held good, and not to be simony. *Anon.* 3 Salk. 325. *Sed vide Bishop of London v. Ffytche*, 1 East, 487. 4 T. R. 801. n.

5. A bond of resignation is not allowed where money has been paid upon it. *Peele v. Capel*, Stra. 534.

RESPONDEAS OUSTER.

1. Where the defendant pleads in abatement, and the plaintiff demurs, if it be adjudged against the defendant, it shall be *quod respondeat ulterius*; but if the thing be alleged in abatement, where upon issue joined it goes for the plaintiff, there he shall have judgment to recover his debt. *Anon.* 1 Vent. 22.

2. No notice is necessary upon a respondeas ouster. *Laurence v. Martin*, Holt, 46.

[See also ante, tit. *JUDGMENT*. Vol. II. p. 835, and tit. *ABATEMENT*, div. X. Vol. I. p. 13.]

RESTITUTION.

WHEN A PARTY IS ENTITLED TO RESTITUTION, AND WHEN A WRIT OF RESTITUTION OR SCIRE FACIAS IS NECESSARY FOR THAT PURPOSE.

1. On reversal, judgment is that the party be restored to whatever he has lost, and on a suggestion that he was seized of such lands, a *scire facias* may taken out against the terre-tenants, who may show cause against the restitution. *Dillon v. Walcot*, 12 Mod. 407.

2. A writ of restitution lies not (where a judgment is reversed) against any that are not parties to the record. *Rex v. Leaver*, Salk. 589. 1 Show. 261. T. Raym. 85. 2 Lev. 223. 3 Keb. 231. Skin. 32.

3. But if it did, it must be by a *scire facias*. *S. C.* 1 Show. 261.

4. Writ of restitution upon an erroneous judgment was reversed for informality. *Simmonds's case*, 2 Ro. 475.

5. In an attainit in the Common Pleas upon a verdict in the King's Bench, and execution upon that verdict, if the verdict be disaffirmed, the Common Pleas may award restitution. *York v. Allen*, *Cro. Eliz.* 372.

6. Goods sold by *fieri facias* are not to be restored, if the judgment be reversed. 2 Leon. 90.

7. No restitution for goods taken upon an erroneous execution, for which damages have been already recovered in an action of trespass. *Turnor v. Felgate*, T. Raym. 74.

8. Where money recovered in a judgment appears by record to [*1211] be paid, restitution shall be without *scire facias*; but otherwise, where it appears to be only levied. *Anon.* Salk. 588.

9. So where judgment is set aside after

execution for irregularity, there needs no *scire facias* for restitution. *Id. ibid.*

10. In a *withernam*, upon satisfaction made, the party shall have a writ of restitution for his cattle. *Annesly v. Johnson*, Cro. Eliz. 162.

11. An executor shall have the writ, by stat. 21 H. 8. 1 And. 25.

12. On outlawry in felony against the testator being reversed by error by the executor, restitution will be awarded *de bonis*. *Marsh's case*, 1 Leon. 326.

13. An outlaw can, after reversal of the outlawry, enter into his land, although the king has sold them; but not after sale under *fi. fa.*, where judgment is reversed. *Anon.* 1 And. 188. 277.

14. Upon a *quare impedit* against husband and wife, the husband paid damages and died; the wife married a second husband; and they brought attain, and had restitution. *Berry v. Nevey*, Palm. 343.

15. Goods imported contrary to act of navigation were seized, and afterwards the property was claimed by another; in such case a writ of restitution was held to be *ex gratia*, and not *ex debito justitie*. 3 Salk. 313. Hardw. 97.

46. No restitution in robbery unless the jury find the fresh suit. *Armstrong v. Lisle*, J. Kely, 96.

17. Restitution made above three years after the inquisition taken of the force, is ill, because the statute intends a speedy remedy. *Rez v. Harris*, 3 Salk. 313.

18. A party having been put out of a parsonage, under colour of a writ of *vi laica removenda*, restitution of possession was awarded upon suggestion and affidavit of the facts. *Wilkinson's case*, Cro. Eliz. 465.

19. If a clerk of a parish is put out by the parson without cause, no writ of restitution lies. March, 101. pl. 174.

20. A barrister of one of the Temples was expelled the house, whereupon he prayed his writ of restitution, and denied, because there is nobody in the inns of court to direct to, they being no body corporate; the remedy is by appeal to the twelve judges. *Booreman's case*, March, 177. pl. 235.

RETAINER.

1. A retainer is not the act of the party but of the law. *Boskell v. Godolphin*, Skin. 215.

2. Testator is bound to A in a bond, &c. to the use of his wife, conditioned for payment of 3000*l.* to B his wife after his death, and dies; administration *durante minoritate* is committed to the wife; she may retain, for the condition of the bond being to pay to her, it is the same as if the bond was to her. S. C. Skin. 214.

3. Retainer for a debt may be either plead-

ed or given in evidence under *plene administravit*. 1 Saund. 333. n. (6).

4. So may a retainer for the expenses of administration. *Id. ibid.*

[See ante, tit. EXECUTOR, div. XIV. Vol. I. p. 662.]

RETRAXIT.

1. A retraxit ought to be in proper person, and not by attorney. *Beecher's case*, 8 Co. 58 a. Cro. Jac. 211. 1 Ld. Raym. 598. 6 Mod. 82.

2. A retraxit is a bar to the same action for ever, so long as the judgment stands in force. *Walwyn v. Smith*, 4 Mod. 87. Cro. Jac. 211.

3. A retraxit or *nolle prosequi* against one defendant, after judgment against both, discharges both, and the judgment is void against both. *Green v. Charnoc*, Cro. Eliz. 762.

4. A retraxit cannot be before declaration, so as to make a perpetual bar. *Anon.* 3 Leon. 19.

5. A *nolle prosequi* does not amount to a retraxit or release where there are more defendants. *Coux v. Lowther*, 1 Ld. Raym. 599.

RETURN.* [*1212]

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I. RESPECTING THE NATURE OF A RETURN.

The returning of a writ is a ministerial and not a judicial act. *Rex v. Bishop of Meath*, 10 Mod. 309.

II. WHEN A RETURN IS NECESSARY.

1. A judicial writ must be returned before an alias can be sued thereon. *Atwood v. Burr*, 7 Mod. 6.

2. If the sheriff upon mesne process make an arrest, and does not return the writ, he is a trespasser. *Turbervil v. Tipper*, 2 Ro. 493. Latch. 222.

3. Where there is a commitment by warrant, the officer must return the warrant; otherwise, of commitments by the court to a proper officer in execution. *Rex v. Clerk*, 1 Salk. 349.

4. A return is not necessary when the execution is completed before it; and in such a case, if it be insufficient, it is not error. *Sir C. Howard v. Visc. Mansfield*, Palm. 266.

5. There is no need of any return of summons or attachment by pledges to a *venire facias* or *habeas corpora juratorum* since 5 G. 2. c. 25. *Philipps v. Philipps*, Andr. 248.

III. RESPECTING THE TIME FOR A RETURN.

1. An original not returned at the death of the king cannot be returned in the time of the next king, though all process upon originals not pending may. 2 Dy. 165. pl. 1.

2. The sheriff must return the writ on the day on which the rule expires, and if he does not, plaintiff may move for the attachment the next day. 2 Saund. 61 d.

3. If a writ be returned as executed on the 14th June last past, it shall refer to the day, and not to the year. *Harvey v. Broad*, 6 Mod. 148.

IV. BY WHOM THE RETURN SHOULD BE MADE.

1. The return of writs may be claimed by prescription, as appertaining to [*1213] a manor.* *Countess of Pembroke v. Earl of Burlington*, Hard. 423.

2. All that are returned by the sheriff to be suitors at the court baron, and present when judgment given, ought to return a writ of false judgment, &c. *Vaughan v. Paramore*, Prac. Ca. K. B. 189.

3. The sheriff must return a writ, though made to plaintiff's own bailiff, or where it is directed to the sheriff, though in fact executed

by a bailiff of a liberty. *Royston v. Reed*, 1 Barnes, 302. *Virely v. Gunstone*, Hob. 83.

4. The sheriff of London is known by the court to be two persons, in so much that a return by one is bad, and not helped by statute. Hob. 70.

5. A return by a sheriff, or other officer, out of office, is void. Cro. Eliz. 312. 1 Dy. 41. pl. 8. Prac. Ca. K. B. 219.

6. A bailiff who executes a writ, and is removed before the return, can make the return to the sheriff, and he over to the court; but if he do not execute it, he cannot make the return. Mo. 431.

V. WHEN THE RETURN SHOULD BE SHOWN IN PLEADING.

1. A sheriff, or other officer, justifying under a returnable writ, must show that the writ was returned. *Freeman v. Blewit*, 3 Salk. 220. 1 Ld. Raym. 632. S. C. 1 Leon. 144.

2. Otherwise of a bailiff. *Park v. Mosse*, 1 Leon. 144.

VI. HOW PROCESS SHOULD BE RETURNABLE.

1. An attachment returnable before the full term, if after the essoin day, which is strictly the first day of the term, was holden good. *King v. Harris*, Com. 547.

2. In an information *ex officio*, or other proceeding, originally commenced in the court of King's Bench, the *venire*, *distingas*, and other process, though sued out into a different county from that in which the court lies, must be returnable at a day certain; but in indictments or other proceedings, commenced in other courts, and removed into the King's Bench by *certiorari*, the process must be returnable on a common day. *Reg. v. Tutchien*, 6 Mod. 268.

3. A *capias* returnable on a common return day, instead of a day certain, is only void. *Karver v. James*, Willes, 258.

4. A *mandamus* may be returnable the fourteenth day after the teste. *Rex v. Corporation of Dover*, Stra. 407.

VII. OF THE APPEARANCE TO THE RETURN.

1. The return of a writ is always a day in court to the parties. *Moor v. Watts*, 1 Ld. Raym. 617.

2. Before the return of an original writ the defendant has no day in court. Plow. 74.

VIII. RELATIVE TO THE FORM OF A RETURN;—

(a) Generally.

1. The sheriff ought not by his return to dispute the jurisdiction of the court. *Draper v. Blaney*, 2 Saund. 193.

2. The name and surname of the sheriff is always put to the return of a writ, but the writ is directed generally to the sheriff of such a county, without naming his name. Plow. 63.

3. The sheriff ought to subscribe his name, and also his name of office, to the return of writs, and the coroners only their name of office. Mo. 548. 2 Ld. Rayn. 886.

4. No officer but a sheriff, and that by the statute of York, was obliged to set his name to the return of a writ. *Reg. v. Bishop of Meath*, 10 Mod. 308.

5. Surplusage in a return will be rejected. *Salk.* 589.

6. In trespass, the sheriff returning to C. B. that the defendant is attached by goods to such a value, is bad; he must specify what things he attaches, as they are forfeited to the king on default. 2 Dy. 199. pl. 54.

(b) *To a habeas corpus.*

In a habeas corpus the return of the cause of the commitment of the prisoner ought to be certain. *Chambers's case*, Cro. Car. 133.

[*1214] (c)* *To a mandamus.*

1. A return to a mandamus or habeas corpus ought to be certain; yet a convenient and not a precise certainty is all that is required. *City of Exeter v. Glide*, 4 Mod. 34. 36. *Rez v. Wilton*, 5 Mod. 259. 1 Show. 365.

2. To a mandamus to admit a person town-clerk of a city, it is not sufficient to return, that he has not taken the oaths according to the statute of 13 Car. 2. c. 1. before the mayor, for he might have taken them before two justices. *Rez v. Slatford*, 5 Mod. 317.

3. A return to a mandamus, setting forth articles for a removal, *ad effectum sequen.*, is ill. *Rez v. Hutchinson*, 8 Mod. 102.

4. A return to a mandamus need not be under hand and seal. 1 Ld. Raym. 223.

5. A corporation may make a return to a mandamus without the common seal, or the signing of the mayor. 2 Ld. Raym. 848.

(d) *To a writ of seisin, entry, or summons.*

1. Non-tenancy is not a good return to writs of seisin or summons. *Plow.* 13.

2. Where a sheriff returns a summons, it ought to express by what goods. 1 And. 51.

3. To a writ of entry, that the sheriff is defendant and cannot summon himself, is a good return. 3 Dy. 266. pl. 8.

(e) *To a distringas.*

1. A sheriff may return to a distringas for a view, that none came to take the view. *Prac. Ca. K. B.* 212. *Gouldb.* 44.

2. A sheriff ought not to return privilege to be exempted from juries, but ought to summon them, and shall not be liable to an action for not returning them privileged. *Rez v. The City of Canterbury*, T. Raym. 113, 114.

(f) *To a capias.*

1. A sheriff must return *cepi corpus*, or *non est inventus*, to a writ of *ca. sa.* *Parker v. Welby*, 1 Mod. 33.

2. If he has let the party go at large on bail, he must return *cepi corpus*. 2 Saund. 61 d.

3. *Mandavi ballivo qui dedit mihi responsum quod cepit corpus*, et A made rescou, is a good return: but *mandavi ballivo qui cepit corpus et A made rescou*, is bad. *Mo.* 402.

4. *Attachieri feci*, or *attachiatus est*, is a good return. 1 Ld. Raym. 21. *Salk.* 589.

5. In trespass, the sheriff cannot return a *mortuus*, but *non est inventus*; and upon an exigent a *mortuus* is not good. *Harwood v. Phillips*, Orl. Bridg. 469.

6. *Non sunt inventi* no good return, without *nec eorum aliquis*. *Rez v. Tucker*, Stra. 225.

(g) *To a fieri facias.*

1. A sheriff who is prevented by a plaintiff from proceeding after seisin in a scire facias to complete the execution, may return *nulla bona*, though the goods remain in the defendant's possession. *Rice v. Sergeant*, 7 Mod. 37.

2. His return to a fieri facias need not specify the price at which every particular article seized sold. 2 Saund. 47. n. [b].

3. If the property in the goods be disputed, the court will enlarge the time for making the return till the right be tried, or one of the parties indemnify him; or they will stay the proceedings against the sheriff. 2 Saund. 47. n. [b].

4. Where a scire facias issued against B, after the seizure of all the partnership goods upon a judgment and execution against A, and the sheriff returned *nulla bona*, it was holden a false return. *King v. Manning*, Com. 619.

5. Upon fieri facias against an executor, the sheriff can return *nulla bona*, although a verdict upon *plene administravit* has been found for plaintiff in his county. 1 And. 32.

6. Sheriff returns that goods came to the executor's hands, and *elongavit vendidit disposuit et ad proprium usum suum convertit*; this is tantamount to a *devastavit*. 1 Vent. 20. 221.

7. Upon a judgment in this court a fieri facias issued out, and upon a *nulla bona* returned in London the plaintiff takes out a *testatum fieri facias*, directed to the sheriff of Montgomery, to levy the monies in the hands of the defendant executor; the sheriff returns, that this is a [*1215] county in Wales, and that *breve domini regis non currit in Wallia*: adjudged an ill return by three justices. *Draper v. Blaney*, T. Raym. 206.

8. If he return, that he has taken goods to the value, for which he has not found buyers, no scire facias can issue, for it is a good return; but the sheriff thereby charges himself to the value. 2 Saund. 47 q. and 71 c.

9. A *distringas* should thereupon issue; and if he make the same return to the *distringas*, and continue in office, the plaintiff may sue out a *venditioni exponas*; but the sheriff may sell without it. 2 Ro. 57. 2 Saund. 47 q. 47 r.

10. The court will not attach the sheriff for returning to a *venditioni exponas*, that he had not found buyers for part of the goods. 2 Saund. 47 r. n. [c].

11. If the plaintiff lies by, and omits to

sue out a *seditioni exponas*, and the sheriff, after the above return, deliver the goods to the assignees of the defendant who has become bankrupt, plaintiff cannot have a *distingas*. 2 Saund. 47. r. n. [c.]

12. If the sheriff be removed, or if to a *seditioni exponas*, the sheriff should return that the goods were taken by his predecessor, a *distingas nuper vice-comitum* should be sued out. 2 Ro. 57. 2 Saund. 47 q.

IX. RESPECTING THE QUASHING OF A RETURN.

The return of a *habeas corpus* was quashed because no authority appeared in the person signing the warrant. *Rex v. Clark*, Gilb. 291.

X. OF DISAVOWING A RETURN.

1. The sheriff in the same term a return is made to a *seire* may disavow it. Prac. Ca. K. B. 20. 6 Jenk. 220.

2. But the sheriff cannot disavow his return of a panel after the term of the return, although he did not discover sooner that the messenger by whom it was sent had changed some of the jurors at the plaintiff's request. 2 Dy. 182. pl. 56.

XI. WANT OF RETURN, HOW AIDED.

The want of a return to a *venire facias* and *habeas corpora juratorum*, is cured by appearance of the jury. *Philipps v. Philipps*, Andr. 248.

XII. REMEDY FOR NOT RETURNING A WRIT.

1. The court can compel a man to make a return to a *mandamus* upon oath. *Rex v. Mayor of Oxford*, Palm. 455.

2. If writs issue out of another court, returnable in B. R., that court may compel the proper officer to make the return. *Clerk v. Elwick*, 10 Mod. 333.

3. An attachment lies against an under-sheriff for not returning a writ. *Makeplaine v. Denton*, 11 Mod. 366.

4. Case lies by an executor against the sheriff for not returning a writ executed in *vita testatoris*. *Anon. Cro. Car.* 297.

XIII. OF RULING THE SHERIFF TO RETURN THE WRIT.

1. The rule to return the writ cannot be had after an assignment of the bail bond, unless the bond be void. 2 Saund. 61 c. n. (7.)

2. Rule to sheriff to return the writ was discharged, defendant being protected by a public minister, and the protection registered. *Wright v. Obeden*, 2 Barnes, 332.

3. The rule may be had after the sheriff is gone out of office. 2 Saund. 61 c.

4. The rule cannot be had where the writ was executed by a special bailiff appointed by plaintiff, or under special directions. 2 Saund. 61 c. n. (7.); but see n. [w.]

5. The court will not make a rule against a high sheriff to return a writ. *Kilderton v. Wilkinson*, 12 Mod. 454.

6. The rule must be served personally on the sheriff, or under-sheriff, and not his

agent, except in London, Middlesex, and Surry. 2 Saund. 61 d.

7. Rule for the late sheriff of D to return a writ of *copias* was discharged; it not having been carried to the sheriff's office till a year after it was returnable. *Potter v. Colworthy*, 2 Barnes, 341.

8. To return a writ of *fi. fa.*, he may be ruled by either plaintiff or defendant. 2 Saund. 47.

9. He may be ruled by defendant, though there has been no sale of goods, but* a payment of money by him. [*1216] 2 Saund. 47. n. [b.]

10. He can be ruled by neither plaintiff nor defendant in case of compromise. 2 Saund. 47. n. [b.]

11. He must be required to return the writ within six months after the expiration of his office, by stat. 20 Geo. 2.; the months are lunar months, and the day on which he goes out of office is reckoned one. 2 Saund. 47. q.

XIV. HOW A BAD RETURN IS CURED.

1. Process returned by one not sheriff is helped by appearance. *Thoroughgood v. Scrogs*, Cro. Eliz. 582.

2. The return of a *venire fac.* in a *moderate lingua*, not showing who were aliens and who were denizens, is aided as a mis-return by 18 Eliz. *Goodwin v. Mountenaugh*, Cro. Eliz. 841.

XV. AS TO THE CONCLUSIVENESS OF A RETURN.

1. The return of the sheriff upon a *scire facias* to terre-tenants is not traversable, but the plaintiff may take execution. Cro. Eliz. 872.

2. In case of the removal of orders or convictions by *certiorari*, entire credit must be given to the returns made by the justices. 10 Mod. 293. 382. 393.

3. If the justices make a false return, whereby justice and the parties are abused, they may be punished. *Reg. v. Simpson*, 10 Mod. 382.

4. If one is returned tenant, he cannot contradict the sheriff's return. 1 Lev. 67.

5. The sufficiency of the bail taken by him is not traversable. *Bentley v. Hore*, 1 Lev. 86.

6. The return to a *mandamus* may be demurred to or traversed, by 9 Ann. 3.20. *Rex v. Tregony*, 8 Mod. 123.

7. But in general there can be no averment against it. *Arundell v. Arundell*, Yelv. 34.

8. The bailiff of a liberty is concluded by the return of the sheriff, and must bring his action if it be false. *Shaw v. Simpson*, 1 Ld. Raym. 184.

9. If the return be not questioned within the first term after it comes into court, it shall be taken for granted that it was made by a proper officer. 10 Mod. 368.

XVI. ACTION FOR A FALSE RETURN;—

(a) *When case lies.*

1. Action on the case lies against a sheriff or other officer for a false return. 2 Ro. 128. Cro. Eliz. 512. *Madox v. Young*, Hob. 209.

2. For making a false return to a writ of *certiorari*. *Cooper's case*, 6 Mod. 90.

3. For a false return to a *mandamus*. T. Raym. 68. 432. 3 Keb. 859. pl. 26.

4. If the sheriff return a summons or proclamation which has not been made, action on the case lies; but it is not assignable for error. Mo. 349.

5. Case lies against particular persons who procure a false return to be made in the name of a corporation. *Reg. v. Mayor of Thetford*, 2 Ld. Raym. 849. 2 Lev. 236.

6. Against a sheriff, for making a different return from that which was made to him by a liberty. 1 Ro. 119.

7. Sheriff returned *mandavi ballivo*, when his own bailiff had made an arrest and suffered an escape; action will lie for this false return. *Steward v. Floyd*, 12 Mod. 311.

8. Upon a *capias*, the sheriff directs his warrant to a bailiff of a liberty, who arrests the party, and the sheriff returns *non est inventus*; action upon the case lies against the sheriff. *Hawkins v. Mildmay*, Cro. Eliz. 730.

9. An action on the case will not lie against a sheriff for returning *cepi corpus*, &c. if he have let the party to bail under 23 H. 6. c. 10. *Parker v. Welby*, 1 Mod. 33. 57. *Page v. Tulse*, 2 Mod. 83.

10. But before the statute 23 H. 6. c. 9. of sheriff's bonds, if the sheriff had let a prisoner at large, and afterwards returned *cepi corpus*, he was liable to the action of the party grieved. *Posterne v. Hanson*, 2 Saund. 60.

11. Though if the sheriff had returned a *cepi corpus*, and yet detained the prisoner, he should be only amerced to the king for not having the body at the day. *Posterne v. Hanson*, 2 Saund. 60.

12. An action on the case at common law will not lie against a returning [*1217] officer* for falsely returning a candidate for a seat in parliament; but an action lies on 7 & 8 Will. 3. c. 7. *Prideaux v. Morrice*, 7 Mod. 14. Salk. 502. 504.

13. An action on the case may be maintained on the statute 7 & 8 W. 3. c. 7. for a false return of members of parliament, though there has been no determination of the House of Commons on the right of election for that place. *Middleton v. Wynn*, bart. (in error), Willea, 601.

14. Case will lie in damages for a false return in the matter of an election to an office. *Reg. v. Heathcote*, 10 Mod. 54.

15. Case may be maintained by executors for a false return or escape in the testator's life-time. *Williams v. Cary*, 12 Mod. 71. Comb. 322. Holt, 307. 4 Mod. 403. S. C.

(b) *Proceedings in such action.*

1. This action lies against the members of a corporation by their private names, for a false return to a *mandamus* by their corporate name. *King v. Rippon*, Com. 86.

2. In case for a false return against a bailiff, that the sheriff *mandavit* to the defendant *pro executione inde* is sufficient. *Hamon v. Lord Jermyn*, 1 Ld. Raym. 190.

3. In case for a false return to a *mandamus*, it is not material whether the writ ought to have been granted. *Green v. Pope*, 1 Ld. Raym. 126.

4. A sheriff who has pretended to execute a writ of election shall not take advantage of any irregularity of his own. *Hales v. Owen*, 2 Ld. Raym. 908.

5. In an action on the case for an escape and false return, if the sheriff demurs generally to the declaration, he loses the advantage of the statute 23 H. 6. c. 9. of sheriff's bonds. *Benson v. Welby*, 2 Saund. 154, 155.

6. If a *scire facias* be taken out, and the goods levied, before judgment entered on the roll, and another *scire facias* is delivered to the sheriff upon another judgment, to which he returns *nulla bona*, and then the goods are sold under the first writ, and satisfaction entered, but the roll not filed, the court will not, on an action brought by the second plaintiff against the sheriff for a false return, give the first plaintiff, who had indemnified the sheriff, leave to file his roll. *Herring v. Crocker*, 6 Mod. 184.

7. In action for a false return on mesne process, the jury may give the whole debt in damages. *Powell v. Hord*, 1 Stra. 650.

(c) *When debt lies.*

Upon a return of a *ferri feci* or *paratus habeo* debt lies; but not if the sheriff returns that he has delivered the goods to the party; for if it be false, an action on the case is the proper remedy. *Holland v. Ley*, Palm. 124. 148.

XVII. ACTION FOR A DOUBLE RETURN.

1. No action lay at common law for a double return of a burgess, the court considering they had no jurisdiction of the matter. *Onaloue's case*, 2 Vent. 37.

2. But case lies for a double return by the 7 & 8 W. 3. c. 7., and the party grieved is entitled to double damages and full costs.

3. In an action for a double return, it is enough to show the writ, and that the sheriff proceeded to an election, and that the plaintiff was *debito modo electus*. *Hales v. Owen*, 2 Ld. Raym. 907.

4. He need not state any thing to show that his election was regular. S. C. Com. 133.

XVIII. INFORMATION FOR A FALSE RETURN.

A copy from the crown office of the writ and return to a *mandamus* is sufficient evidence against the party on an information

for a false return. *Ree v. Chapman*, 6 Mod. 152.

REVERSION.

I. OF THE NATURE OF A REVERSION; AND HOW IT MAY BE GRANTED OR DEVISED, p. 1218.

II. INCIDENTS TO A REVERSION, AND RIGHTS OF THE REVERSIONER, p. 1218.

III.* HOW EXTINGUISHED OR SURRENDERED, p. 1219.

IV. HOW PLEADED, p. 1219.

I. OF THE NATURE OF A REVERSION, AND HOW IT MAY BE GRANTED OR DEVISED.

1. A reversion is a present interest, though to take effect in possession after another estate determined. *Dighton v. Greenvil*, 2 Vent. 328.

2. There can be no reversion but where there is a particular estate in possession. *Plow*. 151.

3. Where a possession vests without entry, a reversion will vest without claim. *Anon*. 2 Mod. 8.

4. A reversion is comprehended in the word "tenement." *Throckmerton v. Tracy*, *Plow*. 153. 155.

5. By the grant of a reversion lands in possession will not pass; but by the grant of lands a reversion will pass. *Rowe v. Huntington*, *Vaugh*. 83.

6. By a devise of a house to one for life, and all his messuages to another in fee, the reversion of the house passes. *Carth*. 50.

7. It cannot vest in a stranger as a reversion, when the land is become in possession after the particular estate ended. *Plow*. 153. 155.

8. It passes by the devise of "all other my lands not before devised or otherwise settled." 1 *Saund*. 182.

9. A grant of a reversion during the life of tenant in tail, on a remainder limited to one for the life of tenant for life, is good. *Cholmley's case*, 2 *Co*. 50 a.

10. Whenever a remainder is devised in contingency, the reversion in fee descends to the heir in the mean time. 2 *Saund*. 381 a.

11. The grant of a remainder or reversion to commence in futuro is not good. *Cro*. Car. 548. *Plow*. 153. 155. 197. 483. *J*. *Bridg*. 109.

12. A grant of a reversion when it shall happen after a tenancy for life is construed a good grant of the present reversion. 1 *Saund*. 152. n. (4.)

II. INCIDENTS TO A REVERSION, AND RIGHTS OF THE REVERSIONER.

1. A reversion may descend on a man without his being actually seised of it; he may nevertheless encumber it by a judgment or recognizance, though it shall not

be assets so as to be liable to his bond. 2 *Saund*. 7 d. 8 f, g, h.

2. If a tenant in tail, who has likewise the reversion in fee, acknowledge a judgment, the reversion may be extended. *Kellow v. Rowden*, 3 *Mod*. 256. See 2 *Saund*. 68 d.

3. But a reversion in fee expectant upon an estate-tail is not assets until it come into possession. *Kellow v. Rowden*, 3 *Mod*. 257.

4. Though the plaintiff has no reversion, yet an action of debt will lie for rent. *Carth*. 161.

5. One cannot properly be farmer of a reversion, nor does an *ejectioe firme* lie of a reversion. *Plow*. 159.

6. When a reversion is expectant on a term of years, the heir cannot plead the term in delay of execution, when sued on the obligation of his ancestor; *secus*, if expectant on a term for life. 2 *Saund*. 7 c.

7. Formerly, in the case of a grant of a reversion, no estate passed till an attornment. *Skin*. 388. *Cro*. *Jac*. 122.

8. But in debt for rent by the bargainee of a reversion, the omitting to state attornment in the declaration was held to be aided by the verdict. 2 *Show*. 234.

9. The reversioner cannot assign or devise a right of entry accruing from a forfeiture. 1 *Saund*. 319 a. 319 a. n. [d.] 12 *East*. 444.

10. The grantee of the reversion shall have an heriot as well as the rent. *Purefoy v. Rogers*, 2 *Saund*. 362. 366.

11. Privity, and the same right of estate, are both requisite to make a rent incident to the reversion. *Pauling v. Hardy*, *Skin*. 62.

12. The reversioner shall have an action for injuries done to real property, when the value of the reversion has been thereby lessened. 1 *Saund*. 322 b. 2 *Saund*. 175 c.

13. But this must appear in the declaration. 1 *Saund*. 322 b. n. [c.]

14. "And the omission is not cured by verdict. 1 *Saund*. 288. [*1219] b. n. [c.]

15. The reversioner shall not be affected by any presumption of a grant to an individual, or dedication to the public, from enjoyment, without his acquiescence. 2 *Saund*. 175 d. 175 e. n. [c.]

III. HOW EXTINGUISHED OR SURRENDERED.

1. If the reversion be granted to tenant for life and a stranger, it is extinct for one moiety; so if tenant for life grant his estate to the reversioner and a stranger, it operates as a surrender for one moiety. *Wiscot's case*, 2 *Co*. 60 b.

2. If the possession and reversion become united, the reversion is destroyed. *Throckmerton v. Tracy*, *Plow*. 151. 163. 196.

3. A reversion ceases to be such upon the determination of the particular estate. *Plow*. 153. 155. 197.

IV. HOW PLEADED.

1. If a man seised in fee devise for life,

the reversion cannot be pleaded to descend to his son till after the entry of the particular tenant. 2 Dy. 110. pl. 39.

2. If the reversion of abbey lands be pleaded to be given to the king, by virtue of 31 H. 8. c. 13., without stating that they were previously surrendered, &c., it is bad. 2 Dy. 110. pl. 39.

3. The assignment of a reversion must be pleaded by deed. *Beely v. Parry*, 3 Lev. 155.

REVOCATION.

1. If a power of revocation by writing have a clause "that then and henceforth the uses shall be revoked," yet the revocation may be by will, though that takes no effect till death. *Thomlinson v. Dyton*, 10 Mod. 73.

2. Settlement in tail, with power to revoke by indenture, sealed in presence of three witnesses; he makes a lease and release with three witnesses, and covenants to levy a fine, and does so; it is a good revocation. *Wigson v. Garret*, 2 Lev. 149.

3. The power of revocation is destroyed by levying a fine. *Herring v. Brown*, Carth. 22.

4. Where a power of revocation is once executed, it is final. *Countess of Bridgewater v. Bolton*, 3 Salk. 316.

5. If a recovery be suffered by A to the use of his last will, and then A declares the uses by writing, yet those uses are revocable. *Earl of Ormond's case*, Hob. 348, 349. *Sed vide* lb. 312.

6. If a conveyance of lands is made by two husbands and their wives, with a proviso for revocation, if one of the wives die, still the survivors can revoke the conveyance. *Gardner v. Savill*, 2 Ro. 178.

7. An authority cannot survive, but an interest may. *Atwaters v. Birt*, Cro. Eliz. 856.

[See also post, tit. WILL.]

RIGHT.

I. OF RIGHTS IN GENERAL, p. 1219.

II. OF WRITS OF RIGHT, p. 1220.

I. OF RIGHTS IN GENERAL.

1. A copyholder before admission has neither *jus in re* nor *jus ad rem*; viz. neither a right of possession, nor a right of property. *Philibrown v. Ryland*, 8 Mod. 352.

2. If the possession of land comes to him that has a right to it, the right is extinct or suspended. Plow. 88.

3. An action may be supported for an invasion of a right without proof of any specific injury. 1 Saund. 346 b.

4. A right of action shall survive as the land itself should have done. Hob. 3.

5. A right of action is not forfeited by attainder, nor escheat, nor is given by the general words of a law; *secus*, of a right of entry. *Lord Stanhope v. Bishop of Lincoln*, Hob. 242. 341.

6. A right of action which was in the person attained, and may serve to settle the king's possession, shall be forfeited; * *secus*, of a right of ac- [*1220] tion to the lands of a stranger; the difference is taken between a naked right of action alone, and when an estate of inheritance is coupled with it; in this last case it is forfeited. *Sheffield v. Ratcliffe*, Hob. 342, 343. 348.

7. A right of entry may descend, but is not assignable. 1 Saund. 319 a.

II. OF WRITS OF RIGHT.

1. A writ of right of advowson is not maintainable before induction of the clerk. Plow. 528.

2. A writ of right can only be brought by tenant in fee-simple against the tenant of the freehold; but joining a stranger does not hurt. 2 Saund. 45 c. *Page v. Hayward*, Salk. 571.

3. If brought on demandant's own seisin, it must be brought within thirty years; if on the seisin of his ancestor, within sixty years, by statute 32 Hen. 8. 2 Saund. 45 c.

4. A purchaser cannot bring it unless on his own seisin. 2 Saund. 45 f.

5. The action is best commenced by suing out a writ returnable immediately into the Common Pleas; the old method of commencing in the count-baron, &c. is unnecessary. 2 Saund. 45 b.

6. It was never commenced in the court-baron for lands held of the king in chief. 2 Saund. 45 b, c.

7. The lord's court shall not be taken away until his assent is first certified. Plow. 74. 76. 208.

8. It is a writ of right close, and the words "*quia dominus remisit curiam*," are superfluous. 2 Saund. 45 b, c. *Tyssen v. Clarke*, 3 Wils. 558.

9. The writ of essoin may be entered on the fourth day after the return of the summons. 2 Saund. 45 c.

10. If the action be against joint-tenants, coparceners, or tenants in common, each is entitled to one essoin, and they may have them *separatim*. 2 Saund 45 c, d.

11. If tenant does not enter it on the fourth day after the return of the summons, demandant may on the next day after enter *ne recipiatur*. 2 Saund. 45 d. See also 43 b.

12. A grand cape should issue if tenant does not appear at the return of the summons, or enter an essoin. 2 Saund. 45 d.

13. The tenant is not actually turned out; but the writ must be executed by service on him fifteen days at least before the return. 2 Saund. 45 d. Booth, 22.

14. There may be an *alias* and a *pluries* grand cape. 2 Saund. 45 d.

15. If the tenant does not appear at the return, the land strictly is lost; but demandant may waive the default, and usually does. *Id.* ibid.

16. If he appears, he may pray a view before the demandant has counted. *Davis v. Lees*, Willes, 344.

17. A count on the seisin of his ancestor must show how he is heir, and great accuracy is necessary. 2 Saund. 45 c, f.

18. An actual seisin in demandant or his ancestor, by taking the esplees must be shown. 2 Saund. 45 f.

19. After a view granted, the tenant is again entitled to an essoin, and must count *de novo*. 2 Saund. 45 g.

20. The tenant may imparl at the day given by the essoin after the view. 2 Saund. 45 h.

21. If the tenant be only seised for life, he ought to pay him in remainder (or reversion) in tail or fee, in aid, to defend the land; and if he neglect this, it is a forfeiture. 2 Saund. 45 k.

22. The prayee is entitled to an essoin; he may, after joining in aid, vouch to warranty, plead in bar, or join the mise on the mere right. 2 Saund. 45 i.

23. If a tenant after the mise joined make default, judgment final after this default shall not be given, but a *petit cape* shall issue. *Richard v. Penryn*, 5 Co. 85 b. *Moore*, 403. *Jenk.* 259. *S. C. Sed vide Herne v. Lilborne*, 1 Bulstr. 161.

24. Judgment against tenant on an issue in fact on the counter plea is peremptory and final; *secus*, if there be a demurrer to the aid prayer and judgment for demandant. 2 Saund. 45 i. n. [k.]

25. Nothing need be pleaded but a collateral warranty. 2 Saund. 45 l.

26. But the tenant may plead several other matters, as fine levied with proclamations, devise by ancestor of demandant, or former recovery by same tenant* [*1221] from same demandant. 2 Saund. 45 m.

27. It is the safest way to join the mise on the mere right, and give the special matter in evidence, but the least expeditious. 2 Saund. 45 m.

28. The writ of right is to determine the right of property only, not that of possession. 2 Saund. 45 k.

29. If there be a *nisi prius* clause, the sheriff may summon the knights from among the grand jury. 2 Saund. 45 k. n. [m].

30. If there be not four knights in the county, the sheriff may return others. 2 Saund. 45 l.

31. The trial may be, and usually is, at the assizes. 2 Saund. 45 l.

32. On the mise joined the tenant begins his case. 2 Saund. 45 l.

33. If tenant tenders the demy-mark, it ought to be tendered at the time of joining the mise. 2 Saund. 45 l.

34. The statute 12 Edw. 1., that trials in Wales on a writ of right shall be by common jurors, does not alter the judgment. *Richard v. Penryn*, 5 Co. 85. b.

35. The jury cannot find a special verdict. 2 Saund. 45 l.

36. If judgment final be given in a writ of right where it ought not, it shall bind him till reversed. *Richard v. Penryn*, 5 Co. 85 b.

37. No costs and damages can be recovered. 2 Saund. 45 m. *Pilfold's case*, 10 Co. 116.

RIOT.

I. WHAT CONSTITUTES A RIOT, p. 1221.

II. RELATIVE TO INQUIRIES FOR RIOTS, BEFORE JUSTICES OF THE PEACE, p. 1221.

III. RELATIVE TO INDICTMENTS AND INFORMATION FOR RIOTS, p. 1222.

I. WHAT CONSTITUTES A RIOT.

1. Both an unlawful assembly and an unlawful act done are necessary to make a riot; therefore, if three or more assemble lawfully, though they quarrel and fall upon one of their company, it is no riot; yet in this case if they fall upon a stranger it is a riot, but in those only who concur. *Reg. v. Soley*, Salk. 594, 595. *Anon.* 6 Mod. 43.

2. But if several meet upon an unlawful occasion, and a sudden affray happens between them, and a person who comes upon a lawful occasion joins in the affray, it may make him a rioter as well as the rest. *Anon.* 5 Mod. 43.

3. So, if upon a lawful meeting acts of violence ensue, this may be a riot. *Skin.* 119.

4. If several make a riot, and a man is killed, they are all principals in the murder. *Reg. v. Walkis*, Salk. 334, 335.

5. Three persons are necessary to make a riot; therefore only two cannot be guilty where four are indicted. *Reg. v. Ellis*, Holt, 637. 2 Lill. Abr. 489.

6. But though there must be more than two to make a riot, yet two only may be indicted. *Anon.* Comb. 19.

II. RELATIVE TO INQUIRIES FOR RIOTS BEFORE JUSTICES OF THE PEACE.

1. Justices of the peace may take an inquiry any where; but they must go to the place to record a conviction on view, and they should inquire and record within a month. 6 Mod. 141.

2. Where the inquiry is on view, the sheriff must be present; and though the statute appoints it shall be within a month, under a penalty, that is only mandatory, and it may be taken after. *Reg. v. Page*, 12 Mod. 123. Salk. 593. *Reg. v. Ingram*, 1 Ld. Raym. 215.

3. Justices not inquiring within the month are punishable. Salk. 593.

4. But if the rioters disperse before the view, the justices may make the inquisition without him. *Rez v. Ingram*, Salk. 593. Comb. 423.

5. And such inquisition by two justices *capt. pro domino rege* is well, and need not be *pro domino rege et corpore com.* S. C. Salk. 593.

6. But all inquisitions by the grand jury ought to be *pro corpore com.* as well as *pro domino rege.* Id. *ibid.*

[*1222] 7. * An inquisition taken before two justices of peace for a riot upon the 13 Hen. 4. c. 7., need not specially pursue the words of the statute, but may conclude generally *contra formam statuti.* *Rez v. Page*, 6 Mod. 140.

III. RELATIVE TO INDICTMENTS AND INFORMATIONS FOR RIOTS.

1. An information lies for riotously pulling down inclosures, although it be under a claim of right. *Rez v. Wyvill*, 7 Mod. 286.

2. An information lies for riotously entering the house of a tenant at will, or even at sufferance, as for a forfeiture of the term committed by the landlord. *Reg. v. Stroude*, 2 Show. 150.

3. An indictment for unlawfully and riotously entering the guildhall of a borough, and preventing the burgesses from electing a bailiff of the corporation, must show the authority of the corporation to elect such a bailiff. *Reg. v. Solely*, 11 Mod. 115.

4. On an indictment against a recorder and other members of a corporation for riotously assembling and choosing an alderman without the presence of the mayor, contrary to the charter, it is not sufficient to say "according to the privileges granted by certain letters-patent will more fully appear;" but it must directly aver that the charter was granted to the corporation, and show the deed. *Rez v. Atkyns*, 2 Show. 237.

5. An indictment stating that the defendants "unlawfully, riotously, and routously assembled themselves together, and hindered the members of a corporation from electing a bailiff," is insufficient, unless it show that the defendants assembled for an unlawful purpose, and committed an unlawful act. *Reg. v. Solely*, 11 Mod. 100.

6. An indictment against diverse persons, charging "that they unlawfully, riotously, and routously assembled to the disturbance of the peace, and with force and arms the door of a certain house, called the guildhall of the borough of B, broke, &c." is bad; for it ought to have stated whose house it was. 11 Mod. 116.

7. Indictment that JS with many others committed a riot, at, &c. is good. *Anon.* Holt, 635. 3 Salk. 317.

8. An indictment for a riot, omitting *contra formam statuti*, is good. 4 Mod. 164.

9. Where many are indicted for a riot, they may move that the prosecutor may name three or four of them, &c., and abide by that verdict. *Anon.* Holt, 635, 636.

10. If all except two indicted for a riot are acquitted, no judgment can be given; but, if it was *cum multis aliis, aliter.* *Rez v. Salisbury*, 12 Mod. 262.

11. On indictment for a riot and assault, an acquittal of the riot is so of the assault. Salk. 593.

12. A defendant in execution for a fine on a conviction for a riot, was admitted to bail on a recognizance to prosecute his writ of error with effect, or to pay his fine. *Rez v. Mayor of Saltash*, 2 Show. 94.

RIVER.

The soil of all rivers, as high as there is *fluxum et refluxum maris*, is in the king, without a prescription to the contrary. *Bulstrode v. Hall*, 1 Sid. 149. 86.

[*Vide ante*, HIGHWAY, Vol. I. p. 759.]

ROLL.

1. The roll of a precedent term ought to be filled before motion to make it a *consistium.* *Thompson v. Leach*, Salk. 565. 2 Lev. 219. S. C.

2. Plea in abatement, and judgment thereon should be entered on the issue roll, and not to make two rolls. *Dubarton v. Chancellor*, 12 Mod. 189, 190.

3. If a *scire facias* be taken out and the goods levied before judgment entered on the roll, and another *scire facias* is delivered to the sheriff upon another judgment, to which he returns *nulla bona*, and then the goods are sold under the first writ, and satisfaction entered, but the roll not filed, the court will not, on an action brought by the second plaintiff against the sheriff for a false return, give the first plaintiff, [*1223] who had indemnified the sheriff, leave to file his roll. *Herring v. Crocker*, 6 Mod. 184.

ROBBERY.

I. WHAT CONSTITUTES A ROBBERY, p. 1223.

II. RELATIVE TO THE REMEDY FOR THE PARTY ROBBED BY ACTION AGAINST THE HUNDRED, AND PROCEEDINGS IN SUCH ACTION, p. 1223.

I. WHAT CONSTITUTES A ROBBERY.

1. A taking in the presence is a taking from the person, and felony; but in a special verdict, it must be expressly found that the party robbed was present at the taking. *Rez v. Frances*, Com. 479. Stra. 1015. C. T. Hardw. 113. Post. Cr. L. 128.

2. On a special verdict in an indictment for a robbery on the highway, the words "then and there immediately," do not sufficiently ascertain the time to find the prison-

ers guilty; it must expressly find, that the party robbed was present at the taking. *Id.* *ibid.*

3. If a taking be *violenter et contra voluntatem*, though the person be not put in actual fear, it is a robbery. *Rex v. Frances*, Com. 479. note. *Sed vide* 2 Dy. 224. pl. 30.

4. J and S in company attempt to rob two, and J robs one out of sight of S; still S is a principal robber. 1 And. 116.

II. RELATIVE TO THE REMEDY FOR THE PARTY ROBBED BY ACTION AGAINST THE HUNDRED, AND PROCEEDINGS IN SUCH ACTION.

1. If A be assaulted and seized in the hundred of B, but led thence and robbed in the hundred of C, the hundred of C is chargeable. *Cooper v. Basingstoke*, 11 Mod. 8. 7 Mod. 158. Holt, 638. *Contra*, *Anon.* 1 Sid. 367.

2. If robbers seize a carrier and his horses, &c., and drive his horses into another hundred, and there rifle his wagon, this is a robbery where the first taking was. *Anon.* Holt, 639. 1 Goldsb. 155. 2 Goldsb. 280.

3. The master may sue for the robbery of his servant, and the servant's oath is sufficient. Holt, 637. *Coombs v. Hundred of Bradley*, 4 Mod. 303, 304.

4. The servant may sue if robbed out of his master's presence. Holt, 637, 638. Comb. 263.

5. A servant delivered money to a quaker to carry home for his master; they were both robbed, *viz.* the servant of 26s. and the quaker of £106; the servant made oath of the robbery, and the quaker refused; the master brought the action; he can only recover the money taken from the servant, for an oath must be made by the person robbed. *Ashcomb v. Inhabitants of Elthorn*, 3 Mod. 287, 288.

6. In an action against the hundred, the robbery need not be averred to be in the highway or in the day-time. *Young v. Hundreds of Sarum, Totum, and Mudbury*, Comb. 150. Holt, 640.

7. Notice can be given to the parish as well as to the vill. *Hall v. Hundred of Skarrock*, 2 Sid. 45.

8. The hundred is not chargeable if they apprehend the malefactors within forty days. *Cooper v. Hundred of Basingstoke*, Holt, 639.

9. In an action against the hundred, one who has lands within the hundred, but has demised them, and resides out of it, may be a witness. *Oliver v. Hundred of Wallington*, 2 Sid. 2.

10. If the hundred be sued, and it do not appear that the parish where the fact was laid to be done was in the hundred, or that it was done upon the highway, or in the day-time, yet this is helped after verdict. *Young v. Inhabitants of Totnam*, 3 Mod. 258.

[See also *ante*, tit. HUNDRED, Vol. I. p. 763.]

RULE OF COURT.

I. OF RULES IN GENERAL, p. 1224.

II. RULE FOR TIME TO PLEAD, p. 1224.

III.* RULE TO PAY MONEY INTO COURT, p. 1224. [*1224]

IV. HOW PROVED, p. 1224.

V. COSTS, p. 1224.

I. OF RULES IN GENERAL.

1. A rule of court is to be construed largely for his benefit for whom made. *Anon.* Salk. 596.

2. Sunday is not reckoned in a rule, unless the first or last. *Anon.* Stra. 86.

3. In a common action, the court will not rule the attorney to give an account where the plaintiff lives. *Braceby v. Dalston*, Stra. 705.

4. A rule nisi was granted for excessive damages, without any affidavits being filed; afterwards the chief justice died; and the court held, a new rule to show cause was necessary, founded on affidavits, without regard to the former rule. *Bolton v. Holmes*, 1 Keny. 370.

5. Service of a rule on an information at the house is not good where the defendant is gone to sea. *Rex v. Badouin*, Stra. 1044.

6. Defeating a rule of court, though by a stranger, is a contempt. *Sir J. Butler's case*, Salk. 176, 177. 596.

II. RULE FOR TIME TO PLEAD.

1. After oyer prayed, the party shall have the same time to plead after oyer given, as he had when he demanded oyer before the rules were out. *Powell v. Say*, Stra. 705.

2. To a judge's order for time, special conditions may be afterwards added by the court. *Anon.* Keny. 376.

III. RULE TO PAY MONEY INTO COURT.

When an executor or administrator sues, money is not to be brought into court, because they are not liable to costs. *Gregg's case*, Salk. 596. *Vide contra*, Stra. 796.

IV. HOW PROVED.

A rule of court is proved as an original writing. *Selby v. Harris*, 1 Ld. Raym. 745.

V. COSTS.

Costs are given on discharging a rule for a *quo warranto*. *Rex v. Carpenter*, 2 Stra. 1039.

SAILOR.

[See post, tit. SEAMAN and WAGES.]

SALE.

I. SALE OF GOODS, p. 1224.

II. SALE OF AN OFFICE, p. 1225.

I. SALE OF GOODS.

1. By 29 Car. 2. c. 3. s. 17., "no contract for the sale of any goods for the price of £10 or upwards shall be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum in

writing of the said bargain be made and signed by the parties to be charged with such contract, or their agents thereto lawfully authorized." 2 Mod. 244.

2. If A and B enter into a verbal agreement for the sale of goods, to be delivered to A at a future period, and there is neither earnest paid, nor note nor memorandum signed, nor any part of the goods delivered, this contract is void within 29 Car. 2. c. 3. *Rondeau v. Wyatt*, 2 H. Bl. 63.

3. A sale of another's goods without warranty, is at the peril of the buyer. *Cro. Jac.* 197.

4. If goods are sold upon conditions to be performed at the time of the delivery, and the goods are delivered, but the conditions not performed, trover will lie to recover them back. 2 Saund. 47 l. n. [w].

5. A felon or traitor may, after the felony or treason, and before conviction, sell *bona fide* for his sustenance, and also his chattels real or personal. *Fleetwood's case*, 8 Co. 171 a.

6. A sale of chattels *bona fide* [*1225] is good after judgment, but not after execution awarded. *Fleetwood's case*, 8 Co. 172 a.

7. A sale in market is no good plea in trover. *Cro. Jac.* 165.

8. If a horse be bought in a market, for which the vendee is to pay 10l., yet the property is not altered unless the money be paid or the horse delivered, and the vendor may afterwards sell it to another person. *Mires v. Solebay*, 2 Mod. 243.

9. In pleading a sale in market-overt, there is no need to allege toll. *Comyns v. Boyer*, *Cro. Eliz.* 485.

10. A sale of goods, though made in market-overt, may be defeated by a subsequent agreement between the parties. *Mires v. Solebay*, 2 Mod. 243.

II. SALE OF AN OFFICE.

A sale of the bailiwick of a hundred is not within the statute of 5 E. 6. c. 16. *Godbolt's case*, 4 Leon. 33.

See *ante*, tit. OFFICE, div. VI. Vol. I. p. 986.]

SALTPETRE.

The owner of the land cannot be restrained from digging and taking saltpetre. *Case of Prerogative*, 12 Co. 12.

SALVAGE.

Goods may be detained for salvage. *Hartfort v. Jones*, 1 Ld. Raym. 393. *Salk.* 654.

SATISFACTION.

1. In ejectment against several, they pleaded, that after the trespass and ejectment, it was agreed, that one of the defendants should pay to the plaintiff in satisfaction 6l. 10s. at the feast of St. Michael then

next following, and that for the payment thereof he should be bound in a bond of 13l., and pleaded performance thereof and receipt of the money; the plea was held to be good. *Peytoe's case*, 9 Co. 77 b.

2. By the rule of the common law, a right or title of freehold or inheritance could not be barred by acceptance of any collateral satisfaction; but only by release or confirmation, or some act tantamount. *Vernon's case*, 1st res. 4 Co. 1 a.

3. Where there is a condition in a deed to do a collateral act, accord with execution for money or other thing is no satisfaction to save the forfeiture; but if such condition was to pay money by accord, some other thing might be given instead of the money in satisfaction of the condition. *Peytoe's case*, 9 Co. 77 b.

4. Payment of the less sum on the day, in satisfaction of a greater, cannot be any satisfaction for the whole; but the gift of a horse, hawk, robe, &c., in satisfaction, is good. *Pinnel's case*, 5 Co. 117 a.

5. Payment of part before the day, and acceptance, may be in satisfaction of the whole; so payment of part at a different place. *Id.* *ibid.*

6. In consideration of 3l. defendant promised to acknowledge satisfaction upon the record of a recovery of 4l. which he had against him; and held the action would well lie. *Reynold v. Purchow*, *Moore*, 412. *Cro. Eliz.* 429. *S. C.*

7. An acknowledgment of a satisfaction by deed is a good bar without any thing received. *Pinnel's case*, 5 Co. 117 a. *S. C.* *Moore*, 677.

8. The defendants may plead the award of a collateral thing in satisfaction, without averring that the award is performed. *Beisloe v. Baily*, 6 Mod. 291.

9. The payment of part ought to be pleaded to be paid in full satisfaction; it is not sufficient to aver that it was accepted in full satisfaction. *Pinnel's case*, 5 Co. 117 a.

[See *ante*, tit. ACCORD, Vol. I. p. 16.]

SCANDAL.

[See *ante*, tit. LIBEL, Vol. II. p. 894, and *post*, tit. SLANDER.]

SCANDALUM* MAGNATUM.

[* 1226]

I. WHAT SLANDER COMES WITHIN THE DESCRIPTION OF SCANDALUM MAGNATUM, p. 1226.

II. WHAT PERSONS CAN HAVE THE BENEFIT OF THE STATUTE, p. 1226.

III. RELATIVE TO THE REMEDY BY ACTION, AND PROCEEDINGS THEREIN, p. 1227.

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V. PUNISHMENT, p. 1227.

I. WHAT SLANDER COMES WITHIN THE DESCRIPTION OF SCANDALUM MAGNATUM.

1. An action lies on the statute of 2 Rich. 2. c. 5, for saying of a peer of the realm, that he is an unworthy person, and does things against law and reason. *Lord Townsend v. Dr. Hughes*, 1 Mod. 233. 2 Mod. 152.

2. To say to a nobleman, "you are not for the king, but for sedition, and for a commonwealth, and by God we will have your head at the next session of parliament," is actionable. *Earl of Shaftesbury v. Lord Digby*, 2 Mod. 99.

3. An action of scandalum magnatum lies for saying of the king's brother and presumptive heir to the crown, "he has burned the city and is now come to cut our throats." *Duke of York v. Pilkington*, 2 Show. 246. See also 12 Co. 132.

4. So, for the words "I do not know but my lord of P sent G to take my purse." *The Earl of Peterborough v. Mardant*, 1 Vent. 59. 1 Sid. 434.

5. Action on the statute *de scandalis magnatum* lies for saying, "the lord of L is a wicked and cruel man, and an enemy to the reformation in England." *Lord Leister v. Nandy*, 2 Sid. 21. 30.

6. To say of an earl "you like those who maintain sedition," has been held actionable upon this statute, for it touches him in his dignity and honour. *Lord Cromwell's case*, 2 Mod. 157.

7. To say, speaking of a particular nobleman, "my lord is a base earl and a paltry lord, and keeps none but rogues and rascals like himself," is actionable. *Lord Lincoln's case*, 2 Mod. 157.

8. So, to say of a duke that "he has no more conscience than a dog." *Duke of Buckingham's case*, 2 Mod. 157.

9. So, to say "he is no more to be valued than the black dog which lies there." *Marquis of Dorchester's case*, 2 Mod. 157. 1 Sid. 232.

10. In scandalum magnatum, for saying "you like not of me, since you like those that maintain sedition against the queen's proceedings," the defendant justified by showing the occasion of speaking the words, and that the plaintiff, encouraging men to preach against the common prayer, he only meant that he liked of those who maintained sedition *excusando seditiosam istam doctrinam* against the queen's proceedings; held that this was a sufficient extenuation of the words. *Lord Cromwell v. Denny*, 4 Co. 12 b.

11. An action of scandalum magnatum will not lie for bringing a writ of forger of false deeds against a peer; more especially while that writ is pending. 3 Dy. 285, pl. 37.

12. Or, though he be found not guilty. Hob. 266.

II. WHAT PERSONS CAN HAVE THE BENEFIT OF THE STATUTE.

1. By the statute *de scandalis magnatum*,

(2 Rich. 2. c. 5,) "it is straitly defended, upon grievous pain, that none devise, speak or tell any false news, lies, or other such false things, of prelates, dukes, earls, barons, or other great men, &c., whereof discord or any slander may arise within the realm." 2 Mod. 98.

2. Slander spoken of the king is punishable under West. 1. c. 34. only, and not under 2 or 12 Rich. 2. which extends only to great men, nobles, &c. 2 Dy. 155. pl. 9.

3. Words spoken of a peer or bishop may bear an action, though they will not if spoken of a common subject. *Walgrave's case*, 1 Leon. 336.

4. Peers of Scotland after the union are entitled to this action. *Falkland v. Phippe*, Com. 439.

5. So, a baron of the exchequer is entitled to this action, though the statute* only mentions justices of the one [*1227] bench or the other. S. C. Com. 440. note.

III. RELATIVE TO THE REMEDY BY ACTION AND PROCEEDINGS THEREIN.

1. The party grieved may have an action *de scandalo magnatum*, and recover damages. *Earl of Northampton's case*, 12 Co. 132.

2. The action is not a mere action on the case, but is founded on the statute of Rich. 2.; and is not limited as to time. 1 Keb. 514. pl. 93. 2 Saund. 101. c.

3. An action on the statute of scandalum magnatum must be *quis tam*. *Cromwell v. Denny*, 4 Co. 12 b. 2 Saund. 101. c. *Anon.* Holt, 611. 2 Mod. 166. S. P.

4. The court will not order special bail in an action on the statute 2 Rich. 2. c. 5. *Marquis of Dorchester's case*, 2 Mod. 216.

5. The court will not change the venue in an action of scandalum magnatum upon the usual affidavit. *Duke of Buckingham v. Hatherington*, 2 Show. 96. Carth. 400.

6. But special cause must be assigned. *Duke of Richmond v. Coetelowe*, 11 Mod. 234.

7. This statute *de scandalis magnatum* is a general law, of which the judges will take notice without pleading; but in an action upon this statute if the act be set forth, a misrecital in a material point as *nuncia* for *mendacia*, is fatal. *Lord Cromwell v. Denny*, 4 Co. 12 b. *Earl of Shaftesbury v. Lord Digby*, 2 Mod. 98.

8. But a misrecital of the preamble of the statute in a part not material to the point in question, will not vitiate the pleadings in an action on this statute. *Earl of Shaftesbury v. Lord Digby*, 2 Mod. 100.

9. As the plaintiff upon this statute must sue as well for the king, as for himself, it has been said that the defendant can only explain the words, but cannot justify them. *Lord Townsend v. Dr. Hughes*, 2 Mod. 166, 167.

10. The court will not grant a new trial in an action upon this statute, on account of excessive damages. 8 C. 2 Mod. 150. 1 Mod. 232.

11. No writ of error lies to the Exchequer Chamber. 2 Saund. 101 c. 1 Sid. 143. *Ld. Stamford v. Needham*, 1 Keb. 514. pl. 93.

IV. RELATIVE TO THE REMEDY BY INFORMATION OR INDICTMENT.

1 The commissions of oyer and terminer give authority to inquire *de illicitis propalationibus*. *Earl of Northampton's case*, 12 Co. 132.

2. An information lies for scandalous words spoken of a deceased king's advancing pernicious doctrines. *Reg. v. Taylor*, 2 Ld. Raym. 879.

3. An indictment for slandering the king, *contra formam statutorum diversorum*, and without saying "whereby scandal might grow, &c.," is good. 2 Dy. 155. pl. 19.

V. PUNISHMENT.

1. The offence of scandalizing a peer was at common law punishable by pillory and loss of ears. 2 Mod. 162.

2. The judgment in an indictment upon the statute 5 Rich. 2. c. 6. and 17 Rich. 2. c. 8. concerning rumours, when the words are spoken generally, without relation to a certain author, is, that the offender shall be fined and imprisoned. *Earl of Northampton's case*, 12 Co. 132.

SCHOOL.

1. By 1 Jac. 1. c. 4. s. 9., no person shall keep any school except a public or free grammar school, &c., except the same be specially licensed by the bishop. *Bates v. Kendal*, 1 Mod. 3.

2. By 19 G. 3. c. 44., no dissenter shall hold the mastership of any college or school of royal foundation founded since the 1 Will. & Mary. 1 Mod. 3.

3. A schoolmaster must be licensed by the bishop, and may be punished in the spiritual court for keeping school without a license. *Matthews v. Burdett*, 3 Salk. 318.

4. But an indictment for keeping a school without license was quashed, because it does not lie. *Rex v. Douse*, 1 Ld. Raym. 672.

5. The master of a free grammar school ought not to be licensed until the bishop is satisfied of his learning and* [*1228] character. *Rex v. Bishop of Litchfield*, 7 Mod. 218.

6. The bishop may take time to inquire into the character of one elected schoolmaster before he licenses him. *Stra.* 1023.

7. A person may set up a school, although it be to the prejudice of another school previously established in the same place. *Yard v. Ford*, 1 Mod. 69.

8. An assignment to a schoolmaster was held a breach of covenant, not to suffer any

trade or business to be carried on. 1 Saund. 288 a. n. [a].

SCIENTER.

The averment called a scienter, as, the knowing a deed to be forged, or that a dog was accustomed to bite sheep, &c., is not traversable, but must be found in evidence upon the general issue. *Gerard v. Dickenson*, 4 Co. 18 a.

SCIRE FACIAS.

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I. RELATIVE TO THE WRIT OF SCIRE FACIAS IN GENERAL ;—

(a) *Nature of it.*

1. A scire facias is a judicial writ, and considered in law an action. 2 Saund. 6 a. 71. 2 Ld. Raym. 1048. 3 Mod. 187.

2. It is in the nature of a new original. 2 Saund. 71.

3. And therefore, there must be a new warrant of attorney, and for want of it, a judgment on a scire facias against bail was reversed. Salk. 603. 2 Ld. Raym. 1048. 1253. 2 Saund. 71.

4. There is no necessity for an order to change the attorney. 2 Saund. 71.

5. It is an action within 17 G. 3. c. 26. 2 Saund. 71 a.

6. It is to some purposes only a continuation of a former suit. *Id.* *ibid.*

7. Where a scire facias is an original and not a judicial writ, that is, where it is not founded on any judgment or judicial process, as where it is brought to repeal letters patent, it will not abate upon the demise of the crown. *Vincent v. Atwood*, 10 Mod. 258, 259. 355.

8. In scire facias on ejectment, the original title may be controverted; *aliter* on a judgment in debt. *Anon.* 12 Mod. 499.

(b) *Form of the writ.*

1. If the scire facias bears teste the day the *cs. sc.* is returnable, it is well enough. *Tevon v. Turner*, Prac. Ca. K. B. 204.

2. If a scire facias be tested on a Sunday, it is error. *Barrel v. Heydorn*, 2 Dy. 168. pl. 17.

3. A scire facias must be returnable at a common return, or at a day certain, as the original proceedings are. *Eden v. Wills*, 2 Ld. Raym. 1417.

4. A scire facias upon a judgment by original may be returnable *ubicunque*, &c., or at a day certain. *West v. Sutton*, 2 Ld. Raym. 854.

5. A scire facias returnable at the next parliament is good. 1 Mod. 106.

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6. If it be made returnable on a Sunday, it is void. *Prime v. Mason*, 11 Mod. 120. *Sed vide* 1 Show. 60.

(c) *Practice respecting a scire facias.*

1. Fifteen days between the test and return of two scire faciases inclusive, are sufficient. *Goodwin v. Bearbank*, Com. 53. 12 Mod. 215. S. C.

2. Not having fifteen days between the teste and return is aided by statute 16 Car. 1. W. Kely. 74.

3. The scire facias must be left four days in the sheriff's office. *Ball v. Potter*, Prac. Ca. K. B. 200.

4. Exceptions to a scire facias are not maintainable, unless the original summons be exhibited to the court. *Moco v. Whiting*, Keny. 373.

5. The venue cannot be changed in scire facias upon a judgment in ejectment. *Foster v. Burden*, 11 Mod. 263.

6. The scire facias in error need not lie four days in the sheriff's office. *Miller v. Yerraway*, 3 Burr. 1723. Prac. Ca. K. B. 205. S. C. *Gross v. Nash*, 4 Burr. 2439.

(d) *Respecting the issuing of several writs.*

1. Two scire faciases of the same teste, but with several returns, are good. *Austin v. Crisby*, 7 Mod. 138, 139.

2. It is the constant practice in B. R. to sue both the scire faciases at once, in regard that there ought to be a full time between the date of the second scire facias and the return of it; and in C. B. there is but one scire facias, except in the case of an executor. *Barney v. Hardisty*, Skin. 633.

3. There should be fifteen days inclusive between the teste of the first, and return of the last. *Goodwin v. Peck*, Salk. 599. Com. 53. S. C.

4. If an *alias* scire facias issue before the first scire facias is returned, it is a discontinuance. *Atwood v. Burr*, 7 Mod. 5. *Anon.* Ib. 50. 96.

5. Two scire faciases cannot be taken out with the same teste, but with different returns; the one returnable within fifteen days of St. Hilary, and the other on the morrow of the Purification. *Jevon v. Turner*, 6 Mod. 86. Prac. Ca. K. B. 204.

6. Two *nilis* are equivalent to a scire feci. 2 Saund. 72 g.

7.* After two *nilis*, the court [*1230] will relieve on motion, if the defendant comes in in a reasonable time. *Whorton v. Richardson*, Stra. 1075.

8. If a scire facias is brought upon a recognizance, and execution is awarded, there may be another scire facias upon the same recognizance. *Anon.* Com. 32.

(e) *Plea.*

1. A defendant may plead to a scire facias as he can to other actions. *Alice v. Gale*, 10 Mod. 112. 2 Saund. 6 a. 71.

2. But a man cannot plead to a scire facias

matter which avoids or abates the writ. *Philips v. Fowler*, Com. 525. *Sed vide* 10 Mod. 112.

3. A scire facias is barred by a release of all actions. 2 Saund. 6 a.

4. But a release of a recognizance, *ante emanationem scire facias*, is an immaterial plea. *Rogers v. Wood*, 10 Mod. 87.

5. Error *coram vobis* is no plea to a judgment on a scire facias. *Vales v. French*, Comb. 12.

6. Nor error in Cam. Scac. Comb. 394.

7. A plea in abatement of a writ of error depending, is not good to a scire facias. *Dighton v. Granvil*, 4 Mod. 248.

8. To a scire facias, the plea in bar is concluded with an *executio non*, as in other cases by an *actio non*. 10 Mod. 112.

(f) *Judgment* ;—

1. Nature of it.

1. Though a judgment in scire facias does not alter the nature, yet it changes the property, of the debt, and debt may be brought upon an award of execution. *Barney v. Hardisty*, Skin. 683.

2. A judgment upon a scire facias is a distinct action from the original cause. 3 Mod. 180.

2. Debt on the judgment.

Debt will lie upon a judgment had on *scire facias*. 8 Mod. 188, 189.

3. Error on the judgment.

1. A scire facias is not one of those actions wherein a writ of error is given in the Exchequer Chamber. Hob. 72. Cre. Car. 286. 300. 464. *Harlop v. Holt*, 12 Mod. 105.

2. But error will lie to the Exchequer Chamber on a scire facias in any action within the statute of 27 Eliz. c. 8. *Skinner v. Webb*, 1 Mod. 79. 2 Keb. 833.

3. In error on scire facias upon a judgment, the principal cannot assign error against the bail. *Spencer v. Monke*, Prac. Ca. K. B. 49. 1 Keb. 256.

(g) *Respecting the quashing or setting aside a scire facias*.

1. A scire facias may be quashed any time before a plea, without paying costs. *Pool v. Broadfield*, Ca. Prac. C. P. 109.

2. A scire facias was abated, because it was *sicut per inspectionem recordi nobis constat*, instead of *prouit patet per recordum*. *Guilliam v. Hardy*, 1 Ld. Raym. 216.

3. Where a scire facias is a judicial writ, it will not abate for want of form. *Shuttleworth v. Patterson*, 10 Mod. 270, 271.

4. Where scire facias issues upon an interlocutory judgment signed after the death of the defendant, it may be set aside. *Sibbet v. Russell*, C. T. Hardw. 183.

(h) *How affected by a writ of error*.

A scire facias is suspended by writ of error; and if the original judgment be reversed, that is also. 3 Mod. 187.

(i) *Costs*.

1. Costs are allowed, whether defendant plead or not. 1 Saund. 58 f.

2. The court may give costs on a scire facias after plea pleaded, but not damages *occasione dilationis*. 2 Ld. Raym. 1534.

3. Costs are payable in K. B. by plaintiff, on quashing his own right. 2 Saund. 72 v.

4. If a defendant has appeared to or pleaded in abatement of a scire facias, he shall have no costs. *Pocklington v. Peck*, 6 Mod. 137, n.

5. The defendant is not entitled to costs under the statute 8 & 9 W. 3. c. 11. on a judgment in scire facias being arrested. *Adams v. Savage*, 6 Med. 137.

6.* No costs are allowed, unless the executor appears and [*1231] pleads to the scire facias. 1 Saund. 219 a.

II. RELATIVE TO THE SCIRE FACIAS AGAINST BAIL;—

(a) *Nature of it*.

A scire facias on a recognizance of bail is a judicial writ. *Weddel v. Jocar*, 10 Mod. 306.

(b) *Form of the writ, and practice relating to it*.

1. There need not be fifteen or fourteen days between the teste and the return of the scire facias. *Naers v. Huntington*, Lutw. [12]. Ca. Prac. C. P. 114.

2. There must be seven days between the teste and return. *Gifford v. Smith*, Prac. Ca. K. B. 49.

3. There must be eight days between the teste and return, when against the principal, in order to charge the bail. *Bail v. Russell*, Salk. 602.

4. Proceedings against the bail were stayed because there were only four days between the teste and return of the scire facias brought by the executor against the principal. *Bond v. Turner*, 8 Mod. 305.

5. There must be fifteen days inclusive between the teste of the first, and the return of the second scire facias. *Price v. Lewis*, Ca. Prac. C. P. 114. 8 Mod. 227. *Hutchinson v. Cooper*, Prac. Ca. K. B. 202. *Elliot v. Smith*, Stra. 1139.

6. The first must be duly returned before the second is issued out; (and it ought to be four days in the office). *Andrews v. Harper*, 8 Mod. 227, 228.

7. The first scire facias against bail may bear teste the same day that the *ca. se.* is returnable. *Stewart v. Smith*, (*bail of Ranger*.) 2 Ld. Raym. 1567. 2 Str. 866. S. C.

8. A scire facias on a recognizance cannot bear teste the same day that the party makes default. *Rex v. White*, Stra. 1220.

9. In C. P., there is but one scire facias against bail, but there are two in K. B., and the first must be returned *nilil* before the second issues, &c. *Andrews v. Harper*, 8 Mod. 227.

10. A scire facias against an administrator was tested 24th Oct., and returnable 31st Oct., and an *alias sc. fa.* tested 31st Oct., and returnable 7th Nov., it was objected, that these writs were irregular, because there were not fifteen days exclusive between the 24th October and the 7th Nov., but adjudged well, there being eight days exclusive between the teste and return of each writ. *Goodwin v. Beakbean*, Carth. 468.

11. The filazer makes out the first scire facias, the prothonotary the second. *Follett v. Tock*, 2 Barnes, 75, 76.

12. In scire facias upon a recognizance, there must be two *nihil* returned: so, to have a charter or pardon of outlawry allowed; but upon judgment against defendant himself, one *nihil* suffices, though there must be two against his executor. *Barret v. Claydon*, 2 Dy. 168. pl. 17.

13. When the scire facias is against bail, upon a writ of error, the judgment being affirmed in the King's Bench, the recognizance must be removed by a *certiorari*. *Barrisdale v. Drew*, 4 Mod. 104.

(c) *When it lies.*

1. Debt lies not against bail on a recognizance for not rendering the body at the day of appearance, but only a scire facias. 1 Keb. 97. pl. 87.

2. Scire facias does not lie against them until a perfect judgment is had against the principal. *Thatcher v. Dampford*, 2 Leon. 1, 2.

3. Scire facias against bail to the action cannot be had until a *ca. sa.* against the principal be issued, and *non est inventus* returned. 2 Saund. 71 c. *Sparkes v. Colt*, Lutw. 1273. 1 Lev. 225. Palm. 567. 2 Leon. 30.

4. Bail are not chargeable by any custom without a scire facias. *Devered v. Ratcliffe*, 2 Leon. 30. 87. Palm. 567.

5. So a custom to sue a *fieri facias* against him, or against him and principal together, is void without a *capias*, and scire facias against the principal. *Beach v. Thorne*, 3 Mod. 209. pl. 11. *Plaw v. Richards*, Palm. 567. 2 Leon. 30. 87.

6. But if there be a *capias* upon the return, though it be not filed, it is good. *Gee v. Fane*, 1 Lev. 225.

(d)* *Parties to the writ.*

[*1232] 1. A scire facias may be brought against the survivor of two bail upon a recognizance; otherwise upon a judgment, for there it is joint. *Trevina's case*, Skin. 100.

2. Upon a recognizance, it ought to be brought against the tenant of the frank-tenement. 2 And. 161.

3. A scire facias against the terre-tenants of a cognizor of a recognizance in Chancery ought to be against all of them. *Jefferson v. Morton*, 2 Saund. 23.

4. A scire facias against three bailees upon a recognizance acknowledged jointly, is not

good; otherwise in debt upon a bond, for there the defendants ought to show that the parties were in full life at, &c. *Blackwell v. Ashton*, Ayley, 21.

5. A scire facias lies against the executor of bail, as well as against the bail themselves. *Anon.* 2 Show 310.

(e) *In what county it should be brought.*

1. The first scire facias upon a recognizance to have execution ought to be in the county where it was acknowledged. *Eyres v. Taunton*, Cro. Car. 313.

2. A scire facias against bail in B. R. must be brought in Middlesex only; *aliter* in C. B. *Moor v. Garret*, Salk. 564. 600.

3. On a recognizance taken in Yorkshire, it may be brought either there or in Middlesex. *Redman v. Idle*, Lutw. [536.]

4. On a recognizance taken in London and recorded at Westminster, the scire facias may issue either in London or Middlesex. *Cock v. Green*, Ca. Prac. C. P. 31.

5. A scire facias directed to the sheriff of Middlesex will not lie on a recognizance taken at a judge's chamber in London; though if it be enrolled at Westminster, the party has election. *Palmer v. Byfield*, 8 Mod. 290.

6. So where the caption of the recognizance is in another county, and afterwards enrolled in Middlesex, the scire facias may be in either county. *Follett v. Trill*, 2 Barnes, 74, 75. 168.

7. But where the caption is in Middlesex, the scire facias must be there also. *Follett v. Trill and Bowen*, 2 Barnes, 74, 75. Ib. 168.

(f) *In what court.*

1. A scire facias lies in B. R. upon a recognizance removed out of C. B. *Drew v. Barsdell*, Comb. 199.

2. A scire facias in B. R., on a recognizance in the Common Pleas, was held good, as being rather an advantage to suitors; because no writ of error lies from thence upon such scire facias but in parliament. *Drew v. Bankside*, 1 Show. 344, 345.

3. A scire facias does not lie in C. B. on the transcript of a recognizance taken in Chancery. *Anon.* 2 Dy. 217. pl. 1.

4. But in a scire facias on a recognizance in Chancery, if the record be transmitted into B. R. to try the issue, and the plaintiff be non-suited, he may well bring a new scire facias in B. R. on the record there. *Jefferson v. Morton*, 2 Saund. 27.

5. On a recognizance in B. R., scire facias lies there before it is estreated into the Exchequer. *Hunt's case*, Comb. 385.

(g) *Service of it.*

1. It may be served at any time before the rising of the court upon the return-day. *Obrian v. Frazier*, Stra. 644. *Bland v. Perry*, Barnard, K. B. 344.

2. A scire facias against bail must be in the sheriff's hands a convenient time; it must lie four days before the return, as well when

scire feci is returned as *nihil*. *Anon.* Salk. 599. note. *Williams v. Mason*, 1 Str. 644.

(h) *Relative to amendments.*

A scire facias against bail cannot be amended. *Cary v. Jefferson*, 7 Mod. 461. Stra. 1165. Cro. El. 855.

[See ante, tit. AMENDMENT, div. (gg.) Vol. I. p. 64.]

(i) *Declaration.*

1. In scire facias against bail in B. R., the year and term of the recognizance need not be shown. *Pentrye v. Trippett*, 2 Ld. Raym. 789.

2. If the scire facias set forth "although plaintiff recovered judgment," without averring he did recover, it is sufficient.* *Maltravers v. Adlam*, 1 Barnes, 310.

3. So, though recognizance was at the suit of J M., and the judgment was J M., junior, held good on demurrer. 1 Barnes, 310.

4. Scire facias upon a recognizance stating that they or either of them acknowledged to owe 40*l.*, to be raised of the goods, &c. of them or either of them, is good. *Fanshaw v. Morrison*, 6 Mod. 197.

5. It is not necessary to set forth the awarding of a *capias* against the principal. *Vincent v. Atwood*, 10 Mod. 257.

6. A scire facias on a recognizance was *quare, &c. in forma præd. recogniti (secundum formam recuperationis præd.)*; these words were held repugnant and void. *Nærs v. Huntington*, Lutw. [12].

7. In a scire facias against one of two persons, as the bail of one defendant in a joint action against two, an averment that he had not paid is sufficient. *Cresley v. Darling*, 2 Show. 147.

8. A scire facias on a recognizance of bail, assigning a breach that the defendant did not pay nor render *prisone mar. maresch. nostræ*, held sufficient. *Bail v. Manucaptors of Russel*, Salk. 602.

(j) *Oyer.*

The defendant demanded oyer of the writs of scire facias and of the recognizances, and the recognizance was entered in *hæc verba*, whereby it appeared that they were bail for O, at the suit of the plaintiff, not administrator; but the judgment was for him as administrator; yet held good. *Baxter v. Peach*, Lutw. [534, 535].

(k) *Pleas;—*

1. *What are good.*

1. *Nul tiel record* of the recognizance or of the judgment against the principal may be pleaded. 2 Saund. 72 s.

2. So, a satisfaction or release to the principal, but not a parol agreement. 2 Saund. 72 s. ib. n. [1].

3. Bail to the action may plead usurious contract. *Anon.* 12 Mod. 493.

4. Or payment. 2 Saund. 72 s. 3 Kel. 70. pl. 13.; 349. pl. 5.; 212. pl. 18.

5. No *ca. se.* issued. *Prac. Ca. K. B.* 51. 2 Saund. 72 s.

6. Death or render of principal before the return of the *ca. se.* 2 Saund. 72 s. 72 t. 10 Mod. 269. 12 Mod. 601.

7. A plea of caption and escape of the principal must show out of what court the writ issued. *Pryn v. Smith*, 1 Mod. 19.

8. Bail may plead they are not the same persons bound, but others of the same name. 3 Keb. 771. pl. 10.

2. *What are not.*

1. The principal and bail cannot join in a plea to the scire facias. *Addison v. Patterson*, 8 Mod. 289, 290.

2. Plea by bail that plaintiff had arrested the principal in execution in the Stannary court, whereby they could not have his body, held bad. *Marshall v. Vincent*, Moore, 400.

3. Where a *non est inventus* is returned to a *ca. se.* against the principal, the bail cannot plead a render, but must be relieved by rule upon motion. *Wismore v. Clerk*, 1 Ld. Raym. 156.

4. Bail cannot plead render after two *nihilis*, or second scire facias. 1 Keb. 450. pl. 39.

5. In a scire facias against bail upon a writ of error, if the bail plead that the principal rendered himself before judgment, it is bad; for the bail are liable not only to render the body, but to pay the debt. *Pawley v. Ludlow*, 3 Mod. 87.

6. It is no plea to discharge the bail, to say that the defendant is taken in execution. *Astree v. Paulfreyman*, T. Jones, 74. 8 Mod. 195.

7. Bankruptcy of the principal is no plea either to scire facias or debt. 2 Saund. 72 s.

8. Bail cannot plead satisfaction by bankrupt in bar against assignee in scire facias. 2 Keb. 706. pl. 74.

9. Proceedings were stayed by injunction above two terms after the bail were put in, and before the declaration delivered; but this was held to be no plea to a scire facias brought against them. *Doc v. Dawson*, 3 Mod. 274.

10. A writ of error pending. *Anon.* Comb. 295.

11. Death of principal before the issuing of the *ca. se.*; not after the return. 2 Saund. 72 s. t.

12. Nor before the return of the second* scire facias. *Anon.* [*1234] 12 Mod. 601, 602.

13. Bail cannot plead death generally, without confining it to some time; so it is bad to say *ante emanationem brevis*. *Weddall v. Jocar*, 10 Mod. 267, &c. 303, &c.

14. The defendant pleaded that the principal died before the return of the *capias ad satisfaciendum*, which might be the *alias capias*; it should be before the return *alicujus capias*. *Rex v. Sharp*, 5 Mod. 167.

15. Plea of payment by the principal bo-

fore the return of the second scire facias held ill, for the recognizance is forfeited before suing out the first. *Conier v. Bail of Rawlin*, 12 Mod. 112. *Wilmore v. Clerk*, 1 Ld. Raym. 157.

16. Bail cannot plead less paid in satisfaction of a judgment to the plaintiff than the sum was. *Holmes v. Bail of Browne*, 2 Lev. 212.

17. Payment according to the recognizance is no good plea, unless pleaded by record. 2 Leon. 213. *Ordway and Parrot's case*, Prac. Ca. K. B. 194.

18. If bail render their principal before a judge, and he immediately make his escape, the court, on a scire facias against the bail, will order the bail-piece to be filed, to prevent the plea of *nul tiel record*. *Anon.* 7 Mod. 52.

(1) Replication.

1. If "a *capias* against the prisoner" be pleaded, a replication showing a *capias* sued out after the expiration of a year and a day from the giving of the judgment, is good, although no scire facias appear. *Cholmley v. Neal*, 6 Mod. 305.

2. That a *capias* issued, without alleging it was delivered to the sheriff, makes a good issue. 3 Keb. 688. pl. 47.

(m) Judgment.

1. On a scire facias upon a recognizance in Chancery, if there be demurrer as to part, judgment must be given in the King's Bench upon the whole record. *Jefferson v. Dawson*, 1 Mod. 29.

2. On a scire facias against the bail jointly, a several judgment may be entered against each. *Clark v. Cornish*, 8 Mod. 99.

3. Judgment *quod recuperet debitum* for *quod habeat* in execution, held ill against bail. 3 Keb. 60. pl. 44.

4. Bail cannot be amerced. 3 Keb. 60. pl. 44.

III. RELATIVE TO THE SCIRE FACIAS AGAINST THE PLEDGES IN REPLEVIN.

1. A replevin in an inferior court by plaintiff being removed into the court of King's Bench, the plaintiff was nonsuited, a scire facias lies against his pledges. *Darlington v. Edwin*, 3 Mod. 68. 2 Show. 485. Comb. 1.

2. It is not necessary to sue a scire facias against the pledges in replevin, in order to entitle the party to bring an action on the case against the sheriff for taking insufficient pledges. *Rouse v. Patterson*, 7 Mod. 387.

3. A scire facias against the pledges in replevin is in the nature of a declaration, and amendable. *Welder v. Buckler*, 8 Mod. 313, 314.

IV. TO REMOVE AN OFFICER.

1. An officer of record cannot be removed even by the king for a forfeiture without scire facias. *Anon.* 2 Dy. 198. pl. 50.

2. Where two distinct matters of record amount to an office, there ought to be a scire

facias before the king seizes, unless in special cases. *Reynel's case*, 9 Co. 95 a.

3. In all cases where a common person is put to his action, an office found, the king is put to his scire facias; but when a common person may enter or seize an office without, a scire facias shall suffice for the king. *Id.* *ibid.*

4. P having the office of marshal of the Marshalsea for life, the king granted it in reversion for thirty-one years to E and his assigns, who assigned it to S; P died; S made R his deputy at will, and afterwards assigned the said office to him by force of a commission under the great seal and returned into Chancery; it was found that R had committed divers forfeitures of the said office, by suffering voluntary escapes of prisoners, &c.; it was held that the king might seize the office without a scire facias, and that the grant for years of the office was void. *Id.* *ibid.*

5. If a sheriff suffer goods to be [*1235] rescued, a scire facias lies against him after he is out of office. *Clerk v. Withers*, 11 Mod. 35. n.

6. If a scire facias be brought against the master of the crown-office, to inquire whether he ought to hold his office, he is, on issue joined thereon, entitled to a trial at bar. *Anon.* 6 Mod. 123.

V. TO REPEAL A PATENT.

1. A scire facias is the proper remedy to repeal a patent. 3 Lev. 220.

2. When a patent is prejudicial to the subject, a scire facias is held to be writ of right. *Vincent v. Atwood*, 10 Mod. 260. 354.

3. Where there are two patents of the same office, the last patentee may be removed by a scire facias sued out by the first patentee. *Anon.* 2 Dy. 198. pl. 50.

4. But the last patentee shall not have a scire facias to repeal the first patent, though he seem to have right. *Basset v. C. of Tarringham*, 3 Dy. 276. pl. 52.

5. Scire facias lies by the first patentee to repeal a subsequent patent of the office of parkership. *Hunt v. Coffin*, 2 Dy. 197. pl. 45.

6. So, by a bailiff of inheritance to repeal a patent of that office. *Penwarren v. Thomas*, 2 Dy. 198. pl. 49.

7. It lies to repeal a patent of auditorship forfeited for not passing his accounts according to act of parliament. 2 D. 197. pl. 46.

8. To repeal the patent of king's remembrancer in the Exchequer. *Rex v. Blage*, 2 Dy. 197. pl. 47.

9. So, of serjeant at arms for non-attendance. *Rex v. Eaton*, 2 Dy. 198. pl. 48.

10. A scire facias may be sued out by any person who is injured by a patent, as well as by the king. *Brewster v. Weld*, 6 Mod. 230.

11. When a scire facias to repeal a patent is sued by the king, the cause of forfeiture is inserted; *contra*, at the suit of a subject. *Anon.* 3 Dy. 198. pl. 50.

12. A scire facias to repeal a grant of a mark is not abated by the demise of the crown. *Rez v. Eyre*, Stra. 43.

VI. ON REVERSING A COMMON RECOVERY.

1. Upon a writ of error to reverse a common recovery, it was moved that a scire facias be granted against the terre-tenants, and adjudged to be a settled rule to grant a scire facias in such case. *Earl of Pembroke's case*, Skin. 273. Carth. 111.

2. A scire facias ought to go to all the terre-tenants before a common recovery is reversed; but the granting of this writ is merely discretionary, and not of right. *Kingston v. Herbert*, 2 Show. 505. Carth. 111. S. P.

VII. TO OBTAIN RESTITUTION.

1. After a fine or recovery reversed between the parties to the record, the party that reversed cannot enter till a scire facias be sued against the terre-tenant, or two *nilhils* returned. Cro. Eliz. 472.

2. On restitution awarded on reversal of judgment, a scire facias should go against the terre-tenants. *Dillon v. Walcot*, 12 Mod. 407.

3. On a scire facias to have restitution to lands extended by an *elegit*, *et quod* the defendant *recuperet residuum debiti et damni*, not levied, it would be sufficient for the plaintiff to say that he was ready to pay the said residue, without tendering it in court. *Semb.* 2 Saund. 72.

4. If A obtain judgment against B, and sue out a scire facias, on which the sheriff takes the goods of B in execution, the debt is discharged by such seizure; and if A die after such seizure, and the sheriff be removed before the sale, the succeeding sheriff may compel his predecessor to sell them, and therefore B cannot sue out a scire facias against him, to have restitution of the goods, for the death of A does not abate the execution. *Clark v. Withers*, 6 Mod. 290.

5. A man acknowledges a statute, and afterwards grants a rent; the statute is satisfied; the grantee of the rent may distrain without suing a scire facias. March, 124. pl. 203; 159. pl. 230; 207. pl. 247.

6. If a term be taken upon an *elegit* for 100*l.* delivered to the party, a scire facias* does not lie to have restitution upon a surmise that the plaintiff has levied the 100*l.* out of the profits. *Comyn v. Bradlyn*, Mo. 873.

VIII. TO HAVE EXECUTION;

(a) In what actions it lies.

1. At common law, a scire facias would not lie upon a judgment in a personal action. *Adams v. Terre-tenants of Savage*, 3 Salk. 321.

2. A scire facias lies upon a judgment after a year and a day, by virtue of the statute Westminster the second. *Dighton v. Granvil*, 4 Mod. 248.

3. If a man has an annuity by deed or prescription, and brings his writ of annuity, and has judgment, so long as this judgment re-

mains in force he never shall have a writ of annuity, but a scire facias on that judgment. *Higgen's case*, 6 Co. 43 b.

4. The statute extends to ejectments. 2 Saund. 72 b.

5. Scire facias lies to have execution where the party taken in execution by *capias* escapes and rescues himself. *Semb. Robinson v. Cleagton*, Cro. Car. 240. 255.

6. Scire facias does not lie upon the tenor of a record, but an original writ of debt only. *Anon.* 3 Dy. 369. pl. 52.

7. Fine *come ceo* levied by a man and his wife for three, who grant and render back an estate tail to the wife, remainder to themselves in tail upon the death of the wife without issue; a scire facias lies to execute the remainder in tail. *Wikes v. Bulcocke*, 1 Dy. 69. pl. 32.

8. It lies not to recover costs and damages in dower after the demandant's death before judgment. *Mordant v. Thorold*, 3 Lev. 275.

9. A scire facias will not lie for costs without showing that the judgment was affirmed in the Exchequer Chamber. *Anon.* 8 Mod. 73.

10. Where, after judgment in ejectment, the term expires, the tenant cannot bring a scire facias *quare executionem habere non debet* of the land, but he may have a scire facias for damages and costs. Skin. 161.

(b) Nature of the proceeding.

1. It is not an original but a judicial writ, and depends upon the first judgment. *Obrian v. Ram*, 3 Mod. 187. Com. 187.

2. As it is founded upon the judgment, it ought to pursue it. *Bodmyn v. Child*, Com. 187.

3. A scire facias against a plaintiff in error is only to compel an assignment of error. *Anon.* 7 Mod. 49.

4. It is no more than a writ of execution. *Anon.* Com. 32.

(c) When necessary.

1. Scire facias to execute judgment in a personal action arises from two things; laches of time, and change of the parties to the record. *Law v. Todhill and Rawlins*, Carter, 124. *Anon.* 11 Mod. 2. *Rez v. Ford*, 2 Ld. Raym. 768.

2. A scire facias must issue to the terre-tenants before a common recovery shall be reversed by writ of error. *Kingston v. Herbert*, 3 Mod. 119.

3. The rule that a judgment above a year old must be revived by scire facias, before execution can be taken out on it, explained. *Booth v. Booth*, 6 Mod. 288. n.

4. Formerly notice seems to have been sufficient. *Mumpersons v. Gates*, 2 Ro. 42.

5. Execution cannot be had after a year without a scire facias, though the plaintiff has been delayed by an injunction. *Symson v. Gray*, Stra. 301. 1 Barnes, 132.

6. In ejectment, a scire facias is as neces-

ary as in a real action. Holt, 265. Salk. 600.

7. An *habere facias possessionem* cannot be sued out a year and a day after judgment in ejectment, nor execution had of the damages, without a scire facias to revive the judgment. *Withers v. Harris*, 2 Ld. Raym. 807. 3 Salk. 319. 7 Mod. 50. S. C. *Barwick v. Fenwood*, Comb. 250. *Sed vide* 1 Sid. 351., *contra*.

8. Though execution was stayed upon terms. S. C. 7 Mod. 65.

9. The scire facias must issue against the defendants and terre-tenants. *Withers v. Harris*, 3 Salk. 319.

10. If a writ of inquiry be not [*1237] executed* within a year, there must be a scire facias. *How v. Adam*, 12 Mod. 500.

11. A scire facias is necessary in *elegit*. 2 Saund. 72 c. n. [z.]

12. If plaintiff in error lies still, the defendant must sue a *scire facias quare executionem non*, &c. *Lynch v. Coot*, Holt, 278.

13. Execution cannot be had on a judgment obtained against testator, without a scire facias, though within a year. 2 Saund. 6.

14. Judgment is acknowledged to two men, one dies, the other cannot take out *elegit* without a scire facias, though it be within the year. *Law v. Toothill and Rawlins*, Carter, 123.

15. If two recover a debt, and one die, execution shall not issue without a scire facias; but otherwise upon a writ of error. *Ham's case*, Mo. 367. *Law v. Toothill and Rawlins*, Carter, 124.

16. Scire facias ought to be to the terre-tenant on writ of error of a fine; but this is the course and caution of the court, and not of necessity. *Tully v. Marwood*, Comb. 318.

(d) *When not necessary.*

1. In the case of the king, there needs no scire facias after the year. *Ball v. Manu- captors*, Salk. 602.

2. If the defendant be taken by *capias* *ullagatum*, and if judgment be affirmed in error, a *capias* or other execution lies without scire facias, although in another court. *Leighton v. Garnons*, Cro. Eliz. 706. 851.

3. If judgment be given in C. B., and removed by writ of error, and judgment affirmed within the year, and a *capias* or *fi. fa.* be awarded, the plaintiff may have execution without a scire facias. *Layton v. Garnon*, 5 Co. 88 a. Prac. Ca. K. B. 195.

4. If judgment be signed under an agreement to stay execution for a year, execution may after the year be taken out without a scire facias; but not if the stay be only for three months, and the execution afterwards hindered by injunction. *Booth v. Booth*, 6 Mod. 283. *Sed quere*, see *Winter v. Lightbond*, and *Mitchel v. Cox*, 6 Mod. 288. n.

5. If two statutes are acknowledged, and execution is sued out on the last, and exe-

cuted by *liberate*, which is not returned, if the first conuisee sues execution, and the sheriff executes it, it is good without a scire facias. *Fulwood's case*, 4 Co. 64 b.

6. Execution awarded on a scire facias in C. B., defendant, (being in the Fleet for another cause, and brought into the bench by *habeas corpus*), on examination proving to be the same person, may be re-committed in execution on the judgment without scire facias, though more than a year has intervened. 2 Dy. 214. pl. 47.

7. A scire facias is unnecessary for statute-merchants and staple. 2 Saund. 71 b.

8. Execution by *elegit* may be taken out on an old judgment without suing out a scire facias. *Cooke v. Bathurst*, 2 Show. 235. Prac. Ca. K. B. 204. S. C.

9. There may be an *habere facias possessionem* in ejectment after a year, without a scire facias. *Okey v. Pencers*, 1 Sid. 351.

10. If execution be taken out within the year, and the writ be not returned, it may be continued by entry *vice comes non misit breve*, without scire facias. *Anon.* 12 Mod. 377.

11. If the process be continued, though for twenty years after judgment, plaintiff can have a *capias* without a scire facias; so, if error be brought and judgment affirmed. *Belloes v. Handford*, 2 Leon. 77, 78. 87. 3 Leon. 259.

12. If the plaintiff takes out execution within a year and a day after judgment obtained, although he does not prosecute it for two or three years, yet when he pleases he may proceed upon it, and shall not be put to a scire facias. *Sir W. Walley's case*, 4 Leon. 44. 3 Leon. 259. S. C.

13. An execution sued out before the testator's death may be executed after, without a scire facias. *Anon.* 8 Mod. 225.

14. If a man acknowledge a statute, and upon process the conusor is returned *mortuus*, yet one may extend without a scire facias, though it be within the year. *Law v. Toothill and Rawlins*, Carter, 114. 123.

15. Judgment in ejectment against two, then one of them dies; the plaintiff may* take out execution [*1238] against the survivor. *Anon.* 3 Salk. 319.

16. Error by two, and one dies pending the writ; execution may be without scire facias. *Pennoire v. Brace*, 8 Mod. 108.

17. A recognizance is acknowledged to two; upon this a scire facias issues out, and judgment thereupon; an *elegit* goes out in both their names, and so by several continuances till one of the conuisees die; an *alias elegit* may be taken out without a scire facias by the surviving conuisee. *Law v. Toothill*, Carter, 193.

(e) *Consequence of issuing execution without a scire facias.*

1. If execution be sued out after the year

without scire facias, it is not void, but voidable by error. *Patrick v. Johnson*, 3 Lev. 403. 2 Saund. 6 a.

2. Or it may be set aside. *Russell's case*, Prac. Ca. K. B. 101. 4 Leon. 24. *Mitchell v. Cue*, Prac. Ca. K. B. 126.

(f) *In what county it should be brought.*

1. A scire facias on a judgment to have execution must be brought in the county of the original action. 2 Saund. 72 p. Hob. 4. 196, 197.

2. Execution was set aside, the scire facias to revive having issued into a wrong county. *Pickering v. Thompson*, 2 Barnes, 167.

3. A scire facias by an administrator against an executor, on a judgment recovered by the intestate against the testator in Middlesex is good, although it allege that the administration was granted in the diocese of York. *Atkinson v. Newton*, 2 Show. 438.

4. A scire facias for costs must always go into that county where execution on the original judgment should be made; but debt on such judgment, or on a recognizance, may be laid in any county. 8 Mod. 73.

(g) *In what courts.*

1. It cannot be in any court but in that wherein it is given, although it be removed into Chancery by *certiorari* and sent by *mitimus* into the King's Bench. *Anon.* Cro. Car. 34.

2. Where the record of the judgment is not B. R., the scire facias out of C. P. is regular. *Eaton v. Southby*, 2 Barnes, 166. 347.

3. After transcript it should go out of B. R. *Id.* *ibid.*

(h) *Respecting the parties to the writ;—*

1. Plaintiffs.

1. The plaintiff in a *quare impedit* was outlawed after recovery; the king can have scire facias to execute the judgment. *Beverley, v. —*, Mo. 241.

2. If judgment be obtained by husband and wife, the husband, on the death of his wife, may take out execution without scire facias. *Miles's case*, 1 Mod. 179.

3. A scire facias was brought by baron and feme upon a judgment recovered by the feme while sole, and after execution awarded the husband dies, a right is attached in the wife. *Anon.* Com. 31.

4. Scire facias lies to have execution of a judgment in debt by the husband. *Deamond v. Long*, Cro. Car. 208. 227.

5. A scire facias lies for the surviving husband where a debt was attached in him by a judgment had on a scire facias in the wife's life. *Woodyer v. Greeman*, Comb. 455.

6. Judgment for 4000*l.*; 1000*l.* was received by testator; scire facias by execu-

tor lies for the residue. *Allen v. York*, Prac. Ca. K. B. 194.

7. Scire facias can be brought on a judgment in ejectment, either by the administrator of the lessee or the lessor himself. *Cole v. Terre-tenants of Skinner*, 1 Sid. 317.

8. If a plaintiff sue an executor, and die intestate after interlocutory judgment, and before the execution of the writ of inquiry, the administrator may have a *scire facias ad audiendum judicium*. *Smith v. Harman*, 6 Mod. 142.

9. Administrator *de bonis non* cannot have scire facias. *Anon.* Prac. Ca. K. B. 200.

10. If an executor recovers and dies intestate, his administrator may not sue execution by scire facias for want of privacy. *Slingsby v. Lambert*, Cro. Jac. 394. 26 H. 8. 7.

11. If after judgment affirmed on a writ of error, the plaintiff become bankrupt, and the judgment be assigned, and then the plaintiff levies execution, the court will retain the money in [*1239] order to afford the assignees an opportunity of proving their title to it in a scire facias. *Monk v. Morris*, 1 Mod. 93.

12. Judgment against the defendant, and on a *testatum scire facias* against the terre-tenants, there was a judgment against them; then the defendant became a bankrupt, and the commissioners assigned the principal judgment to one P, which was entered by leave of the court to entitle him to the benefit of the judgment upon the scire facias, without bringing a new scire facias. *Phummer v. Lea*, 5 Mod. 88.

2. Defendants.

1. Judgment against a feme sole, who afterwards marries, a scire facias issues against the husband and wife, and she dies; a new scire facias well lies against the husband after her death. *Obryan v. Ram*. Comb. 103.

2. A scire facias was granted against the administrator, upon the recovery against an executor, (who died intestate) of a debt of the testator. *Snape v. Norgate*, Cro. Car. 167.

3. On judgment against an administrator *durante minori etate*, a scire facias lies against the executor, &c. when of age. *Sparks v. Crofts*, 1 Ld. Raym. 265.

4. *Scire facias ad audiendum errores* may be against an administrator without naming him. 1 Ro. 23.

5. Scire facias upon a judgment lies against an administrator of an administrator, but not by an administrator of an administrator. 1 Sid. 122.

6. Scire facias against an executor on a judgment in ejectment is not good. *Dogly v. Walker*, Carth. 2.

7. A scire facias against executors shall not be awarded to have execution merely, *de bonis propriis* upon a surmise, &c. unless

it be upon the return of the sheriff of a *de-
vastavit*. *Aldworth v. Peel*, Cro. Eliz. 530.

8. Assets found to a certain value; if afterwards new assets come to the executor, the plaintiff cannot have a scire facias, but a new action. *Mo*. 246.

9. Where a scire facias issued against B, after the seizure of all the partnership goods upon a judgment and execution against A, and the sheriff returned *nulla bona*, it was holden a false return. *King v. Manning*, Com. 619.

10. Upon a recognizance acknowledged by several, if one dies, the creditor must bring a scire facias against his heir and terre-tenants, and also against the survivors. 2 Saund. 51. n. (4).

11. If one of two against whom judgment is recovered die, the plaintiff can have a *feri facias* against the survivor alone. 2 Saund. 51. n. (4). 72 h.

12. But he may have a scire facias against the heir and terre-tenants of the deceased, and also against the survivor; and on the judgment in the scire facias he may have a *feri facias* against the survivor only, or an *elegit* against both. 2 Saund. 51 a. 72 h. n. *Panton v. Hall*, Carth. 105.

13. If scire facias upon the statute issues against the issue in tail, and the sheriff returns a scire facias, if the issue does not come in and plead at the day, he will be charged in execution, and cannot avoid it. *Day v. Gifford*, 1 Sid. 54. *Atwood v. Beach*, 8 Mod. 113.

14. Scire facias on a judgment in ejectment may be brought against those who are strangers to the judgment. *Corbett v. Mariani*, Latw. [530, 531.]

15. It lies against him who enters after the judgment, though not party to the action. *Cook v. Cook*, 3 Lev. 100.

16. A scire facias on a judgment in ejectment may be general against all the terre-tenants, or particular, and name them. *Adams v. Savage*, Salk. 600.

17. Scire facias lies against an heir on the judgment or recognizance of his ancestor. 2 Saund. 6 c. *et seq.* 72 m, n.

18. The heir is chargeable, not as heir, but as tenant of the lands. 2 Saund. 70.

(i) *Relative to the form of the scire facias.*

1. The scire facias ought always to pursue the first action. *King v. Bagg*, Cro. Jac. 331. *Law v. Toothill and Rawlins*, Carter, 180. 1 Com. 187.

2. A scire facias *quare executionem habet* recites the first judgment, but prays no new thing, only to have^a execution [1240] upon that judgment. *Obrian v. Ram*, 3 Mod. 187.

3. When on a *capias* and *cepi corpus* returned against one, another dies, and he in execution escapes, the scire facias ought to suggest the escape, and ought to be *de terris et tenementis* of the deceased, and *de terris*,

tenementis, bonis, et catallis of the survivors. *Anon.* 12 Mod. 254.

4. Upon a judgment in an inferior court, it must appear in the scire facias how the judgment came into B. R., either by *certiorari* or writ of error. *Guillan v. Hardesty*, 3 Salk. 320.

5. In a scire facias to revive a judgment, the term of the recovery need not be inserted. 1 Barnes, 309.

6. In a scire facias on a judgment recovered by the executor, the death of the testator need not be shown. *Morfoot v. Chivers*, Stra. 631.

7. If a scire facias to revive a judgment against an executor mention first a day of appearance, *coram nobis ubicunque*, and afterwards give day to the party to appear "at the day aforesaid at Westminster," it is erroneous, and cannot be amended. *Anon.* 6 Mod. 86.

8. Scire facias, without mention of the *capias* awarded, is good. *Laffe v. Kelbridge*, Cro. Jac. 97.

9. A scire facias on a judgment upon a verdict after the defendant's death, by 17 Car. 2. c. 8. must be general. *Colebeck v. Peck*, 2 Ld. Raym. 1280.

10. Scire facias against the party to the judgment may be in *hac parte*, against the bail must be in *ea parte*. *Lug v. Goodwin*, 1 Ld. Raym. 393.

11. A fine *come ceo* is levied to J. S., who grants back to the consor for life, with the reversion to himself in tail, &c.; the issue brings scire facias for the tenements, which after the death, &c. ought to remain to him; held bad. *Anon.* 1 Dy. 69. pl. 34.

12. A scire facias for the execution of a fine sur grant and render by him in remainder after an estate for life or in tail, must say that the tenant for life or tenant in tail is dead without issue. *Bodmyn v. Child*, Com. 188.

(j) *When there should be several writs.*

1. Upon a judgment in the King's Bench, there ought to be two scire facias, one against the principal, the other against the bail; but one only suffices in the Common Pleas, and two *nihil* returned amount to a scire foci. March, 3. pl. 4.

2. If a scire facias upon a judgment against the father be sued against the heir and terre-tenants, without suing one against the heir first, it is good. *Sir Christopher Heydon's case*, Cro. Eliz. 896.

3. If two scire facias are issued into two several counties, although death be alleged in the one, it shall not prejudice the other. *Aungell v. Cooper*, Cro. Car. 518.

4. Fifteen days between the teste and return of two scire facias inclusive, are sufficient. *Goodwin v. Bearbank*, Com. 53.

(k) *Of the summons and return by the sheriff.*

1. On a scire facias against terre-tenants, one of them ought not to answer till the

others are warned. *Berisford v. Cole*, Comb. 282, 283.

2. Though if he does answer, he may have an *audita querela*, viz.; not to avoid the extent, but to have contribution. S. C. Comb. 282, 283.

3. If it be returned that the heir has no lands, the terre-tenants may be summoned without him. 2 Saund. 6. c.

4. And he may be summoned without the terre-tenants. 2 Saund. 72 n.

5. In a scire facias against terre-tenants, &c., one may be summoned by a rent liable to a judgment. *Blake v. Gill*, Comb. 185.

6. But the summons ought to be upon the land. Id. *ibid*.

7. A return of scire feci against terre-tenants ought to be of all terre-tenants in *balliva sua*. Salk 598.

8. If to a scire facias J. S. be returned terre-tenant *omnibus terrarum et tenementarum*, without showing of what in certain, it is no error. Hob. 90. l

(l) *Oyer*.

Defendant pleaded in bar to a scire facias execution by a *capias ad satisfaciendum*; oyer of the *ca. sa.* was refused. *Maindard v. Harvey*, W. Kely. 67.

[*1241] (m)* *Pleas*;—

1. What are good.

1. The heir may pray his age, and the parol will demur. 2 Saund. 7.

2. In scire facias upon a recognizance, joint-tenancy will abate the writ. Mo. 524.

3. To a scire facias against a terre-tenant, it is a good plea that a stranger not summoned has parcel of the land. Mo. 429.

4. Where one terre-tenant is returned summoned, he may plead that there are other tenants, though in another county; but he must not plead this by way of abatement, but demand judgment, *et ipse ad breve præd. in forma præd. relorum respondere compelli debeat*. *Prynne v. Stoughter*, 2 Vent. 104, 105.

5. Where the scire facias against the terre-tenants is general without naming them, it is not false for them to plead in abatement that there are other terre-tenants not named. *Adams v. Savage*, 3 Salk. 321. 6 Mod. 199.

6. And the defendant shall not answer over till the others are summoned, though the writ shall not be abated. *Adams v. Savage*, 6 Mod. 199.

7. In a scire facias on a recognizance to perform covenants to permit the plaintiff to have common in D, and not to alter the course of the fields, plea, that defendant has permitted, &c., and has not altered the course, is good. 3 Dy. 279. pl. 6.

8. A release of all executions is a good plea to a scire facias. 2 Saund. 6 a.

9. In scire facias for execution, it is a good bar that the plaintiff had assigned the damages to the king, although the king had not levied them. Mo. 468.

10. So a scire facias is barred by the she-

riff's seizure of defendant's goods under a *feri facias*, although the sheriff has not satisfied the plaintiff, or returned the writ. 2 Saund. 46 c. Mo. 468.

11. If judgment in debt on bond be obtained against an administrator, and a scire facias be brought against his administrator *de bonis non*, on a suggestion of a *deceitavit* by the intestate administrator, the defendant may plead *plene administravit*, by payment of the simple contract debts of his intestate; for the wasting is the charge, and that is of no higher nature. *Britton v. Buckworth*, 2 Show. 485.

12. To a scire facias against an executor on a judgment in debt against the testator, it is a good bar that he died a prisoner in execution. *Williams v. Cutler*, Cro. Jac. 136. 143.

13. After judgment in annuity for exercising a stewardship, a scire facias is brought for further arrears; it is a good plea, that pending the writ plaintiff refused to hold a court. *Anon.* 3 Dy. 377. pl. 28.

14. Defendant pleading to a scire facias that the parties to the fine had nothing, must add neither in possession nor in use, conformably to the statute. *Lord Sendes's case*, 2 Dy. 215. pl. 53.

2. What are bad.

1. The heir cannot plead that there are terre-tenants. 2 Saund. 9 a. n. (10).

2. On a scire facias to have execution of a judgment by *nihil dicit* against the heir, &c., he is too late to plead *riens per descent*. *Henningham's case*, 3 Dy. 344. pl. 1.

3. The plaintiff cannot plead a sham plea to a scire facias *quare executionem non* on a writ of error. *Foster v. Burdett*, 11 Mod. 274.

4. To a scire facias upon a judgment, defendant cannot plead the statute of usury. 1 Sid. 182.

5. In scire facias for the execution of a fine, joint-tenancy is no plea; otherwise upon a recognizance. Mo. 571.

6. Entry of the plaintiff between verdict and judgment, whereby he became seized, &c., is no plea to a scire facias for execution and damages recovered in assize; but, if he had pleaded that the plaintiff is still seized, *quare*. 2 Dy. 227. pl. 42.

7. Nothing can be pleaded which might have been pleaded to the original action. 1 Saund. 219 c. 2 Saund. 72 t. *Bush*, assignee of *Jones v. Gower*, C. T. Hardw. 233.

8. An executor cannot plead judgments to the scire facias which he might have pleaded in the action. *Earle v. Hinton*, Stra. 732.

9. If a plaintiff sue an executor, and die intestate after interlocutory judgment, and before the return of the writ of ^{*}inquiry, and his administrator [*1242] sues a scire facias on the judgment, the defendant cannot plead a judgment recovered in debt on bond, and that he has no *assets ultra*; for the statute 8 & 9 W. 3. c. 11. does not authorize a personal represent-

ative to make any other defence than his testator or intestate might have made to the writ of inquiry, and he would not in this case have pleaded such a plea on such a writ. *Smith v. Harmer*, 6 Mod. 142.

10. To a scire facias against an administratrix to have execution, she pleads *nulla bona que fuerunt intestati tempore mortis sua, &c., nec habuit die impetrationis brevis, nec unquam postea*; no good plea; for one judgment cannot be answered without another, and perhaps she has paid debts upon specialties or statutes. *Ordwey v. Godfrey*, Cro. Eliz. 575.

11. To a scire facias brought by an executor on a judgment obtained by his testator, the defendant cannot plead that a *ca. sa.* issued against him, upon which he was taken, and in the custody of the warden of the Fleet, and that he paid his condemnation money to the warden. *Compton v. Ireland*, 1 Mod. 194, 195.

12. *Non tenore* cannot be pleaded by a defendant to a scire facias upon a judgment in a personal action. 2 Ld. Raym. 1256.

13. On a scire facias against heir and terre-tenants, if the sheriff return the defendant "terre-tenant," he cannot plead "*non tenore*," and traverse the return. *Whitrong v. Blaney*, 2 Mod. 10.

14. If, on a scire facias against terre-tenants, the sheriff return among others John and Sarah his wife as tenants, a plea in abatement that T. G. is tenant, is bad, for it is pleading "*non tenore*" by implication. *Adams v. Savage*, 6 Mod. 226.

15. General *non tenore* is not pleadable to scire facias, but special *non tenore* is. 3 Lev. 220.

16. Terre-tenants for several parts cannot join in a plea which goes to one part only, for a defendant can only plead as to the lands that he is returned tenant of. *Adams v. Savage*, 6 Mod. 226. Salk. 601. 2 Ld. Raym. 1256.

(n) Judgment and execution.

1. Upon scire facias brought against the heir, on judgment against the ancestor, if the heir plead a false plea, judgment shall be not against his lands by descent only, but against all the other lands. W. Jo. 87, 88. *Sed vide Brandlin v. Millbank*, Carth. 93, *contra*.

2. To a scire facias against terre-tenants, to have execution of lands, a plea in abatement that there was another terre-tenant of part of the lands, is not peremptory. *Collop v. Brandon*, 2 Show. 43.

3. A judgment in scire facias against bail, that the plaintiff "do recover his damages sustained by occasion of the delay of execution," is erroneous; for by 8 & 9 W. 3. c. 11. s. 3, the court cannot award damages, but only costs of suit. *Fanshawe v. Morrison*, 6 Mod. 157.

4. In scire facias *quare executio non*, the plaintiff in error may assign error, which if

he do, the judgment is only that execution be awarded. *Anon.* 12 Mod. 231.

5. But judgment in *scire facias quod habeat executionem*, does not alter or enlarge the first judgment. *Brandlin v. Millbank*, Carth. 93.

6. Error upon a judgment in C. B. in scire facias, where a feme sole recovered in C. B. and took husband; and afterwards, they joined in a scire facias to have execution, and had judgment in the scire facias; the wife died, and the husband sued execution without taking out letters of administration, and held that the judgment in scire facias attached a joint interest in baron and feme; and if the husband died, it would survive to the wife, *et contra*. *Woodyear v. Gresham*, Skin. 682.

7. The execution against the heir must be an *elegit*, and only half the lands descended can be taken. 2 Saund. 7.

8. A scire facias was sealed and delivered after the party's death, and held execution thereon good, and that the statute of 29 Car. 2. c. 3. is only to be understood of the goods of a purchaser purchased before the delivery of the writ. *Dr. Needham's case*, 12 Mod. 5.

9. In scire facias on a judgment in annuity* for arrears, [*1243] plaintiff shall have execution for those incurred pending the writ. *Anon.* 3 Dy. 377. pl. 28.

SCIRE FIERI INQUIRY.

1. Notice must be given of issuing and executing a scire fieri inquiry. *Steel v. Lateward*, 8 Mod. 366.

2. The scire fieri inquiry may still be resorted to, but an action of debt suggesting a *devastavit* is usually substituted for it. 1 Saund. 219 a. *Berwick v. Andrews*, 2 Ld. Raym. 974.

[*See ante*, tit. DEVASTAVIT, div. III. Vol. 1. p 491.]

SCOLD.

1. A common scold may be indicted, but the indictment must expressly charge the defendant with being a common scold, for this offence cannot be described by any other words, as common slanderer, &c. *Rex v. Foxly*, 6 Mod. 11. 2 Saund. 308 a. n. [a.]

2. *Communis rixa* instead of *rixatrix*, is error. *Rex v. Foxly*, 6 Mod. 239.

3. To a writ of error on a judgment for being a common scold, the defendant must assign error in person. *Rex v. Foxly*, 6 Mod. 178.

4. The punishment for a common scold is ducking. 6 Mod. 11.

SCOTLAND.

1. The validity of a marriage in Scotland may be tried by a jury on an issue of *ne unquies accouple, &c.* 2 Saund. 44 c.

2. A Scotch peer since the union is equal-

ly entitled to privilege from arrest with any English peer, and to an action of *scandalum magnatum*. *Falkland v. Phippe*, Com. 439, 440.

3. Absence in Scotland is no bar to the statute of limitation. 2 Saund. 121. n. [c.]

SEAL.

1. One piece of wax may be the seal of several persons. *Rex v. Harris*, 7 Mod. 55.

2. The seal being broken off a deed, will not prevent its being given in evidence. 1 Mod. 11.

3. If several persons be bound jointly and severally in a bond, and each of them deliver the same as his act and deed, and the seal of one of them be taken before issue joined, the other obligors cannot be sued on this instrument although their seals remain, for the bond is void as to all. *Seaton v. Henson*, 2 Show. 28. See also March, 125. pl. 205. 2 Lev. 220. Cro. El. 120.

4. But whether the seal was debruised before or after issue joined, is a fact for the consideration of the jury. *Nichols v. Haywood*, 1 Dy. 58. 2 Show. 29. *notis*.

5. But where the bond is several, the taking off the seal of one does not affect the liability of the others. *Collins v. Prosser*, 1 B. & A. 682.

6. A declaration on an arbitration bond is good, although it do not appear that the award was under the seal of the arbitrators. *Elitson v. Comyns*, 7 Mod. 361.

7. A mandamus lies to a corporation to affix its seal. *Rex v. Wilks*, 7 Mod. 261. *Rex v. Bland*, lb. 355. and *Rex v. Cambridge Chancellor*, lb. 356. n.

SEAMAN.

PROCEEDINGS AGAINST HIM.

A seaman will be discharged on common appearance if in the king's service. *Studwell v. Burton*, 2 Barnes, 71.

[Respecting seamen's wages, see *post*, tit. WAGES.]

SECRETARY OF STATE.

If a person surrenders on proclamation to the secretary of state on a charge of misdemeanor, the secretary may bind [*1244] him to appear in the court of King's Bench, but cannot oblige him to find sureties for his good behaviour. *Rex v. Tutchin*, 6 Mod. 165.

SEISIN.

I. OF SEISIN GENERALLY, p. 1244.

II. HOW TO BE ALLEGED IN PLEADING, p. 1244.

1. OF SEISIN GENERALLY.

1. The profits of all and every part of the land are the esplees of the land, and prove

the seisin of the whole land. *North v. Coe* Vaugh. 255.

2. If tenant holds hy homage, fealty, escuage, and suit of court twice a year, the seisin of the fealty is a seisin of all the services. *Bevil's case*, 4 Co. 8 a.

3. Seisin of part of any service is actual seisin of the whole. *Id. ibid.* 1 And. 57, 58.

4. The jury finding a seisin of one coparcener, is a sufficient finding for both. *Cro. Car.* 521.

5. Seisin of a superior service is a seisin of all inferior services; seisin of escuage is a seisin of homage and fealty, &c.; seisin of homage is a seisin of fealty; seisin of rent is a seisin of the fealty where the seignory is by fealty and rent; so the doing homage is a seisin of all services, as well inferior as superior. *Bevil's case*, 4 Co. 8 a.

6. Seisin of a rent, suit, &c., which is annual, is sufficient seisin of escuage, homage, fealty, heriot-service, &c., and such casual services as may not happen for forty years; but seisin of one annual service is no seisin of another annual service. *Id. ibid.*

7. The termor may take seisin for the benefit of him who has the freehold. *Bredman's case*, 6 Co. 57 b.

8. Seisin by the hands of a disseisor shall bind him who has right, but encroachment of rent by him shall not. S. C. 6 Co. 57 b. 58 a.

9. A man grants his seignory upon condition, and afterwards enters upon breach thereof; seisin of the service before is sufficient for an assize where he distrains; *secus*, in case of a gift of land on condition. *Bevil's case*, 4 Co. 8 a.

10. In an entry for disseisin or other action, where esplees are to be alleged, the profits of a mine will not serve. *North v. Coe*, Vaugh. 254.

11. If a mesuallty become rent-sock by surplusage, the ancient seisin is sufficient; *secus*, as to a rent become sock by the act of the party himself, as in case of a grant of a seignory or of a reversion, saving the rent. *Bevil's case*, 4 Co. 8 a.

12. Seisin of a manor is seisin of the *villains regardant* without actual possession of them. Mo. 90.

13. Payment of parcel of the rent before the day is good to give seisin of the rent, though no discharge of the rent. *Bevil's case*, 4 Co. 8 a.

14. Judgment for return irreplevisable is a sufficient seisin of the rent; so of a recovery of damages in an avowry for suit. *Id. ibid.*

15. The payment of the rent by the tenant for years is no seisin to bind the terretenant after the years determined. *Bredman's case*, 6 Co. 57. a.

16. Seisin of lands imports the possession of them. *Bedmyn v. Child*, Com. 187.

17. Seisin of fees is a sufficient seisin of an office to maintain an assize; so, laying his hands on the mace of office, and the other's withholding it, is a sufficient seisin and disseisin to maintain the assize. 2 Lev. 120.

18. Respecting the difference between attornment and seisin, see *Brediman's case*, 6 Co. 58 a.

II. HOW TO BE ALLEGED IN PLEADING.

1. He who has but a reversion expectant on an estate for years, may plead that he is seised in *dominio suo ut de feodo*. *Bates v. Bates*, Lutw. [283. 478.]

2. If it be not so pleaded, it shall be intended frank-free. *Hill v. Bolton*, Lutw. [474. 478.]

3. By an averment of seisin is understood sole seisin, and a traverse may be taken accordingly. 2 Saund. 9 c. n. (14).

4. In pleading seisin in a prior, it should not be said *pro quod* the prior and convent were seised, but prior only. 1 And. 268.

5.* If seisin be pleaded in the [*1245] master and fellows of a college, it need not be said in *jure collegii*. *Fulmerston v. Steward*, 2 Dy. 103. pl. 5.

6. Dower for one hundred acres in L and S, and judgment for that part in L only; the writ of seisin must be special, as the quantity there is uncertain. 1 Dy. 34. pl. 23.

7. A plea that the husband was seised in the right of his wife is ill. *Atkin v. Milner*, Lutw. 596. 679, 680.

8. In an avowry for damage feasant, the defendant said, that he was seised of the place where, &c., without showing how seised; held ill. Lutw. [513.]

9. Seisin within fifty years need not be alleged in formedons. *Anon.* 3 Dy. 315. pl. 10. 1 lb. 278. pl. 2.

10. Nor in *scire facias* upon a fine. 3 Dy. 315. pl. 101.

SEQUESTRATION.

1. No sequestration ought to be granted by a court of equity until all the processes of contempt are run out; and the sequestering of things collateral is illegal. March, 81. pl. 130.

2. The tithes of a rectory impropriate cannot be sequestered by the ordinary towards the repair of the chancel. 2 Mod. 254. 259.

SERJEANT AT LAW.

1. On a serjeant at law being called, the rings given to the chief judges ought to weigh twenty shillings each. 1 Mod. 9.

2. The king's serjeant made commissioner of the great seal loses his place, and precedence of king's serjeant, if removed; but

another serjeant made judge and displaced, retains his degree of serjeant. 3 Lev. 351.

3. A serjeant at law may be sued by original in any of the courts in Westminster-hall, for his right to practise is not confined to the court of Common Pleas. *Humbleton v. Scroggs*, 2 Mod. 294. *Deakim v. Sir W. Scroggs*, 2 Lev. 129.

4. A serjeant sued with another loses his privilege. S. C. 2 Lev. 129.

5. But neither serjeants at law nor their servants can be sued in the Marshalsea or other inferior court. *Serjeant Headly's case*, Cro. Car. 84, 85. 2 Mod. 297.

6. And according to North, (Chief Justice,) a serjeant ought to be sued only in the court of Common Pleas by bill, for he is bound by oath to be there. *Humbleton v. Scroggs*, 2 Mod. 299.

SERVANT.

[See *entire*, tit. MASTER AND SERVANT, Vol. II. p. 944.]

SERVICE.

1. Service by doing suit to the court of the manor twice a year, held well. *Tomkins v. Crocker*, Salk. 604.

2. The suit to such court shall be intended by reservation before the statute *quia emptores*, &c. Id. *ibid*.

3. Also, one that is *resiant* may be bound to do suit real; for it shall be intended a suit service reserved on creating the tenure. S. C. Salk. 604.

4. Suit to the court of the manor to be held twice a year, may be claimed in an avowry without prescribing in the court, and it shall not be taken to be the court-baron. S. C. 2 Ld. Raym. 862.

5. Some entire services by alienation of parcel of the tenancy shall be multiplied, and some entire services by alienation of parcel shall not be multiplied. *Talbot's case*, 8 Co. 105 b.

6. When things entire, valuable, or of pleasure, shall be rendered by the tenant to the lord, such entire services shall be multiplied by alienation of parcel of the tenancy. Id. *ibid*.

7. When the tenant is to exercise a personal office, the services shall not be multiplied by alienation of parcel of the tenancy. S. C. 8 Co. 106 a.

8. So, also, when the tenant is bound to do manual labour or work touching houses, lands, or tenements. Id. *ibid*. *See vide ib*. 105 b.

9. There is no difference between entire annual services, valuable, or of pleasure, and which shall be multiplied, and* such entire services not annual. [*1246] S. C. 8 Co. 106 a.

SESSIONS.

- I. RESPECTING THE HOLDING OF THE SESSIONS, p. 1246.
- II. OF THEIR STYLE, p. 1246.
- III. RELATIVE TO THE CIVIL JURISDICTION OF THE SESSIONS;—
 - (a) *In what cases they have jurisdiction*, p. 1246.
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- IV. RELATIVE TO THE CRIMINAL JURISDICTION OF THE SESSIONS;—
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- IX. RESPECTING APPEALS AT SESSIONS, p. 1249.
- X. RESPECTING CASES SENT BY THEM, p. 1249.

I. RESPECTING THE HOLDING OF THE SESSIONS.

1. The sessions may be held by custom at other times than the statute appoints. *Anon.* Comb. 490.
2. In corporations, they rarely hold their sessions quarterly, but as they have occasion. *Anon.* Comb. 286.

II. OF THEIR STYLE.

1. If any thing be done at sessions in which a justice of the peace is concerned, his name ought not to be in the caption, &c. The case of *Fozham Tithing*, Holt, 517. 2 Salk. 607.

2. An indictment found at an adjourned sessions, must show in the caption when the sessions began. *Rex v. Fisher*, Stra. 865.

3. *Ad generalem sessionem pacis*, not saying *quarterialem*, is bad. Carth. 222.

III. RELATIVE TO THE CIVIL JURISDICTION OF THE SESSIONS;—

(a) *In what cases they have jurisdiction.*

1. The sessions have an original jurisdiction in respect of discharging an apprentice. *Arglis v. Heaseman*, C. T. Hardw. 101. *Contra*, Carth. 198.

2. The sessions, on articles exhibited pursuant to 1 W. & M. c. 21. s. 6., may inquire into excessive fines taken by a clerk of the peace. *Rex v. Baines*, 6 Mod. 192.

3. The sessions may originally charge parishes to contribute to the maintenance of the poor of a parish in another hundred. *Rex v. Percival*, Stra. 56.

4. They could not before 3 Car. 1. c. 4. s. 15., make an order of maintenance. 2 Show. 132.

5. If there is an objection as to the proportion of a rate, or the omission of particu-

lar persons, the sessions cannot amend, but must quash or confirm it; *secus*, where the appellant is overcharged. Salk. 483.

6. The sessions can determine whether a marriage be by a clergyman or not. *Rex v. Inhabitants of Luffington*, Burr. Sett. Ca. No. 79.

(b) *In what not.*

1. The justices at session cannot make an order on the overseers to pay a surgeon's bill for attending a pauper. *Rex v. Baldwin*, 11 Mod. 178.

2. They cannot order an administrator to refund any part of the fee which an intestate has received with his apprenticeship. *Rex v. Standish*, 11 Mod. 110. n.

3. The sessions cannot annex parishes, but may order one parish to contribute to the poor of another. Salk. 480, 481.

4. On an appeal to the sessions, if the right of tithes come in question, the court cannot proceed in the cause. *Rex v. Ferness*, 11 Mod. 320.

- 5.^a The sessions cannot set aside assignment of an apprentice [*1247] bound out by justices. *Rex v. Barnes*, 1 Stra. 48.

6. Nor make an original order of removal. *Rex v. Melverton*, 7 Mod. 10. 2 Show. 504.

7. If the sessions quash an order of two justices on an appeal, and the same sessions supersede their order, and confirm the order of the two justices, it is wrong, because they had executed their authority before. *Battersea v. Westham*, 5 Mod. 396.

8. The keeper of a house of correction cannot be displaced by the sessions without cause. *Rex v. Apsley*, 11 Mod. 165.

9. The sessions cannot discharge a constable and appoint another, except on the neglect of the leet. *Rex v. Lashmerc*, 11 Mod. 380.

10. When an order is made for the payment of servant's wages, they cannot commit a man for not performing it, but ought to indict him for disobeying their order. *Rex v. Pope*, 5 Mod. 419.

11. The sessions cannot commit a man for disobeying an order of filiation, but must proceed on his recognisance. *Rex v. West*, 11 Mod. 59.

12. They cannot make an order to prosecute an offender out of the county stock. *Reg. v. Savin*, Salk. 605. 2 Ld. Raym. 871. S. C. See also Salk. 605. n. (a).

IV. RELATIVE TO THE CRIMINAL JURISDICTION OF THE SESSIONS;—

(a) *Of what offences they can take cognisance.*

1. An indictment may be found at sessions for perjury and barratry. 11 Mod. 67.; but see this subject further discussed, *lb.* note.

2. They have jurisdiction *de conspirationibus*. 8 Mod. 321.

3. An indictment for a trespass before justices of the peace was quashed for want

of "*non ad diveras felonias*," &c. *Res v. Carter*, Str. 442.

4. Justices of the peace in sessions can indict and fine for libels. *Res v. Sumner*, 1 Sid. 270. 3 Salk. 194. S. P.

5. So, for speaking contemptuous words of magistrates. *Res v. Cranfield*, 5 Mod. 303.

6. An indictment lies at sessions on the 1 Eliz. c. 2. and 13 & 14 Car. 2. c. 4. for using other than the common prayers. *Res v. Sparkes*, 2 Show. 450.

7. The sessions may punish an overseer by indictment for fraud in his accounts, or for not accounting; but they cannot order him to return money, &c. *Res v. Cummings*, Comb. 374. 5 Mod. 170. S. C.

8. Where a statute gives authority to two justices of peace without appeal, it may be executed at the sessions. *Res v. Cummings*, Comb. 374.

(b) Of what not.

1. The sessions have not, in general, cognizance of penal statutes. *Res v. Laughton*, Gilb. 104.

2. The justices have only jurisdiction by their commission over offences *contra pacem*, and therefore cannot try a new offence that is not against the peace, unless specially empowered so to do by the statutes which create it. *Res v. Alsop*, 1 Show. 339.

3. One cannot be indicted at the sessions for petty treason. *Res v. Barney*, Comb. 405.

4. Justices at session cannot try an indictment for a conspiracy under commission for the peace. *Res v. Salter*, 2 Show. 456.

5. The sessions of the peace have no jurisdiction to indict for forgery (by the common law), or upon the 5 Eliz. *Res v. Edwards*, 8 Mod. 321. *Wilson's case*, Cro. El. 601.

6. They have no jurisdiction in perjury by the common law, but have by statute. 8 Mod. 321. Str. 1088.

7. Their jurisdiction does not extend to usury. *Res v. Smith*, 2 Ld. Raym. 1144. Gilb. 103. 136.

8. An indictment does not lie before justices of the peace (for shooting in a gun), upon the statute of 2 & 3 Ed. 6., for want of jurisdiction. *Res v. Alsop*, 4 Mod. 51. T. Raym. 378. 1 Show. 339.

9. The quarter sessions have no authority by 35 Eliz. c. 2. to proceed against Quakers for not going to church. 2 Show. 401.

10. They cannot suppress an ale-house licensed, unless for disorder. Salk. 470. 8 Mod. 309.

11.* An indictment lies not at [*1248] the sessions for exercising the trade of a weaver or cloth-worker. *Res v. Briggs*, Comb. 252.

12. They cannot try an indictment for selling earthenware in a corporation by an inhabitant elsewhere, at a fair held there, upon statute 1 & 2 Ph. & M. c. 37. *Res v. Clough*, 5 Mod. 149.

13. The sessions cannot make an order for the repairs of the highway; for they have no jurisdiction but upon presentment. *Res v. Wells*, 6 Mod. 307.

14. They have no power by 22 H. 8. c. 5. with respect to a private bridge not common on a highway, unless it becomes a public nuisance. *Res v. Saintiff*, 6 Mod. 256.

V. RELATIVE TO PROCEEDINGS AT A BOROUGH SESSIONS.

1. An indictment may be at a borough sessions on 5 Eliz. for exercising a trade, not having served as an apprentice. *Res v. Franklin*, 1 Salk. 370. 2 Ld. Raym. 1039. 6 Mod. 220. S. C.

2. The quarter sessions of a borough have no jurisdiction in an appeal from an order of removal; the appeal must be to the quarter sessions of the county. *Res v. Inhabitants of Doneyland*, Burr. Sett. Ca. No. 191.

3. An indictment of forgery of a will upon 5 Eliz. is not good before the mayor and bailiffs of H, but it ought to be before the judges of oyer and terminer and gaol delivery only. *Hunt's case*, Cro. Eliz. 697.

4. An indictment can only be found by jurors of the county, although it be in a corporation whose liberty extends into two counties. Cro. Car. 379.

5. An indictment before justices of the peace *infra burgum*, and not said *pro burgo*, is ill. *Res v. Page*, 1 Lev. 304.

VI. DISTINCTION BETWEEN GENERAL AND SPECIAL SESSIONS.

1. Surveyors of highways are to account at special sessions, and not at general sessions. *Reg. v. Brandling*, Fort. 254.

2. When a statute gives power to justices at their quarter sessions, they have no power at their other general sessions. *Taylor's case*, Palm. 44.

3. The 5 & 6 Ed. 6. enacting that the quarter sessions of Anglesa shall be holden at Beaumaris only, and not elsewhere, an indictment taken at a sessions holden elsewhere is void. 2 Dy. 135. pl. 14. Jenk. 5. S. C.

4. Where a statute appoints an indictment to be *ad generalem quarterialem sessionem*, an indictment *ad generalem sessionem* is ill. *Res v. Turnock*, 12 Mod. 117.

5. An indictment on 23 Eliz. c. 1. s. 9. at a general sessions, shall, if after Michaelmas, be intended a general quarter sessions. *Res v. Spiller*, 2 Show. 206.

VII. RELATIVE TO AN ADJOURNMENT OF THE SESSIONS.

1. General and quarter sessions may adjourn matter for further debate to another sessions. *King's Langley v. St. Albans*, 12 Mod. 280.

2. An appeal may be adjourned from one quarter sessions to another. Salk. 447. 605.

3. If the session is once dropped and not adjourned, it cannot be resumed. *Res v.*

Inhabitants of West Torrington, Burr. Sett. Ca. No. 105. 293. Str. 1263.

4. The sessions cannot be entered as sitting three days together, but it must be by adjournment. *Salk*. 494.

5. On adjourning the sessions, continuance may be from one day certain to another, but not from one sessions to another. *J. Kely*. 90.

6. All adjournments of the sessions are in the preter tense, and so of indictments. *T. Raym*. 115, 116.

7. Upon an adjournment of the sessions, it must appear when the original sessions were holden. *Rex v. Inhabitants of Hemptonstall*, Burr. Sett. Ca. No. 28. 32.

VIII. WHEN AND HOW THE TRIAL SHOULD BE.

1. The quarter sessions may try the same session that issue is joined, if there be fifteen days for return of the venire. *Rex v. Jones*, Comb. 235.

2. There may be a trial at the same sessions, if there be an adjournment, so as there be fifteen days between the*
[*1249] tests and the return. *Anon.* 12 Mod. 50.

3. Neither the general nor quarter sessions can by consent of parties refer a thing, and oblige the parties to stand by their order, as justices of *nisi prius* may. *Holford v. Lawrence*, 12 Mod. 87.

4. A bill of exceptions will not lie at sessions. 2 Show. 288.

IX. RESPECTING APPEALS AT SESSIONS.

Reasonable notice should be given of appeals to be determined by justices at sessions. *Foley*, P. L. 244.

[See ante, tit. APPEAL, div. II. Vol. I. p. 77.]

X. RESPECTING CASES SENT BY THEM.

1. The sessions must state the fact itself; not evidence of the fact. *Rex v. Inhabitants of Martley*, Burr. Sett. Ca. No. 38.

2. And where their expression is not absolutely clear and explicit, they shall be intended to have done right. *Rex v. Inhabitants of Mayfield*, Burr. Sett. Ca. No. 144.

3. They are not obliged to state a case specially. *Rex v. Inhabitants of Oulton*, Burr. Sett. Ca. No. 19.

4. A *mandamus* does not lie to the sessions, commanding the justices to state a special case. *Peat's case*, 6 Mod. 229.

SET OFF.

1. By 8 G. 2. c. 24., when there are mutual debts between a plaintiff and defendant, one debt may be set against the other, and either pleaded in bar or given in evidence. 1 Mod. 215. *notie*.

2. A debt due to the defendant as surviving partner may be set off against a demand on him in his own right. *Willes*, 106. note.

3. So, a debt due from the plaintiff (as surviving partner) to the defendant, may be set off against a debt due from the defendant to the plaintiff in his own right. *Ibid.*

4. A debtor to a bankrupt may set off a debt due to him from the bankrupt. 1 Mod. 215.

5. If an ostensibly sole partner join dormant partners as copartners, this shall not oust the defendant of his set off. 1 Saund. 291. n. [k].

6. If a defendant die between verdict and the day in bank, leaving a creditor his executor, such executor cannot set off his debt in a *scire facies* of the judgment. *Burne v. Holden*, 1 Mod. 6.

7. When an executor sues in his own name for money due to the testator in his lifetime, but received by the defendant afterwards, the defendant cannot set off a debt due to him from the testator. *Shipman v. Thompson*, *Willes*, 106. 7 Mod. 246. S. C.

8. Under the statute 8 G. 2. c. 24., no debt on bond can be set off, unless it be on a bond for securing the payment of money. *Hutchinson v. Sturges*, *Willes*, 261.

9. Consequently, a bail-bond cannot be set off under that act; nor can such a bond (given to an officer of the palace court) be set off under the statute 2 G. 2. c. 22., to an action brought against that officer. *Willes*, 263.

10. But a bail-bond assigned over to the party may be set off to an action brought by that party. *Semb. Willes*, 264.

11. A plea of set off is good to a count on a special agreement. 1 Saund. 109 a. n. [a].

12. The plea of set off is an exception to the rule that a plea bad in part is bad for the whole. 1 Saund. 27. n. [d].

SETTLEMENT.

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XV. WHEN A SETTLEMENT IS DETERMINED, p. 1263.

I. RELATIVE TO THE SETTLEMENT OF AN ADMINISTRATOR OR EXECUTOR.

1. A settlement is gained by an administrator who was a mortgagee of a term for 15l., and a creditor by bond and simple contract for 18l. more, and resided forty days; such an one is not within 9 G. 1. c. 7. s. 5. *Rex v. Inhabitants of Stockland*, Burr. Sett. Ca. No. 61. p. 160. Str. 1162.

2. A son's residence in a leasehold cottage after his father's death intestate, without the son's taking out administration until after the expiration of the lease, does not obtain a settlement. Between the *Parishes of Widewelly and Farringdon*, C. T. Hardw. 392. Andr. 5. Burr. Sett. Ca. No. 34. S. C.

3. A settlement is gained by an executor who was entitled only to one fifth of 22l. a year; but who proved the will alone, and resided 12 weeks; the value of the tenement is immaterial, as it devolved upon him by act of law. *Rex v. Inhabitants of Uffoxeter*, Burr. Sett. Ca. No. 172. p. 538.

II. RELATIVE TO THE SETTLEMENT OF A CERTIFICATE PAUPER AND HIS FAMILY, &c.

1. A certificate is valid, though the words "legally settled" be not in it, provided there be words tantamount. *Rex v. Inhabitants of Hilperton*, Burr. Sett. Ca. No. 77. p. 227.

2. It is not necessary that it should be directed or delivered to a parish officer. *Rex v. Inhabitants of St. Nicholas*, Burr. Sett. Ca. No. 62. p. 171.

3. A certificate man may be sent back, though there is a mistake in the name of the parish to which the certificate is addressed. Between the *Parishes of Saint Nicholas and Woolverstone*, Str. 1163.

4. It is invalid, if not allowed as well as witnessed by two justices, pursuant to 8 & 9 W. 3. c. 30. *Rex v. Inhabitants of Wootton and Saint Lawrence*, Burr. Sett. Ca. No. 187, p. 581. Between the *Parishes of Hornessle and Boston*, Str. 94. S. P. Fort. 301.

5. It does not bind the parish giving it, unless it be in the terms required by the statute, though said to be signed, attested, and

allowed according to the statute; and especially where it is given for the purpose of admitting a patient into an hospital. *Rex v. Inhabitants of Saint George's and Saint Olave's, Southwark*, Burr. Sett. Ca. No. 99. p. 283.

6. A certificate man may gain a settlement in a third parish by the same means as any other person. *Rex v. Inhabitants of Bishopside*, Burr. Sett. Ca. No. 122. Say. 231. S. C.

7.* A certificate man may gain a settlement by purchase. Be- [*1251] tween the *Parishes of Doddington and Dunfren*, Str. 1193.

8. As by making a purchase of 47l. value. *Rex v. Inhabitants of Hanefeld*, Burr. Sett. Ca. No. 72.

9. So by making a purchase of 42l. value. *Rex v. Inhabitants of Doddington*, Burr. Sett. Ca. No. 75.

10. Descent of a copyhold to a certificate man or his wife gives him a settlement. *Rex v. Parish of Burclear*, 11 Mod. 292. Str. 163. S. C.

11. A settlement is gained by a certificate man by renting a windmill of 10l. per annum. *Rex v. Inhabitants of Bulley*, Burr. Sett. Ca. No. 33.

12. A schoolmaster who receives 10l. a year for instructing youth, having no freehold there, gains no settlement. *Rex v. Inhabitants of Melborne*, Burr. Sett. Ca. No. 83.

13. A settlement is not gained by a certificate man who hired a tenement of 10l. per annum, but the sessions adjudged it fraudulent; and the circumstances vindicated or warranted their conclusion. *Rex v. Inhabitants of Saint Nicholas in Norwich*, Burr. Sett. Ca. No. 62.

14. A settlement is gained by a certificate man by executing an annual office, though it be not a parochial office, as a constable. *Rex v. Inhabitants of Saint Maurice in Winchester*, Burr. Sett. Ca. No. 10. Str. 1014. S. C.

15. If legally placed in an annual office, and he do not execute it a whole year, he gains no settlement. *Rex v. Inhabitants of Fittleworth*, Burr. Sett. Ca. No. 81. p. 238.

16. Nor by serving or executing an annual office, if not legally placed in it or sworn into it. *Rex v. Inhabitants of Wingham*, Burr. Sett. Ca. No. 76. See No. 167. Str. 1199. S. C.

17. His children are included in the certificate, and cannot gain a settlement but by one of the two methods specified in 9 & 10 W. 3. c. 11. *Rex v. Inhabitants of Sherborne*, Burr. Sett. Ca. No. 65. *Rex v. Inhabitants of Siltan*, Burr. Sett. Ca. No. 92. Ib. No. 121.

18. They cannot gain a settlement by hiring and service in the parish to which the father was certificated. *Rex v. Inhabitants of Bury*, Burr. Sett. Ca. No. 88. 92. *Rex v. Inhabitants of Sherbourne*, Str. 1165. Say. 171. *Rex v. Inhabitants of Latchlade*, Burr.

Sett. Ca. No. 121. p. 380. *Rex v. Inhabitants of Alton*, Burr. Sett. Ca. No. 134. *Rex v. Inhabitants of Buckingham*, Burr. Sett. Ca. No. 112. Say. 11. S. C.

19. Unless under particular circumstances, as, if a child had served an apprenticeship in a third parish, and after that, returned into the parish the father came into by certificate; he may then gain a settlement by hiring and service for a year. *Rex v. Inhabitants of Great Torrington*, Burr. Sett. Ca. No. 136, 137.

20. And if a certificate man or his family have been removed by an order of two justices, or if the certificate have not been resided under for many years, the son of the certificate man may gain a settlement by serving as an apprentice in the parish to which the certificate is addressed, although the certificate be not delivered up. Say. 201. 228. 305.

21. But they are not restrained from gaining a settlement in a third parish in the same manner any one else might. *Rex v. Inhabitants of Sherbourne*, Burr. Sett. Ca. No. 65. 92. Say. 238. 288.

22. Or by hiring and service in a third parish. *Rex v. Inhabitants of Horsley*, Burr. Sett. Ca. No. 123.

23. Or even in the parish to which the father came by certificate after a removal, for then the certificate was *functus officio*, and it can have its effect but once. *Rex v. Inhabitants of Sudbury*, Burr. Sett. Ca. No. 119.

24. Where a certificate man gains a settlement, his apprentice shall gain a settlement. Between the *Parishes of Ivinghoe and Stonebridge*, Stra. 265.

25. His grand children are not prevented gaining a settlement by apprenticeship, where the certificate has been a long time deserted or waived. *Rex v. Inhabitants of Taunton and Saint Mary Magdalen*, Burr. Sett. Ca. No. 129. p. 402.

26. A certificate man's apprentice being assigned over to a master legally settled in another parish gains a settlement by serving out his time with the assignee.

[*1252] *Rex v. Inhabitants of Petham*,* Burr. Sett. Ca. No. 54. Stra. 1047. S. C.

27. A poor man coming into a parish with a certificate, shall not go back if he has gained a settlement subsequent to the certificate. *Harrison v. Lewis*, 3 Salk. 252.

28. A certificate man residing upon his own property cannot be removed from it. *Rex v. Inhabitants of Shenston*, Burr. Sett. Ca. No. 149. p. 468.

29. A certificate man is not removable till actually chargeable. Between the *Parishes of Telly and Willedon*, Stra. 77.

30. Being likely to become so, will not do. *Rex v. Inhabitants of Hacheston*, Burr. Sett. Ca. No. 100. 126.

31 The reversal of an order of removal of a certificate man before he is chargeable does not prevent the removing him when he is. Between the *Parishes of Oggathorpe and Dereworth*, Stra. 1256.

32. A certificate is conclusive to the parish that gives it as to the marriage of the pauper. Between the *Parishes of Maidstone and Hidcome in Kent*, Stra. 1233.

33. A certificate to husband and wife concludes the parish from saying they were not married. Between the *Parishes of New Windsor and White Waltham*, Stra. 186.

34. A certificate man married a second wife, his first living; the parish who gave the certificate acknowledging the second wife, is not only obliged to maintain the second wife, but also the first and her children. *Rex v. Inhabitants of Headcorn*, Burr. Sett. Ca. No. 86. p. 253.

35. No other parish is concerned in a certificate, but the two from which and to which it is given; if directed to A, it ought to be left there, and not taken from thence to B. *Rex v. Inhabitants of High and Low Bishopside*, Burr. Sett. Ca. No. 122. p. 381. Say. 231. S. C.

[See the late acts of 51 G. 3. c. 80., 54 G. 3. c. 107., and 1 & 2 G. 4. c. 32.]

III. RELATIVE TO THE SETTLEMENT OF A PAUPER'S WIFE.

1. A settlement is gained by marriage, and forty days' residence upon the husband's own, without her husband. *Rex v. Inhabitants of Aythorp Rodding*, Burr. Sett. Ca. No. 131. p. 412.

2. And after thirty years' cohabitation, the validity of their marriage is not to be disputed. *Rex v. Inhabitants of Stockland*, Burr. Sett. Ca. No. 163. p. 508.

3. Though a wife has a legal settlement before marriage, yet it is lost or suspended by the marriage, during coverture. *St. Giles v. Eversley Blackwater*, 8 Mod. 170. *Rex v. Inhabitants of Martley*, Burr. Sett. Ca. No. 39. p. 120.

4. The settlement of the husband is the settlement of the wife. 3 Salk. 256. Andr. 350.

5. But the woman's settlement before marriage remains, if the husband has no settlement. Between the *Parishes of Wenham and Cheddington*, Stra. 683. *Rex v. Inhabitants of St. Botolph*, Burr. Sett. Ca. No. 118. p. 367. Say. 198. S. C.

6. On the husband's death she is to be placed where he was last settled. 8 Mod. 170.

7. A woman purchased a leasehold tenement for 6l., and afterwards married; upon her marriage it vested in her husband, and by forty days' residence he gained a settlement; the husband died first; his settlement communicated itself to the wife. *Rex v. Inhabitants of Honington*, Burr. Sett. Ca. No. 182. p. 566.

8. A settlement is not gained by a woman's marrying (without consent of parent or guardian) a minor, since the act of 26 Geo. 2. c. 33.; for by sect. 11. the marriage is absolutely null and void. *Rex v. Inhabitants of Preston near Feversham*, Burr. Sett. Ca. 154. p. 486.

IV. RELATIVE TO THE SETTLEMENT OF CHILDREN.

1. The settlement of the husband makes the settlement of his children. *Rex v. Inhabitants of Oking*, 1 Salk. 256.

2. The settlement of children eleven or fourteen years of age must be adjudged. *Rex v. Wooton St. Lawrence*, Burr. Sett. Ca. No. 187. p. 581.

3. An order for removing poor children was quashed, not saying of what ages they were. *Rex v. Chester*, 8 Mod. 337.

4.* An order unappealed from [*1253] to remove a man and his wife is conclusive as to after-born children. Between the *Parishes of Nympsfield and Woodchester*, Stra. 1172.

5. But the settlement of an infant goes no higher than the last legal settlement of the parent, not the grandmother. *Rex v. Inhabitants of Hasfield*, Burr. Sett. Ca. No. 49. p. 147. Stra. 1131. S. C.

6. Children of a former husband do not acquire the settlement of their mother's second husband. *Rex v. Inhabitants of St. Giles in the Fields*, Burr. Sett. Ca. No. 2. p. 2.

7. No settlement is gained by children taken into a family from charity, and continuing there six years without any contract or agreement. *Rex v. Inhabitants of Weyhill*, Burr. Sett. Ca. No. 157. p. 491.

8. Lawful children are to be settled where the parents are settled; but bastards where born. *St. Giles v. Eversley*, 8 Mod. 169.

9. If children live with their father without gaining a settlement of their own, their settlement follows that of their father; otherwise, if they leave their father's family, and gain a new settlement of their own. *Rex v. Inhabitants of Snoton, in Devonshire*, Andr. 350.

10. The settlement of the son follows the settlement of the father so long only as he continues part of his family. *Rex v. Inhabitants of Eastwoodhey*, Stra. 438.

11. A son emancipated from his father's family cannot gain a new derivative settlement. *Rex v. Inhabitants of Burden*, Burr. Sett. Ca. No. 93. 1 Wils. 183. S. C.

12. If a son grown up does not remove with his father, he gains no settlement in the last place his father lived. Between the *Parishes of St. Michael, Norwich, and St. Matthew, Ipswich*, 2 Stra. 831.

13. If the father of a legitimate child have no settlement in England, and the mother have, the settlement of the mother is the settlement of the child. *Rex v. St. Botolph, Bishopsgate*, Say. 200.

14. Children may gain a settlement by living with the mother (after the father's death,) as they may by living with the father before his death. *Rex v. Inhabitants of Walton*, C. T. Hardw. 169. Burr. Sett. Ca. No. 15. p. 49. Between the *Parishes of Paulbury and Wooton*, Stra. 746.

15. Children of a father having no settlement, must have the settlement of the mother. *Rex v. Inhabitants of St. Matthew, Bethnal-green*, Burr. Sett. Ca. No. 153. p. 482.

16. Children born where the father is not settled may be sent to his settlement after his death. Between the *Parishes of St. Giles and Eversley Blackwater*, Stra. 580.

17. If the parents are both dead, the children must be settled in the place where born. *Luckington v. St. Austin's Parish*, 3 Salk. 257.

V. RELATIVE TO THE PLACE OF SETTLEMENT OF A SERVANT.

1. A hired servant is to be settled where he serves, and not where he is hired. *Rex v. St. Peter's, Oxford*, 8 Mod. 60, 61. Stra. 528. 794. *Graveny v. Feversham*, 11 Mod. 325.

2. The settlement is gained where the last forty days' service is performed. *Rex v. Inhabitants of Crocombe*, Burr. Sett. Ca. No. 57. p. 256.

3. Hiring a servant in an extra-parochial place is a good cause, within the statute, to make a settlement in that town or parish where the master lives. *Rex v. Saint Peter's, Oxford*, 8 Mod. 50. 51.

4. A servant may be settled where the master had no settlement. 8 Mod. 50, 51. 170.

5. The master has lands in two parishes, lives in one, but keeps servants in the other; they are settled in the parish where they serve, and not where the master lives. *Rex v. Saint Peter's, Oxford*, 8 Mod. 61.

VI. OF SETTLEMENT BY APPRENTICESHIP;—

(a) *When and how a settlement is gained by apprenticeship.*

1. The son of a certificate-man may gain a settlement by apprenticeship in a third parish. *Rex v. Inhabitants of Stilton*, Burr. Sett. Ca. No. 92. 122.

2.* An apprenticeship of a poor [*1254] boy by one overseer is sufficient to gain a settlement. *Parish of Woolstanton v. Uttoxeter*, Andr. 362.

3. And it is not necessary to make the apprentice a party to the indenture. S. C. Andr. 363.

4. Nor is it necessary to show in orders for what time he was bound apprentice. Id. ibid.

5. If the indenture be stamped with a six-penny stamp it is sufficient. Id. ibid.

6. Where a poor person is bound apprentice, it is necessary, on 43 Eliz. c. 2, that one of the justices confirming the indentures be of the quorum, for gaining a settlement. S. C. Andr. 363. 371.

7. A settlement is gained by apprenticeship, though 5l. were given with the apprenticeship, and the indentures were not stamped pursuant to the 8 Ann. c. 9. s. 32. 36. 39.; for it is exempted, because the money was paid out of a voluntary charitable subscription for that purpose. *Rex v. Inhabitants of Saint Matthews*, Burr. Sett. Ca. No. 185.

8. So, though 30s. were given the master to clothe the apprentice, and not inserted in the indentures, it is not within the 8 Ann. c. 9. s. 35. 39. *Rex v. Inhabitants of North Oram*, Burr. Sett. Ca. No. 48.

9. And where the consideration-money, which was only 6d., was not inserted, the indenture was held not void. *Rex v. Inhabitants of Yarmouth*, Burr. Sett. Ca. No. 120.

10. So, although the duty were not paid for the sum of 6d., which was the consideration-money mentioned in his indenture. *S. C.* Say. 170.

11. A service of four years, under indentures of apprenticeship for that period, is sufficient to gain a settlement. *Rex v. Inhabitants of Saint Nicholas*, C. T. Hardw. 323. Stra. 1066. Burr. Sett. Ca. No. 28. p. 91. *S. C.* *Rex v. Inhabitants of East Bridgeford*, 2 Stra. 1115.

12. And although the 5 Eliz. c. 4. s. 4. makes all apprenticeships in corporate towns for less than seven years void, yet indentures for a less time are voidable only as between the parties. *Id.* *ibid.*

13. A settlement is gained by apprenticeship to a mariner for four years only; though the indenture is not inrolled pursuant to 5 Eliz. c. 5. s. 2, and 3 Anne. c. 6. *Rex v. Gainsborough*, Burr. Sett. Ca. No. 189.

14. Forty days' service under an indenture gains a settlement. *Buckington v. Bechamp*, 8 Mod. 235. See 50, 51. 61.

15. Apprentice living forty days in a parish, to which the master goes as a settled inhabitant, gains a settlement. *Ivinghoe v. Stonebridge*, Stra. 265.

16. An apprentice may gain a settlement (though the master has none) as a hired servant, by 14 Car. 2. *Saint Bride v. Saint Saviour*, Salk. 533.

17. The apprentice gains a settlement where he lodges by night, though he works in the day-time and diets with his master in another parish. *Rex v. Inhabitants of Castleton*, Burr. Sett. Ca. No. 183. *Saint John Baptist v. Saint James*, 1 Stra. 594.

18. A is bound to B, but serves C; his settlement is in C's parish. *Parish of Holy Trinity v. Shoreditch*, Stra. 10. 554.

19. A settlement is gained by apprenticeship after forty days' habitation, notwithstanding his then going away sick with the consent of the master, and the indenture being mutually given up. *Rex v. Inhabitants of Titchfield*, Burr. Sett. Ca. No. 164.

20. So, by apprenticeship to a master of a ship, by lying in a parish forty days on board

of ship; this ship lay in a bason or harbour, which was part of and cut out within the parish of B B, and it was stated to be "the proper home of a ship;" there is no difference between lying in a house and lying in a ship in a parish. *Rex v. Inhabitants of Burton Bradstock*, Burr. Sett. Ca. No. 171.

21. The forty days' inhabitation of an apprentice need not be altogether. *Rex v. Inhabitants of Cirencester*, Stra. 579.

22. A settlement is gained by a parish apprentice hired out by the first master, by the last forty days' residence, without the assent of justices. *Rex v. Inhabitants of Saint George, Hanover-square*, Burr. Sett. Ca. No. 5. 43.

23. An apprentice hired out by the master against a settlement where the service* is performed. Between the [*1255] *Parishes of Saint George and Saint James*, Stra. 1001.

24. If a son be bound apprentice to his father, and the father give up his indenture to the son, and hires him out in another parish, where he serves a year, he is settled in the father's parish; for the indenture not being cancelled, the apprenticeship continues. *Rex v. Thursley*, 6 Mod. 191.

25. So, although the apprentice was told by the master two years before the expiration of the term, "to go about his business;" and accordingly he went away and hired himself to several masters, but the indentures were not cancelled; they therefore remained in force, and his settlement is in the place where he served the original master the last forty days; otherwise, if the master had assigned him over. *Rex v. Inhabitants of Saint Luke, in Middlesex*, Burr. Sett. Ca. No. 174.

26. An apprentice was bound out by the parish till twenty-four; after he was twenty-one, the master and he agreed to cancel the indentures; he then hired himself and served for a year; held that he gained a settlement thereby. *Rex v. Inhabitants of Burton*, Burr. Sett. Ca. No. 180.

27. Otherwise, if he had been under the age of twenty-one. *Burr. v. Inhabitants of Anstrey*, Burr. Sett. Ca. No. 142.

28. A settlement is gained by apprenticeship with the first master, where he was bound for seven years, and served five, and then the indentures were exchanged; afterwards it was agreed to bind him for four years; and he lived with that master a year and three quarters, but no indenture was executed. Burr. Sett. Ca. No. 95.

29. So, where he is assigned by the master, though the assignment be void, yet a service to the second master will gain a settlement. Between the *Parishes of Caster and Aicles*, 1 Salk. 68. 1 Ld. Raym. 683. S. C.

30. If an apprentice serve two years in one parish, and is turned over by verbal agreement to a master in another parish, and there serve out his time, he is settled under

the indenture in the last parish. *Saint Olave v. Alhallowes*, 8 Mod. 169.

31. So, where the apprentice was assigned by indorsement on the indenture. *Rez v. Inhabitants of Petrez*, Burr. Sett. Ca. No. 84.

32. A settlement is gained by apprenticeship with a second master, the first having given his consent to the apprentice serving the second the remainder of the term. *Rez v. Inhabitants of Farringdon*, Burr. Sett. Ca. No. 133.

33. Where he is assigned from the first to a second, and from the second to a third master, without the assent of the first master, a settlement is gained by forty days' residence with that third master. *Rez v. Inhabitants of Clapham*, Burr. Sett. Ca. No. 91.

34. The consent of the second master includes that of the first. *Rez v. Inhabitants of Tavistock*, Burr. Sett. Ca. No. 186.

35. By an apprenticeship to a certificated master in one parish, who afterwards assigned the apprentice to one legally settled in another, and he served out his time with the assignee, the apprentice was held to have gained the assignee's settlement. *Rez v. Inhabitants of Petham*, Burr. Sett. Ca. No. 54.

36. An apprentice gains a settlement by his apprenticeship in a place to which the master came by certificate after the removal, for the certificate was *functus officio*. *Rez v. Inhabitants of Sudbury*, Burr. Sett. Ca. No. 119.

37. A settlement is gained by apprenticeship for the last part of a term in a parish with one who, after the expiration of the term, and not before, brought a certificate thither; because the master was no certificated man during any time of the apprenticeship. *Rez v. Inhabitants of Clithyden*, Burr. Sett. Ca. No. 56. p. 161.

38. So, where the apprenticeship was to a master who said he came into the place by certificate, but no certificate was found. Burr. Sett. Ca. No. 106.

39. So, by apprenticeship to a certificated master who removes into another parish, if the apprentice serves him there forty days. *Rez v. Inhabitants of Saint Peter's*, Burr. Sett. Ca. No. 125. 170.

40. An apprentice to a certificate-man in a third parish gains a settlement. *Rez v. Inhabitants of Bishopsride*, Burr. [*1256] Sett. Ca. No. 122. p. 381. *Rez v. Inhabitants of Saint Peter's*, ib. No. 125. p. 391. Fort. 315.

41. A, removed by certificate from B to C, takes an apprentice who serves out his time at C, and lives two years; he thereby gains a settlement, and cannot be removed with his master. *Saint Giles v. Weybridge*, 11 Mod. 204. Fort. 315. S. C.

42. An apprentice may, after the death of his master, gain a settlement by hiring and service for a year. *Rez v. Inhabitants of Eakring*, Burr. Sett. Ca. No. 114. p. 320.

(b) When not.

1. An apprentice gains no settlement by parol binding; it must be by indenture. *Rez v. Inhabitants of Mawnan*, Burr. Sett. Ca. No. 102.

2. Nor unless a binding within the act of 3 & 4 W. & M. c. 11. s. 8. appears. *Rez v. Inhabitants of St. Helens*, Burr. Sett. Ca. No. 104. p. 292.

3. If the apprentice does not execute the deed of apprenticeship, he gains no settlement under it, and it is void, except in the case of a parish apprentice. 1 Saund. 313. n. [b].

4. So, though all the terms were complied with pursuant to an agreement, but no indenture executed. *Rez v. Inhabitants of Stratton*, Burr. Sett. Ca. No. 94, 95. 173.

5. Where the duty on apprentices by the 8 Ann. c. 9. s. 39. is not paid, the apprentice gains no settlement. Between the *Parishes of Currenden and Laland*, Stra. 903. Burr. Sett. Ca. No. 379.

6. So, where the indentures are not stamped. *Rez v. Inhabitants of Holbeck in Leeds*, Burr. Sett. Ca. No. 69. 80.

7. A settlement is not gained by a parish apprenticeship where one of the two justices who assent to the binding is not of the quorum. *Rez v. Inhabitants of Woldanton*, Burr. Sett. Ca. No. 41. p. 129.

8. By 12 Ann. c. 18. s. 2. it is enacted, that if any person whatsoever shall be an apprentice, bound by indenture to any certificated person, and not having afterwards gained a legal settlement in the parish, such apprentice, by virtue of such apprenticeship, shall not gain or be adjudged to have any settlement in such parish by reason of such apprenticeship; but every such apprentice shall have his settlement in such parish, as if he had not been "bound apprentice to such person as aforesaid." *St. Giles v. Weybridge*, 11 Mod. 205. n.

9. A settlement is not gained by apprenticeship to a master who at the time of binding had not a certificate, but obtained one within twenty-two days after the binding; otherwise, if the apprentice had served forty days before the master had got his certificate. *Rez v. Inhabitants of Westbury*, Burr. Sett. Ca. No. 150. p. 470.

10. If an apprentice serve his master by day in one parish, and lodge by night with his father in another parish, he does not gain a settlement in the master's parish, although his lodging with the father is paid for by the master, in pursuance of a covenant in the indentures; for serving without inhabiting is not sufficient; but he gains a settlement under the indenture in the father's parish. *Rez v. Parish of Saint John*, 8 Mod. 285.

VII. OF SETTLEMENT BY HIRING AND SERVICE;—

(a) When a settlement is gained.

1. By a general hiring, if it be a hiring at

all, it is a hiring for a year. *Burr. Sett. Ca. No. 107. 160.*

2. A servant before 3 & 4 W. & M. need not have been hired for forty days. *Rez v. Inhabitants of Portsmouth, 2 Stra. 746.*

3. A settlement is gained by a conditional hiring, with a year's service. *Rez v. Inhabitants of Sidney, Burr. Sett. Ca. No. 1. p. 1. Nos. 7. 71. 101.*

4. A farmer makes over his stock and servants to another; this does not hinder the servant from gaining a settlement. *Rez v. Inhabitants of Ivinghoe, Stra. 90.*

5. A settlement is gained by hiring a married man, and service for a year, but the agreement was not completed till after his wife's death. *Rez v. Inhabitants of Bank Newton, Burr. Sett. Ca. No. 145. p. 455.*

6.* So, by hiring and service, [*1257] though absent, without the master's leave, for three weeks in the middle of the year, but the master received him again. *Rez v. Inhabitants of Eaton, Burr. Sett. Ca. No. 14. p. 47. C. T. Hardw. 131. S. C. Say. 115. 116.*

7. A settlement was held to be gained by hiring for a year, and service till within three weeks of the end of the year; then going away for about six weeks, with leave, and returning to his master's service. *Rez v. Inhabitants of Goodnestone next Wingham, Burr. Sett. Ca. No. 85. p. 251.*

8. Absence of servant by the master's permission does not prevent a settlement. Between the *Parishes of Beales and Leowstaff, in Suffolk, 2 Stra. 1207.*

9. So, where the servant was hired for a year, and served till within five weeks of the end of the year, and was then absent with leave. *Rez v. Inhabitants of Nether Heyford, Burr. Sett. Ca. No. 152.*

10. Sickness or absence for reasonable cause does not prevent the settlement. *Rez v. Inhabitants of Islip, Stra. 423.*

11. A settlement was held to be gained by hiring and service till within seventeen days of the end of the year, and then the pauper left through illness, and never returned, for the relation between master and servant continued. *Rez v. Inhabitants of Christchurch, Burr. Sett. Ca. No. 158. p. 494.*

12. So, by hiring till within ten days of the end of the year; and then desiring leave to go and visit his relations, because "he wished not to be settled there;" the leave was held to be fraudulent, and a mere evasion of the settlement. *Rez v. Frome and Selwood, Burr. Sett. Ca. No. 181. p. 565.*

13. So, where the pauper was hired for three quarters of a year, and served it; then left the service for one hour, returned, and was hired for a whole year, but served only half a year; this was held to be no discontinuance. *Rez v. Inhabitants of Fifehead, Magdalen, Burr. Sett. Ca. No. 37. p. 116. Andr. 62. S. C.*

14. So, where the service is with two masters. *S. C. Andr. 63.*

15. Service for a year, on different hirings for a year, gains a settlement. Between the *Parishes of Hammer and Ellesmere, Stra. 878.*

16. When the first hiring was for less than a year, then a second hiring to the same master for a year, but not serving out the whole year, it was held it might be coupled to the former hiring, and then the total service amounted to above a year. *Rez v. Inhabitants of Underbarrow and Bradley Fields, Burr. Sett. Ca. No. 175. p. 545. Bayly's case, 3 Salk. 257.*

17. A service under a hiring from Christmas to Michaelmas may be joined to a service from Michaelmas to Christmas, under a successive hiring for a year, to gain a settlement. *Rez v. Inhabitants of Agnhoe, 11 Mod. 410.*

18. A settlement is gained by hiring for a year, and service for a year; though paid only in proportion to the work done, viz. so much per stone for spinning yarn; but lodged and boarded with the master. *Rez v. Inhabitants of King's Norton, Burr. Sett. Ca. No. 52. p. 153. Stra. 1164. S. C.*

19. Serving the last forty days of the year with an executor in another parish is a settlement there. Between the *Parishes of Ladoch and Saint Ennedore, Stra. 1164. Burr. Sett. Ca. No. 64. p. 179.*

20. A settlement may be gained by hiring, though the master or servant were at liberty to determine the contract at the end of any quarter by a month's notice, but did not do it. *Rez v. Inhabitants of Atherton, Burr. Sett. Ca. No. 71. p. 203. 2 Stra. 1182. S. C.*

21. Hiring at yearly wages for a quarter, and if the parties like, to continue a year, is sufficient for a settlement. Between the *Parishes of Sidney and Stroud, Stra. 950.*

22. A settlement was held to be gained by hiring, though the wages were received as wanted; and absence at diverse times, with leave. *Rez v. Inhabitants of Beccles, Burr. Sett. Ca. No. 78.*

23. So, by hiring and service for a year, and forty days' residence at different times, but not together. *Rez v. Inhabitants of Greenwich, Burr. Sett. Ca. No. 82. p. 243. No. 189.*

24. So, though the term for which he was bound apprentice was not expired; but the indentures were cancelled.* [*1258] *Rez v. Inhabitants of Eccleclaf Bierlow in Sheffield, Burr. Sett. Ca. No. 180. p. 562.*

25. By hiring and service by an apprentice, after the death of his master. *Rez v. Inhabitants of Eakring, Burr. Sett. Ca. No. 114. p. 320.*

26. The servant of a visitor gains a settlement. *Rez v. Inhabitants of Saint Peter's, Stra. 524. 8 Mod. 50, 51. Foley, 272.*

27. The gaining of a settlement is not

prevented by the marriage of a servant, during the year he was hired for. *Say*. 101.

28. A settlement was held to be gained by hiring and service for three quarters of a year; when the master complained of the servant's marrying within the year, and the justice allowed a discharge against the servant's consent. *Rez v. Inhabitants of Hanbury*, Burr. Sett. Ca. No. 115. p. 322.

29. So, by hiring for eleven months, and to give in a month's service, for it is a hiring and service for a year. *Rez v. Inhabitants of Millwich*, Burr. Sett. Ca. No. 139. p. 433.

30. So, by hiring for three years, under certain conditions, and service for one year and a quarter; though, at the end of six months, the servant was absent for the space of three months, being ill; but, when he returned, the master received him. *Rez v. Inhabitants of Oxleworth*, Burr. Sett. Ca. No. 108. p. 302.

31. Servant removing with his master in his second year gains a settlement, though there was no new hiring. Between the *Parishes of Crocombe and Saint Cuthbert in Wells*, 2 Stra. 1240.

32. A servant going to sea with his master's leave, and finding another to do his work, is settled. Between the *Parishes of Saint Peter and Zoolaston*, 2 Stra. 1232.

33. Turning the servant out of doors before the end of the year does not prevent the settlement. Between the *Parishes of Eastland and Westhoreley*, Stra. 526.

(b) *When not.*

1. A settlement is not gained by hiring for a year, and service for eleven months only; and though he had for some time before been a weekly labourer, the former weekly service cannot be coupled with the hiring for a year; because not *ejusdem generis*. *Rez v. Inhabitants of Wrinton*, Burr. Sett. Ca. No. 98. p. 280.

2. Several hirings for eleven months each, and service, gain no settlement. *Rez v. Inhabitants of Haughton*, Stra. 83.

3. A settlement is not gained by hiring for a year, where the time upon liking, previous to the hiring, is included; a hiring for a year can have no retrospect. *Rez v. Inhabitants of Ilam*, Burr. Sett. Ca. No. 109. p. 304.

4. A settlement cannot be gained by a hiring and service for a year, unless the commencement of the service were subsequent to the hiring. *Say*. 8.

5. A settlement is not gained by hiring for a year, with liberty to be absent during the harvest month. *Rez v. Inhabitants of Bishop's Hatfield*, Burr. Sett. Ca. No. 141. p. 439.

6. Nor by hiring and service for two years in two different places. Burr. Sett. Ca. No. 142. p. 441.

7. Nor where the master of a parish apprentice, in consideration of 40s., agreed to

discharge him, but the apprentice was not of age to consent to the discharge. *Rez v. Inhabitants of Anstrey*, Burr. Sett. Ca. No. 142. p. 441.

8. An apprentice hired as a servant, after his master broke, makes no settlement, unless the indenture be discharged, &c. *Buckington v. Bechamp*, 8 Mod. 235.

9. A settlement is not gained by hiring and service for three years, where the service was only to be eleven hours the six working days, and the rest of the time the servant was his own master. *Rez v. Inhabitants of Macclesfield*, Burr. Sett. Ca. No. 146.

10. Nor by hiring for a year, and service till within three weeks of the end of the year, and then with his own consent discharged, though the servant returned a fortnight after, and was hired for a year, and served for six months. *Rez v. Inhabitants of Caverswall*, Burr. Sett. Ca. No. 147. p. 401.

11. A hiring and service for a year, wanting a week, is insufficient. Between the *Parishes of Coombe and Westwoodhay*, Stra. 143.

12. So, by a hiring from the 14th of November* till Martin- [*1259] mas following (the 11th.), because not a hiring and service for a year. *Rez v. Inhabitants of Newton*, Burr. Sett. Ca. No. 55. p. 157.

13. A settlement is not gained by hiring and service for a year, by a man who is married at the time of being hired. *Rez v. Inhabitants of Hitcham*. Burr. Sett. Ca. No. 156. p. 489.

14. Going away twelve days before the end of the year prevents a settlement. Between the *Parishes of Syford and Castlechurch*, Stra. 1022. Burr. Sett. Ca. No. 20. p. 68. S. C.

15. A settlement is not gained by service for six years without any contract or agreement. *Rez v. Inhabitants of Weyhill*, Burr. Sett. Ca. No. 157. p. 491.

16. So where there was a service for four or five years, but no hiring or agreement, and the servant was to be paid one penny a gross for the buttons he should make, deducting 5s. a week for his meat, &c. *Rez v. Inhabitants of Saint Peter's in Dorchester*, Burr. Sett. Ca. No. 165. p. 513.

VIII. RELATIVE TO SETTLEMENTS BY BIRTH.

1. A bastard is settled where born, though called in the order the son of J H, the father. *Rez v. Inhabitants of St. Peter's*, Burr. Sett. Ca. No. 9.

2. Birth gains a settlement in no case (except bastardy), but where the settlement of the father or mother is unknown, and then it gains only till the legal settlement be known. *Giles v. Everley Blackwater*, 8 Mod. 170.

IX. RELATIVE TO THE SETTLEMENT BY EXECUTING AN ANNUAL OFFICE.

1. Executing the office of tithing-man gains a settlement. Between the *Parishes of Burslem and Sumpford Feverel*, Stra. 544.

2. So, the office of collector of a revenue gives a settlement. *Rez v. Inhabitants of Bicham*, 1 Stra. 411.

3. So, by executing an annual office in a parish for a whole year, though the extent of the office's jurisdiction does not exceed one-sixth part of the parish. *Rez v. Inhabitants of Whitechurch*, Burr. Sett. Ca. No. 117. p. 365. Say. 134.

4. But a settlement is not gained by executing the office of constable, if he be not presented at the court leet according to the custom. *Rez v. Inhabitants of Winterbourn*, Burr. Sett. Ca. No. 167. p. 520.

5. Officiating as a schoolmaster and receiving £10 per annum, does not gain a settlement. Between the *Parishes of Sheephead in Leicestershire, and Melborne in Derbyshire*, Stra. 1225.

X. OF THE SETTLEMENT BY ESTATE;—

(a) *When and how a settlement is gained.*

1. A settlement is gained by residing upon one's own estate of freehold, be it ever so little. *Rez v. Inhabitants of Sundrish*, Burr. Sett. Ca. No. 4. p. 7. Stra. 983. S. C. Fol. P. L. 257. 262. 264. But see Burr. Sett. Ca. No. 166.

2. A settlement is gained by purchase of an estate of the value of £30 *bona fide* paid, with forty days' residence, though the premises should be immediately mortgaged. *Rez v. Inhabitants of Tedford*, Burr. Sett. Ca. No. 18. p. 57.

3. Or, though the forty days' residence be not successively, nor upon the estate, but only lodging in the parish, or though the estate is sold during the forty days, if he continues to reside on it. *Rez v. Inhabitants of Snoton*, Burr. Sett. Ca. No. 40. p. 125. Andr. 345. S. C. Between the *Parishes of St. Neots and St. Cleer*, Stra. 1116. Burr. Sett. Ca. No. 42.

4. Though part of the purchase-money is advanced by another, yet if there is no fraud, a settlement may be gained. Between the *Parishes of Whaddington and Tedford*, in Lincolnshire, Stra. 1014.

5. So, though the purchaser borrowed £24 to pay £38 for the estate, and immediately let it, without ever residing upon it, but lived in the parish seven years, and then sold it to pay a mortgage. *Rez v. Inhabitants of Acton Beauchamp*, Burr. Sett. Ca. No. 116. p. 326.

6. Where the estate is of less than £30 value, if the owner comes to it by [*1260] gift* or devise, &c., it is not then within 9 Geo. 1. c. 7. *Rez v. Inhabitants of Marwood*, Burr. Sett. Ca. No. 124. p. 386. No. 179.

7. So, a settlement is gained although the purchase-money was only £12, by being rated

and paying to the land-tax. *Rez v. Inhabitants of Uffculme*, Burr. Sett. Ca. No. 138. p. 430.

8. Allowing a debt in a purchase is a good purchase of £30 value to make a settlement. Between the *Parishes of Colleigh and Stockland*, Stra. 1162.

9. If a person reside forty days upon an estate to which he became entitled by act of law, he gains a settlement. Say. 3.

10. A person settled in A, has an estate descended to him in B; he cannot be sent thither. Between the *Parishes of Wookey and Hinton Blewet*, 1 Stra. 476.

11. Descent of a copyhold gives a settlement. *Rez v. Parish of Burclear*, 11 Mod. 292.

12. A settlement is gained by leaseholder for term of years, the value of it being above £30. *Rez v. Inhabitants of St. Mary, White-chapel*, Burr. Sett. Ca. No. 17. p. 55.

13. Obtaining a term by act of law, though of small value, gains a settlement. Stra. 97.

14. If a father, without receiving any pecuniary consideration, grant the remainder of a term of years in a house to his daughter, and the husband of the daughter reside forty days in a house, he gains a settlement, however small the value of the term is. Say. 269.

15. The court will presume a lease to be by deed. Stra. 555.

16. A tenant at will of a tenement, or the moiety of a tenement, of the annual value of £10, gains a settlement. Say. 312. Str. 502. Burr. Sett. Ca. No. 128.

(b) *When not.*

1. The act of 9 Geo. 1. c. 7., takes the value of the purchase from the money actually paid at the time of making the purchase. *Rez v. Inhabitants of Dunchurch*, Burr. Sett. Ca. No. 177. p. 553.

2. And therefore it was held, that no settlement was gained where the purchase-money was only £19, though £15 more were laid out to put it in repair, and though the owner was taxed after the rate of a tenement of £30 value. Id. ibid.

3. When the party took premises of less than £10 value a year, but the landlord was to make improvements which would have made them worth £10, held, no settlement was gained unless the improvements were actually made. *Parish of Southwold v. Yezford*, Stra. 1127.

4. A settlement was held not to be gained by an estate of £14 a year by descent, because the interest in it determined before forty days' residence. *Rez v. Inhabitants of West Shefford*, Burr. Sett. Ca. No. 110. p. 307.

5. No person can gain a settlement by purchase of an estate or interest, whereof the consideration does not amount to £30 *bona fide*. Foley, P. L. 237.

6. The purchaser is only irremovable during the time of inhabiting the purchased pre-

misses; therefore, though the father is irremovable, the son has no derivative settlement there. *Rex v. Inhabitants of Salford*, Burr. Sett. Ca. No. 166. p. 516.

XII. RELATIVE TO SETTLEMENT BY RENTING A TENEMENT;—

(a) When a settlement is gained.

1. A windmill is a tenement within 9 & 10 Will. 3.; therefore, by renting one of the value of £10 a year, a settlement is gained. Between the *Parishes of Butney and Benhall*, C. T. Hardw. 391. *Stra.* 1077. *Andr.* 3. Burr. Sett. Ca. No. 33. p. 107.

2. The giving sureties for the rent is no impediment to the settlement. *Andr.* 3.

3. The ability to stock the farm is not material. *Rex v. Inhabitants of Weston*, Burr. Sett. Ca. No. 59. pl. 166.

4. Renting a coney warren is a settlement. Between the *Parishes of Kinber and Stone*, *Stra.* 678.

5. A settlement is gained by renting of £12 a year, for half a year only. *Rex v. Winterborn*, Burr. Sett. Ca. No. 167. p. 520.

6. So by renting of £10 a year, and residing above forty days in a part of it worth 40s. a year only; and letting the rest to under tenants. *Rex v. Inhabitants* of [*1261] Llandoveras*, Burr. Sett. Ca. No. 184. p. 571.

7. Renting a house and land at 10l. a year, though by several contracts, is sufficient. *Northknibly v. Wooton-Underedge*, *Foley*, P. L. 79. 80.

8. Renting different tenements in different parishes, amounting to 10l. a year, gains a settlement in that parish where the man resides above forty days. *Rex v. Inhabitants of Sandwich*, Burr. Sett. Ca. No. 13. 190. Between the *Parishes of Elotstead and Holliborne*, *Stra.* 849. *Foley*, P. L. 81. 85.

9. So an entire tenement of 10l. per annum, though it lies in two parishes, gives a settlement in that where the party lives. Between the *Parishes of Saint John and Amwell*, in the *County of Hereford*, 1 *Stra.* 529. *Amwell v. Saint John's*, 11 *Mod.* 380. Between the *Parishes of South Sydenham and Lamberton*, 1 *Stra.* 57.

10. By two tenements in the same parish. 8. C. *Stra.* 57.

11. A settlement is gained by renting the moiety of a tenement, as tenant at will, where the moiety exceeds 10l. a year. *Rex v. Inhabitants of Duns Tew*, Burr. Sett. Ca. No. 128. p. 398.

12. So, by renting land from Candlemas to Michaelmas, and paying 11l. for it, with forty days' residence, it need not be a taking for a whole year. *Rex v. Inhabitants of Shenston*, Burr. Sett. Ca. No. 151. p. 474. No. 190.

13. So, by renting land from 29th of May to Lady-day, at twenty-six guineas' rent. *Rex v. Inhabitants of Staunton under Berdon*, Burr. Sett. Ca. No. 178. p. 558.

14. By renting a house for five months, at 4l. rent, though it is not equivalent to 10l. a year; but the sessions expressly stated it to be worth 10l. a year. *Rex v. Inhabitants of Christ Church*, Burr. Sett. Ca. No. 185. p. 494.

15. A settlement is gained by an alien army, who occupies a house of the yearly value of 10l. for forty days. 1 *Saund.* 7.

16. A prisoner gains a settlement by renting 10l. a year. Between the *Parishes of Saint Margaret and Saint Martin's*, *Stra.* 924.

(b) When not.

1. No settlement is gained by renting a tenement of 6l. 10s. per annum, with a covenant to make it worth 10l. a year, but that covenant was not performed. *Rex v. Inhabitants of Southwold*, Burr. Sett. Ca. No. 47. p. 140.

2. Nor by renting a tenement of 16l. per annum, jointly between two persons, though it had been let at 20l. a year, since the half does not amount to 10l. a year. *Rex v. Inhabitants of Marden*, Burr. Sett. Ca. No. 111. p. 311. *Say.* 10. 8. C.

3. Nor by renting a messuage, &c., and feeding for sixteen cows in a dairy, though he was to pay above 10l. a year, this was no tenement; a tenement must lie in tenure, and relate to land. *Rex v. Inhabitants of Lockerly*, Burr. Sett. Ca. No. 113. p. 315.

4. Renting the pasture of land is no settlement. *Rex v. Inhabitants of Minchinhampton*, 2 *Stra.* 874.

5. A settlement cannot be gained by hiring the feed of land, or the wick of a dairy of cows. *Rex v. Inhabitants of Lockerly*, *Say.* 21.

6. Nor by renting a tenement of 8l. per annum, and being a joint-tenant for 3l. 15s. more, and to pay the joint-tenant 4s. more for some privileges; this 4s. cannot be considered as a rent; then 8l. added to the half of 3l. 15s. is not equal to 10l. *Rex v. Inhabitants of Kniveton*, Burr. Sett. Ca. No. 60. No. 159. p. 499.

7. The settlement by the hiring of a tenement of the annual value of 10l., is not gained by reason of the credit given by the landlord to the tenant, but the express provision of the legislature forbidding a removal. *Rex v. Inhabitants of Duns Tew*, *Say.* 312. Burr. Sett. Ca. No. 128. S. C.

XII. RELATIVE TO SETTLEMENT BY INHABITANCY.

1. A settlement is gained by the occupation of a tenement of the annual value of 10l., an actual hiring not being necessary. *Rex v. Inhabitants of Duns Tew*, *Say.* 312.

2. Long possession is a settlement till the right is determined. *Stra.* 608.

3. To gain a settlement by inhabitancy, forty days' residence is absolutely necessary. *Rex v. Inhabitants of Dilwyn*, Burr. Sett. Ca. No. 16. p. 54.

[*1262] 4* A married woman gains no settlement by living with an adulterer. Between the *Parishes of Saint Andrew and Saint Bride's*, Stra. 51.

5. Nor sea boy by lying on board a ship. Stra. 60.

6. A stall makes no inhabitancy. *Rez v. Inhabitants of Saint Olaves Jury*, Stra. 51.

7. By 35 G. 3. c. 101., no person shall gain a settlement by delivery and publication of notice. *Saint Alban's v. Saint Botolph's*, 11 Mod. 106. n.

8. The settlement of a poor man is where he dwells, and not where he works. *Rez v. Spittalfields*, 8 Mod. 308.

9. Yet his settlement is where he serves, and has board wages, and not where he lodges, &c. *Rez v. Whitechapel*, 8 Mod. 369.

XIII. RELATIVE TO SETTLEMENTS BY PAYING TAXES, RATES, &c.

1. A settlement is gained under the 3 W. 3. c. 11. s. 3. by being charged to and paying the public taxes, as by payment of the land tax. Between the *Parishes of Armsley and Bramley*, C. T. Hardw. 210.

2. Payment of taxes, though not charged personally or nominally, but only as occupier of the tenement, makes a settlement. *Rez v. Brickill*, 8 Mod. 38.

3. A settlement was held to be gained by a tide-waiter who was rated, and paid the land-tax for his salary, though he was repaid by the collector. *Rez v. Inhabitants of Oakhampton*, Burr. Sett. Ca. No. 3. p. 5.

4. So, by tenant paying the land-tax, though repaid by the landlord. *Rez v. Inhabitants of Chedingfold*, Burr. Sett. Ca. No. 132. 155.

5. So, by being rated by name "Bowdens," and paying a quarter's church and poor levy, though repaid by the landlord. *Rez v. Inhabitants of Christ Church*, Burr. Sett. Ca. No. 168. p. 494.

6. Being charged and paying to a rate are both of them necessary. *Rez v. Inhabitants of Saratt*, Burr. Sett. Ca. No. 21. p. 73.

7. A settlement is gained by the land-tax, though it be not for a whole year. *Rez v. Inhabitants of Bramley*, Burr. Sett. Ca. No. 22. p. 75.

8. The tax need not be a parochial tax. *Rez v. Inhabitants of Bramley*, Burr. Sett. Ca. No. 22.

9. A settlement is gained by the land-tax on a tenement of less than 30l. value. *Rez v. Inhabitants of Worth*, Burr. Sett. Ca. No. 27. p. 90.

10. So, by the land-tax and poor's rate, though the purchase money was only 12l. *Rez v. Inhabitants of Uffoulme*, Burr. Sett. Ca. No. 138. p. 430.

11. By being rated thus, "T C, or tenant," the tenant paid the taxes, and gained a settlement thereby. *Rez v. Inhabitants of Peasmarsh*, Burr. Sett. Ca. No. 180. p. 148.

12. A settlement is not gained by tenant paying the poor's rate, if not rated also. *Rez v. Inhabitants of Bramshaw*, Burr. Sett. Ca. No. 29. p. 98. Str. 1023.

13. Nor by paying taxes unless rated also. *Rez v. Inhabitants of Lower Walton*, Burr. Sett. Ca. No. 30. p. 100.

14. Nor will taxing a poor man make a settlement unless he pay it. 3 Salk. 253.

15. No person can gain a settlement by being taxed to a scavenger's rate or highways. Foley, P. L. 241.

XIV. RESPECTING SETTLEMENTS IN EXTRA-PAROCIAL PLACES.

1. A settlement is not gained in an extra-parochial place, unless such place comes under the notion of a vill or town. *Rez v. Inhabitants of Denham*, Burr. Sett. Ca. No. 11. p. 35.

2. And therefore a pauper whose last residence was in a place extra-parochial, and without officers for the poor, cannot be removed thither as to the place of his last legal settlement. *Parishes of Dalham v. Denham*, C. T. Hardw. 110. S. C.

3. The statutes 43 Eliz. c. 2., and 13 & 14 Car. 2. c. 12. s. 21., construed to give the justices powers of removal in all extra-parochial places containing more houses than one, with this restriction, viz. so as such places come under the denomination of a vill; and it must be left to the court to judge upon the circumstances what is meant by a vill or town. Id. ibid. Burr. Sett. Ca. No. 11. p. 35. [*1263] S. C.

4. To constitute a village there must be a constable or tithing-man. *Rez v. Inhabitants of the manor of Grafton*, Burr. Sett. Ca. No. 31. p. 101.

XV. WHEN A SETTLEMENT IS DETERMINED.

One settlement cannot be determined until another is gained. *Rez v. Inhabitants of St. Botolph, Say*, 199.

SEWERS.

1. The commission of sewers to defend against the sea is very ancient, but those for the melioration of land are by statute. Holt, 643.

2. The statutes 25 Edward 3. and 1 Henry 4. remain in force, and the authority given by the commissioners of sewers does not extend to mills, mill-stanks, causeys, &c., erected before the reign of Edw. 1., unless they had been raised and exalted beyond their former altitude, and therefore made more prejudicial, in which case they are not to be thrown down, but to be reformed by the abatement of the excess and enhancement only. Case of *Chester Mill*, 10 Co. 137 b. 13 Co. 35.

3. The several commissioners of sewers throughout England are not bound to follow the laws and customs of Romney Marsh. *Keighley's case*, 10 Co. 139 a.

4. The words in the act 23 Hen. 8. c. 5., viz. "according to your wisdom and discretion," are to be intended and interpreted according to law and justice. *Id. ibid.*

5. Commissioners of sewers cannot make a new river. *Iste of Ely's case*, 10 Co. 141 a.

6. When an old sewer is newly to be made or cleansed, some small alteration in respect of the natural change of the current may be made; when an old wall by the violence of the water is broken down, another wall in case of inevitable necessity may be made to defend the level; but if the danger may be avoided by the reparation of the old wall, a new one ought not to be erected. *Id. ibid.*

7. If one is bound by prescription to repair a wall against the flowing of the sea, and there is no default in him, but by reason of the sudden and unusual increase of water the wall is broken, the commissioners of sewers ought to tax all who hold lands or tenements, or common of pasture, &c., or have or may have any loss, damages, &c., according to the quantity of their land; if any default is in him, and the danger is not inevitable, but he may well repair it, the commissioners may bind him only to repair it; if through his fault the danger become inevitable, or he cannot repair it, in which all are charged, &c., every one charged may have an action on the case against him. *Keightley's case*, 10 Co. 139 a.

8. Commissioners of sewers can order the owner of the land (whatever estate he has) to repair. 1 Sid. 145.

9. None can be taxed towards the repairs, &c. but those who have prejudice or damage, &c., by the nuisance, and who may have benefit by the repair. *Iste of Ely's case*, 10 Co. 141 a.

10. The assessments ought to be, 1st, according to the quantity of their lands, &c.; 2nd, according to the rates of every person's portion, tenure, or profit, or of the quantity of the common pasture or fishing, &c. A tax generally of a several sum in gross upon a town is not warranted by the commission. S. C. 10 Co. 141 a. Cro. Jac. 338.

11. A rate may be made to reimburse charges. *Str.* 1127.

12. The commissioners of sewers and their proceedings are subject to the jurisdiction of the King's Bench, notwithstanding the clause in stat. 13 Eliz. c. 9.; and a certiorari lies to remove their proceedings. *March*, 196, pl. 241. *Str.* 609. 1 Lev. 288. *Smith's case*, 1 Vent. 67.

13. The commissioners must obey the certiorari, and if they proceed afterwards, an attachment lies against them, and they shall be fined. 1 Lev. 288. 1 Ld. Raym. 469. 1 Vent. 67.

14. Objections to orders removed must be argued before they are filed. *Str.* 1263.

15. An order of the commissioners removed into the K. B., may be confirmed* for part and quashed [*1264] for part. 1 Sid. 145.

16. They cannot imprison except for a contempt committed in their presence. 1 Sid. 145.

SHERIFF.

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I. WHO IS LIABLE TO SERVE THE OFFICE.

The subject cannot be exempted from the office of sheriff but by act of parliament or the king's grant. *Rez v. Larwood*, 3 Salk. 134. 1 Ld. Raym. 29. S. C.

II. CONSEQUENCE OF NOT TAKING THE OFFICE.

1. An information lies against a person for not taking upon him the office of sheriff, although at the time of his election he is under sentence of excommunication, and thereby rendered incapable of receiving the sacrament required by 25 Car. 2. c. 2.; for it is incumbent on such person to remove the disability. *Attorney-General v. Read*, 2 Mod. 299.

2. If any citizen of London, being fully qualified, shall be duly elected and chosen one of the sheriffs of the city of London and county of Middlesex, and should refuse to take upon himself the said office, (unless he should be discharged by oath as to the insufficiency of his estate, not being worth 10,000*l.* at the time of his election,) he shall forfeit the sum of 400*l.* to the mayor and commonalty and citizens, to be recovered by action of debt in any of the courts of record within the city of London. *Mayor of London v. Markwick*, 11 Mod. 164.

3. And an *indebitatus assumpsit* may be brought for the fine. *York v. Twen*, 5 Mod. 444.

4. To debt on a bye-law brought by the chamberlain of London in the mayor's court of the city, against a person for refusing the office of sheriff, the court of King's Bench, on the record being removed, will not permit a suggestion to be entered thereon that the defendant is a dissenter, and disabled by the statute from serving the office, he not having received the sacrament, &c. *Bosworth v. Whiteman*, 7 Mod. 300.

III. RELATIVE TO THE EXTENT OF THE SHERIFF'S JURISDICTION.

1. All hundreds that were not granted in fee by the crown before the time of Edw. 3. are joined to the office of sheriff. *Cole v. Ireland*, T. Raym. 361, 362.

2. So, the custody of the gaols of counties is inseparable from the sheriff; and therefore, if the king grants the custody of such gaol to another it is void; for the sheriff being the immediate officer of the king's courts, and answerable for escapes, and subject to amercements, ought to have the appointment of such gaolers for whom he will answer. *Milton's case*, 4 Co. 32 b.

3. He cannot be restrained himself in any part of his own power by the king. *Norton v. Simmes*, Hob. 13.

4. The sheriff of York has no authority to summon one inhabiting in Middlesex, although he has a freehold in the county of York. 2 Ro. 163.

5. An arrest by the sheriff within a liberty is good, but he thereby commits an offence to the lord. *Wolfraston's case*, Yelv. 51, 52.

6. The power of a sheriff does not extend beyond his county. *Plow. 37.*

7. Each sheriff of London has his distinct officers, and those of one comptroller cannot arrest on a plaint in the other, nor can they carry to another comptroller than that in which the plaint was. *Ridings v. Edwin*, 1 Show. 162.

IV. WHAT FEES HE IS ENTITLED TO.

1. By the common law he is to take no fees for doing his office. *Mitchel v. Reynolds*, 10 Mod. 139.

2. For the sheriff is only the king's minister, and is entitled to no profit, but only an allowance for his labour, and therefore if the king appoints another to execute a writ, no wrong is done thereby to the sheriff. *Plow. 76.*

3. But now he has fees given him by statute. 10 Mod. 139.

4.* He may maintain debt for fees on executing an *elegit*. *Holt*. [*1266] 318.

5. Since the statute of 28 Eliz., it has always been the usage for the sheriff to take a fee upon a *ca. sa.* for the trouble which he has in the execution; and if there be a second execution, he shall have a fee for that also, and an action will lie for this fee; and it was

said that this statute is mistaken in the printed books, for the roll is *an. 28 Eliz.* and the statute is *an. 28. Pope v. Hayman*, Skin. 363.

6. The sheriff shall have poundage for executions within corporations if on foreign judgments. *Pope v. Haman*, Comb. 217.

7. Poundage and other necessary charges may be levied out of a penalty. *Dakeyne v. Thornhill*, 1 Barnes, 134.

8. A sheriff shall not take fees for executing the judgment of an inferior court. *Brecknell v. Lock*, 5 Mod. 97.

[See *ante*, tit. FREE, Vol. I. p. 686.]

V. HOW FAR HE IS PROTECTED IN THE EXECUTION OF HIS OFFICE.

1. It is a contempt to disturb him in executing an execution. *Holt*, 154.

2. Where erroneous process is directed to him, he is protected in executing it. 2 Saund. 101 *x.* 193 *a. n.* [a]. *Hob.* 48.

3. The sheriff of a county palatine is protected. *Id. ibid.*

4. But a bailiff of a franchise to whom a sheriff's writ is erroneously directed, is not protected. *Id. ibid.*

5. He is not punishable as a trespasser for entering into land to execute the process of law, though the parties to the suit are mere strangers to the land, and never had any thing in it. *Plow.* 13.

6. The sheriff, having an extent upon a statute, can collect the goods together in one place to be viewed and appraised by the jurors, without being a trespasser. *Mo.* 563.

7. Where the sheriff does not misbehave himself in executing a *feri facias*, he shall not be charged in debt or *scire facias*, unless it appears by his own return that he has the money in his hands. 2 Saund. 345.

8. If the sheriff has no notice of an act of bankruptcy, and has paid over the money, he is excused. 2 Saund. 47 *m.*

9. On an erroneous judgment, the sheriff cannot show the error to defend himself in an action for escape. 2 Saund. 101 *a.*

10. A sheriff cannot justify receiving any person who is brought to him in illegal custody, for he is not bound to receive a prisoner from any body but from a constable or other peace-officer. *Rich v. Doughty*, 6 Mod. 154.

11. He cannot take advantage of his own irregularity to excuse himself in an action. *Hale v. Owen*, Com. 132.

12. If, after selling, an extent be delivered to him, and he give up the money to the crown, the assignees may bring money had and received against him; otherwise, if he sold under extent, though wrongfully preferring it to the *fi. fa.* 2 Saund. 70 *e. n.* [i]. 70 *f. n.* [i].

VI. RELATIVE TO THE LIABILITY OF THE EXECUTOR OF A SHERIFF.

If the sheriff does not pay the money levied, an action of debt lies against him and his executors after his death, because it was

a duty owing by him, and not only a personal wrong. 3 Salk. 323. pl. 6.

VII. RESPECTING BONDS GIVEN TO A SHERIFF;—

(a) What are good.

1. A condition of a bond to a sheriff to appear personally is good. *Bolles v. Heart*, Cro. Eliz. 776.

2. A bond "to be a good prisoner, and not escape," is good. 1 Saund. 161. *n.* (1).

3. A sheriff's bond, conditioned, that if the party appear, then the condition to be void, is good, although not in the form prescribed by 23 H. 6. c. 9., for the latter words shall be rejected as surplusage. *Maleverer v. Redshaw*, 1 Mod. 35.

4. Bond conditioned "*ad respondend. pre-fat. J R de placito transgressionis, &c., ac etiam bills*," omitting "*ipsius J R.*" is good. *Wrench v. Britton*, 10 Mod. 327, 328.

5. A sheriff's bond conditioned to answer the plaintiff in a plea of trespass generally,* is good, although the [*1267] writ is to answer in a plea of trespass, with an *ac etiam* in debt. *Gardiner v. Dudgeate*, 2 Show. 51.

6. Neither the writ nor any part of it need be inserted in the condition of the bond. *Wrench v. Britton*, 10 Mod. 328.

7. He may take a bond in more than £40 for appearance. Cro. Jac. 286.

8. The sheriff has a right to have two sureties, but he may take the bond with one only. 2 Saund. 61 *c. n.* (5).

9. A bond taken by sheriff is not void by statute 23 H. 6., although the surety have no lands. *Colton v. Wale*, 2 And. 175.

10. Nor for the insufficiency of the sureties. *Mo.* 636.

11. The bond must be to the sheriff himself, as such, by his name of office, and not to his bailiff. 2 Saund. 59 *b.*

12. But a bond given to the plaintiff himself for appearance, is good, though not according to the statute; and if an attorney undertake to appear for defendant, the court will attach him if he do not. 3 Salk. 75. 2 Saund. 59 *b.*

13. Since the statute 23 H. 6., upon a *feri facias* delivered to the sheriff, he may take a bond of the defendant to pay the money into court at the return of the writ. *Beawfage's case*, 10 Co. 99 *b.* 1 Saund. 161.

14. Such bond is not within the statute 23 H. 6., for that statute extends only to such bonds which any one in his ward makes to the sheriff, but is good at common law. *Beawfage's case*, 10 Co. 99 *b.*

15. A bond taken by a sheriff from his clerk for payment of money to the queen in the Exchequer is not void by the statute 23 H. 6. *Mo.* 542.

16. So, a bond to save him harmless against a false return of a *fi. fa.* is good. 1 Saund. 161.

17. He may or may not at his discretion

4. He may remove his gaol from one place to another within his bailiwick. Hob. 202. See 1 Show. 162.

XII. RELATIVE TO HIS POWER AND LIABILITY WHEN HE IS OUT OF OFFICE.

1. The acts of a sheriff are good till the writ of discharge is received. *Saint John's case*, Mo. 186.

2. By the seizure of goods in execution, the sheriff has a property therein, so that he may make a valid sale of them, or re seize them, as well when he is out of office as before. 2 Saund. 344. Lutw. [227.] Cro. Jac. 73. 3 Salk. 322. *Contra*, *Ayer v. Aden*, Yelv. 44. Prac. Ca. K. B. 210. S. C.

3. And the defendant cannot reclaim the goods, although the plaintiff die before the return of the writ; for the defendant is completely divested of them by the levy, and the sheriff, though out of office, may sell them without a *conditio exposita*; or, if he will not, he may be compelled by a *distringas* directed to the new sheriff. *Clerk v. Withers*, 11 Mod. 34, 35.

4. A bailiff-errant can execute a warrant of the old sheriff made before the writ of discharge, though the new sheriff be elected. Mo. 364.

5. An action on the case for negligence lies against an ex-sheriff for omitting to deliver to the new sheriff a writ of *superseatas*, by reason of which the plaintiff was taken in execution. *Callharp v. Phillips*, 2 Mod. 218. 1 Mod. 222. S. C.

6. If the sheriff suffer goods to be rescued, a *scire facias* lies against him after he is out of office. 11 Mod. 35. n.

7. If the plaintiff consent to the sheriff's abstaining from selling the goods, and the sheriff go out of office, the plaintiff cannot afterwards have a *distringas* against him. 2 Saund. 47 r. n. [c.]

8. No sheriff can be called upon to make a return except within six months after his office expires. 1 Mod. 222. *notis*.

XIII. OF THE ASSIGNMENT FROM THE OLD SHERIFF TO THE NEW ONE.

1. The old sheriff ought to give notice to the new sheriff of all executions wherewith any person is charged in their custody; and though the executions are of record, the new sheriff is not bound to take notice of them. *Westly v. Skinner*, 3 Co. 71 b.

2. A prisoner in execution at the suit of two several creditors was delivered over by the sheriff at the end of his year to his successor, by indenture, wherein the execution at the suit of one of them was mentioned, but the other execution was omitted; this was held to be an escape, for which the old sheriffs were liable. *Westly's case*, 3 Co. 71 b. Mo. 668.

3. If a sheriff deliver not a prisoner whom he has in execution, to the next sheriff, he himself remains still a sheriff for this pur-

pose, so as to be chargeable as a sheriff for the escape of that prisoner. Hob. 266.

4. By 20 G. 2. c. 37., sheriffs shall, at the expiration of their office, turn over to the succeeding sheriff, by indenture and schedule, all writs and processes unexecuted, and all prisoners in his custody. 6 Mod. 183. n. 1 Mod. 222. *notis*. 2 Mod. 218. *notis*.

5. But formerly an assignment of prisoners by under-sheriff to next sheriff was good without indenture. W. Kel. 125. 1 Barnes, 259.

XIV. CONSEQUENCE OF THE SHERIFF BEING INTERESTED.

1. If the sheriff be a party, or related to one of the parties, &c., and the *venire* be awarded to him, it is only matter of challenge, which may be waived or released. Skin. 118.

2. On challenge to him, the writ is to go to the coroners. Holt, 166, 167.

3. If eight only plead to issue, and the *venire* is awarded to the sheriff, if after it fall out that the sheriff is a defendant, the *venire* shall go to the coroner,* though the sheriff has not yet pleaded. [*1271] *Rex v. City of Worcester*, Skin. 106.

4. Where it is suggested on the roll that a brother of the defendant is one of the sheriffs of London, the coroner must return the jury. *Lord North v. Elliot*, Skin. 102.

5. Where there are two, and one of them only is party to the suit, the *venire facias* may be directed to the other, and not to the coroner. Carth. 214. *Rex v. Warrington*, 4 Mod. 65. 12 Mod. 22.

XV. EFFECT OF THE DEATH OF THE SHERIFF.

1. If a sheriff die, no process shall issue till a new one be made, and the process shall not go to the coroner. *Rex v. Warrington*, 12 Mod. 22.

2. Where one of the sheriffs of London dies, the other cannot act, for one alone is no sheriff, and the survivor must wait till another be made. 1 Show. 289.

3. If process be directed to the sheriffs of London, and one of them dies, the process is gone, for both make but one sheriff. *Salter v. Grosvenor*, 8 Mod. 304.

4. If a sheriff dies, the new sheriff is bound to take notice of all executions against any persons he finds in gaol. *Westly v. Skinner*, 3 Co. 71 b.

5. Where a sheriff dies, and before another is appointed one in execution goes at large, it is not an escape; for the prisoners were in the custody of the law till a new sheriff was made. Id. *ibid*.

XVI. RELATIVE TO THE REMEDY AGAINST A SHERIFF;—

(a) *For refusing a writ.*

Case lies against a sheriff for refusing a writ. *Lane v. Cotton*, 12 Mod. 485.

(b) *For refusing a vote.*

An action lies against the sheriff, as returning-officer, for refusing to receive the poll of a legal voter at the election of a member of parliament. *Ashby v. White*, 6 Mod. 46.

(c) *For refusing bail.*

1. If a defendant in custody upon *mesne process* tender a bail-bond with sufficient sureties to the bailiff, and he refuses it, an action on the case will lie against the sheriff. *Smith v. Hall*, 2 Mod. 32.

2. What are sureties so sufficient that the refusal of them shall be a ground of action, see 2 Saund. 61. n. [u.] 61 c. n. [v.]

(d) *For refusing to assign the bail-bond.*

1. He is liable to an action on the case if he refuses to assign. 2 Saund. 60 c.

2. But not after a surrender of defendant before the return of the writ. 2 Saund. 61 a.

(e) *For taking insufficient bail or sureties, &c.*

1. The taking a bail-bond discharges the sheriff. 1 Saund. 196 g. 2 Saund. 60 b.

2. The 23 Hen. 6. c. 10., which authorizes sheriffs to discharge prisoners upon reasonable sureties of sufficient persons having sufficient in the county, is compulsory upon the sheriff, and to be construed for the benefit of the sheriff, and therefore no action lies for taking sureties that are insufficient, or that do not inhabit within the county; but if the sheriff do not bring in the body at the return of the writ, or suffer him to go at large without authority, he is liable to an action. *Ellis v. Yarborough*, 1 Mod. 228. 3 Salk. 57. *Grosvenor v. Soame*, 6 Mod. 122. 2 Saund. 60, 61, c. n. (6) 154. *Contra*, *Ethericke v. Cooper*, 1 Ld. Raym. 425. 1 Salk. 99.

3. If an action is brought against him for returning *cepi corpus* when he has let the party to bail, he may either demur, or plead 23 Hen. 6. c. 10. in bar. *Parker v. Welby*, 1 Mod. 57. Moore, 483. *Page v. Tulse*, 1 Mod. 240. S. P.

4. By those words in the statute, that if the sheriff returns a *cepi corpus*, he shall be obliged to have the body at the day of the return, &c., it is only intended that he may be amerced to the king for not having the body at the day. 2 Saund. 60. See 10 Co. 99 b.

5. If the defendant do not appear at the return of the writ, the sheriff may be ruled to bring in the body, and upon his [*1272] neglecting so to do, an attachment* shall issue. *Ellis v. Yarborough*, 2 Mod. 178. *Page v. Tulse*, 2 Mod. 83.

6. Or he may be amerced, unless he has assigned the bail-bond, for that discharges the sheriff. *Grosvenor v. Soame*, 6 Mod. 122. 1 Salk. 99. 1 Saund. 161. n. [g.] 2 Saund. 60 b.

7. But an action lies against a sheriff for taking insufficient pledges in replevin. *Rouse v. Patterson*, 7 Mod. 387. 2 Mod. 181. *notis*.

8. So, case against him for not returning good issues on a *distringas*. *Anon.* 12 Mod. 494.

(f) *For an escape.*

1. An action lies for an escape upon *mesne process*, if he let the party go at large without taking a bail-bond, or return *cepi corpus*, and has him not at the return of the writ, i. e. does not put in and perfect bail in due time. 2 Saund. 61 a. b. n. (4.)

2. The sheriff is liable for the escape of a prisoner committed to the gaoler. *Rex v. Belwood*, 11 Mod. 80.

3. If the sheriff arrest upon a *capias ultagatum*, and return *cepi*, and suffer him to escape, he is liable in damages to the amount of the debt. Mo. 641.

4. If a *ca. sa.* is delivered to the sheriff, who makes a precept to the bailiff of the dutchy, who returns the precept served, and the sheriff returns *cepi corpus*, he is thereby chargeable to the plaintiff. Yelv. 52.

5. Upon escape of one in execution, it is at the party's election, to sue the prisoner or the sheriff. Cro. Car. 109.

6. If the sheriff suffer a voluntary escape, the creditor may, at his election, have an action against the sheriff, or a *scire facias quare executionem non* against the debtor. *Bassell v. Salter*, 2 Mod. 136. Holt, 279.

7. If the process is faulty, yet the sheriff is liable to an action for escape. *Shirley v. Wright*, Prac. Ca. K. B. 151. Salk. 273. 7 Mod. 29. 11 Mod. 50. Prac. Ca. K. B. 211. Ib. 169.

8. An action was brought as administrator against a man who escaped; the administrator brought escape against the sheriff: but a will was found, and the administrator was appointed executor, and it was held that he might maintain the action. Prac. Ca. K. B. 104.

9. But it does not lie either for an escape (on *mesne process*) or false return, if he put in bail before the expiration of the rule to bring in the body. 2 Saund. 61 a. n. (4.)

10. No proceedings can be had if defendant surrender before the return of the writ. 2 Saund. 61 a.

11. A sheriff is not liable for an escape, until the prisoner has been regularly delivered over to him by his predecessor. 6 Mod. 183. n.

12. An assignment of the bail-bond should always be demanded before bringing an action for an escape. 2 Saund. 61 b. n. [t.]

13. In an action of debt against a sheriff for permitting an escape, the indorsement of *non est inventus* on the *ca. sa.* is sufficient evidence of its having been delivered to him. *Blatch v. Archer*, 6 Mod. 152. n.

14. So, the bailiff's name indorsed on the writ is sufficient evidence that he was authorized by the sheriff without proving the warrant. Id. *ibid*.

15. The testimony of the steward of the

sheriff's court is inadmissible to prove that plaints had been levied without producing them. *Wilkinson v. Salter and Perry, Sheriffs of London*, C. T. Hardw. 310.

[See ante, tit. ESCAPE, Vol. I. p. 605.]

(c) For permitting a rescue.

1. For a rescue upon mesne process no action lies against the sheriff; otherwise in case of execution. March, 1. pl. 1. W. Jo. 201.

2. No action lies if the taking was illegal. 1 And. 234.

3. But a rescue from the bailiff on mesne process, while removing under a *habeas corpus*, will not excuse the sheriff. *Crompton v. Ward*, 11 Mod. 347. See also W. Jo. 201.

4. If the sheriff returns that goods are seized, it is no excuse to say, that they are rescued. 2 Ro. 57.

5. A *scire facias* lies to have execution against him of the money, according to the value returned. 2 Saund. 344, 345.

6. Or an action of debt. 2 Saund. 344. n. (3.)

7. But if the sheriff return a [*1273] rescous, it* will excuse him from being fined by the king, though the party can have his action on the case. 1 Ro. 389.

8. A *scire facias* lies against him after he is out of his office. *Clerk v. Withers*, 11 Mod. 35 n.

9. In escape, one may plead a rescue on mesne process, without pleading a return of the rescue, and without having returned it. 2 Lev. 144. 2 Saund. 345.

10. In case of rescue from mesne process, the plaintiff must prove the original cause of action, the writ, the warrant, and a legal arrest. *Wilson v. Gary*, 6 Mod. 211.

11. The party rescued is a competent witness. *Wilson v. Gary*, 6 Mod. 211.

12. No writ of error lies to the Exchequer Chamber. 2 Saund. 101 c.

[See also ante, tit. RESCUE, Vol. I. p. 3208.]

(h) For money levied under an execution.

1. The sheriff is answerable to the plaintiff to the value of the goods taken in execution. 2 Saund. 46 c. 47.

2. After the debt levied, the sheriff is debtor to the plaintiff, and capable of a release from him. Hob. 206, 207.

3. And the defendant is discharged, though the sheriff does not satisfy the plaintiff, or has not returned the writ; but it is no actual satisfaction of the debt; and therefore one obligor cannot plead the seizure of another co-obligor's goods under a *feri facias*. 2 Saund. 46 c. 47. n. [a].

4. An action of debt lies against a sheriff for money levied on a *feri facias*, although the writ is not returned. *Cockran v. Welby*, 2 Show. 284. *Speake v. Richards*, 2 Show. 281. S. P. 4 Mod. 404. *contra*.

5. Debt lies by an executor for money levied under an execution sued out by the testator. *Cockran v. Welby* 2 Mod. 212.

6. If he returns that he has taken goods to the value, but retains them, a *scire facias* lies against him, to have execution of the money. 2 Saund. 71 b.

7. But if he returns, that the goods seized remain in his hands *ob defectum emptorum*, he shall not be charged in debt or *scire facias*. 2 Saund. 345.

8. The statute of limitations cannot be pleaded to debt against a sheriff for money taken in execution. 2 Show. 79. *Cockran v. Welby*, 1 Mod. 245, 246. 2 Mod. 212. S. C. 2 Saund. 67 a. n. [z].

[See ante, tit. EXECUTION. div. XVII. and XVIII. Vol. I. p. 656.]

(i) For neglecting to pay a year's rent to the landlord.

A declaration in an action by a landlord against the sheriff, for neglecting to pay him a year's rent on an execution against the goods of his tenant, need not recite the statute 8 Ann. c. 16., nor the judgment on which the execution was founded. *Pain v. Womansel*, 7 Mod. 257.

(j) For a wrongful seizure.

1. An action on the case lies against sheriff and him to whom the warrant to arrest was made, when they have no writ. W. Jo. 379.

2. Case lies for knowingly seizing the goods of one man under an execution against another. 1 Sid. 183.

(k) For a tortious arrest.

If he arrest one by *capias* and returns not the writ at the day, it is a tortious arrest, but not so in his servant or bailiff. Cro. Car. 446, 447.

(l) For entering a liberty.

Case lies by a corporation having return of writs within a town against a sheriff for entering therein. 1 Ro. 118.

(m) For a false return.

So, for returning on a jury one who lived in a place exempt. 1 Ro. 119.

[See ante, tit. RETURN, div. XVI. Vol. II. p. 1216.]

(n) For deceit.

Deceit lies against him if the tenant was not summoned. Jenk. 69.

XVII. RELATIVE TO THE FORM OF PROCEEDING AGAINST HIM;—

(a) By action of trespass or trover.

1. Trespass lies against a sheriff for making* a replevin after claim of property notified to him. *Leonard* [*1274] v. *Stacey*, 6 Mod. 140.

2. The sheriff took the goods after an act of bankruptcy, and after a commission and assignment proceeded to sell them; held that assignees might not have trespass against sheriff, but they might have trover. 2 Saund. 47 p.

(b) *By motion to the court.*

1. Rule for the sheriff to bring in money levied by him on *ieri facias* was granted. *Thompson v. Dempster*, C. T. Hardw. 180.

2. The court refused to order the administrator of a bailiff (to whom an execution had been delivered) to pay over to the plaintiff the money which he had received after the bailiff's death. *Went v. Swayne*, Willes, 185.

(c) *By ruling him to bring in the body.*

1. A rule to bring in the body cannot be had after a recovery against sheriff for an escape, nor after taking a *cognovit* from defendant. 2 Saund. 61 d. n. [a].

2. The rule cannot be obtained till bail is excepted to. *Anon. Prac. Ca. K. B.* 42. Lofft, 158.

3. Sheriff has four days exclusive to bring in the body. *Anon. Prac. Ca. K. B.* 213.

4. The object of the rule is to compel the sheriff to put in bail. 2 Saund. 61 d. e.

5. He may be ruled where he takes only one bail, though bail has surrendered defendant. *Steward v. Bishop*, 1 Barnes, 46.

6. The sheriff should put in bail on rule to bring in the body in six days, else he must pay costs. *Henley v. Anderson*, 1 Barnes, 80.

7. The sheriff was ordered to pay the costs of the application against him, where bail was not perfected till after plaintiff was entitled to come for an attachment. *Peeston v. Tracy*, 2 Barnes, 78.

8. If the bail taken by sheriff were then good, but afterwards became insufficient, the sheriff must put in good bail. *Champion v. Townshend*, 1 Barnes, 80.

9. If the sheriff neither bring in the body, nor duly put in and perfect bail, the court will on affidavit of the service, &c. grant the attachment. 2 Saund. 61 e.

10. Formerly he was only amerced. 2 Saund. 57. n. (2).

11. The sheriff shall not be discharged from the attachment, but upon payment of the whole debt and costs, and not merely the sum sworn to. 2 Saund. 61 f., but see n. [h].

12. The attachment may issue though defendant dies, if the sheriff be already in contempt. 2 Saund. 61 f.

13. Rule to bring in the body shall be discharged, if defendant has continued in custody since the arrest: otherwise if he has escaped. *MacLeod v. Marsden*, 1 Barnes, 27. 248.

(d) *By distringas.*

1. If the sheriff after a levy does not pay the money at the return of the writ, plaintiff may have a *distringas* against him directed to the coroners. 2 Saund. 47 r.

2. If the sheriff does not sell between the tests and return of the *distringas* against himself, he will forfeit issues to the amount of the debt. 2 Saund. 47 r.

(e) *By amercement.*

1. If he return a *cepi corpus*, and has not body, he shall be amerced. 3 Salk. 314.

2. After the plaintiff has accepted an assignment of the bail-bond, the sheriff shall not be amerced. 3 Salk. 57.

(f) *By attachment.*

The court will not grant an attachment against a sheriff for neglecting to take a replevin bond. *Rez v. Lewis*, 2 Mod. 181. *notis*.

(g) *By indictment.*

1. If a sheriff take upon himself the custody of prisoners without delivery by indenture to him, he may be indicted if he suffer them to escape. 2 Ro. 146.

2. A sheriff is indictable for refusing to execute a warrant of justices. 2 Show. 182.

(h) *By information.*

An information prayed against the sheriff* of Montgomery, for refusing [*1275] ing after notice to keep his prisoners in a new gaol, was refused. *Rez v. Edwards*, 7 Mod. 280.

XVIII. RELATIVE TO THE REMEDY FOR A SHERIFF;—

(a) *For disturbing him in his office.*

If, while a sheriff is taking a poll, a person take away the poll-books, or other papers, it is disturbing him in his office, and an action will lie against the disturber. *Show v. A Burgess of Colchester*, 2 Mod. 228.

(b) *For entering his bailiwick.*

Case lies for entering his bailiwick. *Cary v. Callice*, Comb. 198.

(c) *For rescuing or removing goods seized in execution.*

1. The sheriff acquires a special property in goods seized under a writ of execution, and may maintain either trover for their value, or trespass for the tortious taking. *Wilbraham v. Snow*, 1 Mod. 30. 1 Vent. 53. S. C. 2 Saund. 46 c. 47.

2. He must continue in possession in order to maintain the action. 2 Saund. 47. n. [c]. See 1 Mod. 31. & 29 Car. 2. c. 3.

3. The declaration need not state that he has paid the value to the plaintiff. 2 Saund. 47.

(d) *For an escape.*

1. If judgment in debt be given against the sheriff for escape, he shall have his action on the case against the party escaping, although the gaoler suffered him to escape. *Moore*, 404. 1 Leon. 237.

2. The sheriff may bring an action for an escape against a prisoner, either before or after he has paid the money. 1 Leon. 237. 11 Mod. 135. n.

(e) *For money paid on account of a defendant.*

If the sheriff took no bail-bond, he can have no action against defendant though he has paid the debt. 2 Saund. 61 g. n. [k].

(f) *For his fees.*

1. He may have an action of debt for his fees on the statute 28 Eliz. c. 4. *Attorney-General v. White*, Com. 435. Noy, 75.

2. Or an action on the case upon a promise to pay his fees due by law; thus, in consideration that the sheriff at defendant's request would levy an execution, he promised to pay him such fees as the statute of 28 Eliz. allows. *Straton v. Sulard*, Cro. Eliz. 654, in error. Mo. 699.

3. But bonds taken for execution fees are void. 10 Mod. 85, 86. 139. Noy, 75.

4. A promise for the payment of them is good. *Mitchel v. Reynolds*, 10 Mod. 85.

5. On a writ of false judgment, unless sheriff's fees are paid, he may execute a writ *de executione judicii*. *Gale v. Hooker*, 1 Barnes, 33.

[See ante, tit. FEES, div. IV. Vol. I. p. 686.]

XIX. RELATIVE TO THE FORM OF PROCEEDING.

The sheriffs of London cannot sue as one sheriff, but otherwise in Middlesex. 2 Show. 433.

XX. RELATIVE TO THE SHERIFF'S TOURN OR COURT.

1. A court leet cannot be held at any other time, except only within one month after Easter and Michaelmas, unless it be by patent or special prescription. 2 Saund. 291. See also *Griffith v. Bedle*, W. Jo. 300.

2. Presentments in the tourn ought to be to the next quarter sessions. Id.

3. If the king grants to another the office of clerk of the county court, or shire clerk of the county of S, with all fees, &c., for life, this is void against the sheriff of S, when he is made sheriff, because the county court and the entering of all proceedings in it are inseparably incident to the office of sheriff, and it is in the court of the sheriff, though the suitors are judges, and the sheriff is the immediate officer to the court, and ought to answer for the records of the court if they are embezzled. *Milton's case*, 4 Co. 32 b.

4.* It is inseparably incident to [*1276] the office of a sheriff to make the county-clerk. *Harcourt v. Fox*, 1 Show. 531. *Milton's case*, 4 Co. 32.

SHIP.

I. RESPECTING THE APPOINTMENT OF THE CREW, p. 1276.

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IV. RELATIVE TO THE HYPOTHECATION OF A SHIP, p. 1276.

V. RESPECTING THE MORTGAGE OF A SHIP, p. 1276.

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VII. REMEDY TO RECOVER A SHIP, p. 1276.

VIII. RELATIVE TO THE LIABILITY OF THE MASTER AND OWNERS, p. 1276.

I. RESPECTING THE APPOINTMENT OF THE CREW.

When a person is made master of a ship, he has the appointing of the crew, for as he is answerable for all events, he should have the election of those he can confide in. *Resiers v. Sankins*, 12 Mod. 434.

II. RELATIVE TO THE PRESERVATION OF A SHIP.

If a tempest arise at sea, the passengers may *levandi navis causa*, and for the salvation of the lives of the men, cast over the merchandizes, &c. *Mouse's case*, 12 Co. 63.

III. RESPECTING THE STOPPING OF A SHIP.

1. The king cannot stay a ship or lay an embargo in time of peace. Comb. 216.

2. An action lies for suing in: the admiralty to stay a ship bound to the East Indies. Comb. 215.

IV. RELATIVE TO THE HYPOTHECATION OF A SHIP.

1. The master of a ship has power to pawn it, in case of necessity, by the civil law; not so by our law. Hob. 12.

2. An hypothecation bond given at land by the master of a vessel for necessities to supply damage done by stress of weather at sea, is good. *Johnson v. Shippen*, 11 Mod. 30.

3. If a ship has been legally hypothecated, the ship remains liable to answer the money borrowed, into whose hands soever she may come. 6 Mod. 12.

V. RESPECTING THE MORTGAGE OF A SHIP.

To secure the re-payment of money advanced upon the mortgage of ships, it is not requisite that the mortgagee should have actual possession of them; it is sufficient if the mortgagor delivers to him all the possession he can give. *Belchier v. Parsens*, Keny, 48.

VI. RESPECTING THE CAPTURE OF A SHIP.

If a captured ship be retaken upon fresh pursuit, though after a week's time, the property in her is not changed by the capture, but remains in the first owners. *Watson v. Tranter*, 6 Mod. 12.

VII. REMEDY TO RECOVER A SHIP.

1. The part owners of a ship may have trover for it. *Dockwray v. Dickinson*, Comb. 366, 367.

2. One took away a ship, and sent it to the West Indies, where it was destroyed; held evidence of a destruction such as to enable the other to bring trover; but the mere sale of a ship is not such a destruction. 2 Saund. 47 h. n. [s].

3. The buyer of a ship, not duly conveyed under the register acts, acquires a property sufficient to maintain trover against a stranger. 2 Saund. 47 d. n. [h].

VIII. RELATIVE TO THE LIABILITY OF THE MASTER AND OWNERS.

1. The master of the ship is responsible,* as well as the owners. [*1277] *Boson v. Sandford*, 3 Lev. 258.

2. The master engages against every thing except pirates and storms, and is answerable though there be no apparent neglect in him or his servants and seamen. *Horseman v. Gibson*, Fort. 34. *Morse v. Slue*, 2 Lev. 69.

3. The master of a ship is a common carrier, and liable in an action on the case for the value of goods which he has received on freight, on their being stolen by open force and violence from on board his ship while lying in the river Thames. *Mors v. Sluce*, 1 Mod. 85. 2 Lev. 69, S. C. T. Raym. 220. Comb. 175.

4. The master though not on board, or the person having the care of the ship in his absence, is subject to the penalty on the statute 10th of queen Anne, for mooring a merchant ship at the king's moorings, at the election of the king. *Horseman q. t. v. Gibson*, Fort. 34.

5. The master is answerable for the distress of the ship. 3 Lev. 37.

6. The owners or the master are in general liable for necessaries for the use of a ship, if the master order them; but if it appears that the credit has been given exclusively to the owners, and that the master in giving the orders acted merely as their servant, he will not be liable. *Hoskins v. Slayton*, C. T. Hardw. 376.

7. For repairs done to the ship, the master or owners are liable at the election of the person employed. *Carnam v. Bennet*, 2 Stra. 816.

8. For goods lost out of a ship, case will lie, either against the master or owners. *Horseman v. Gibson*, Fort. 35.

9. So where goods are damaged in a ship, an action lies, either against the master or the part-owners. Comb. 117, 118.

10. So it lies against all the owners of a ship for damage done to goods delivered to the master to be carried. 2 Show. 478. 3 Lev. 258.

11. Though goods are spoiled by default of the master, the owners are liable. Salk. 440.

12. The owner who has let his ship to another, is still liable for a loss of gold sent by the ship. Stra. 1251.

13. Although it appears that the freight of certain goods shipped on board a general ship usually belongs to the master, yet if he refuse to deliver the same to the consignee, an action for non-delivery lies against the owners on the general custom, and this, although the master do not account to them for the freight; but then, in the case of a special verdict, it must be found that the ship was a general ship, viz. carrying for hire, for the custom need not be alleged in the declaration: facts must be found sufficient to bring the case within the custom. *Boucher v. Lawson*, C. T. Hardw. 85.

14. By 7 Geo. 2. c. 15., no owner shall be liable on account of embezzlement by

master or mariners beyond the value of the ship and freight. *Mors v. Sluce*, 1 Mod. 85. *notis*.

15. One part owner is not suable without the others, for all must be joined. Comb. 117, 118.

SIMONY.

1. Selling a curacy, and taking money to admit persons into holy orders, is simony. *Bishop of Saint David's v. Lucy*, Carth. 484. 1 Ld. Raym. 447. 1 Salk. 106. 134. 294. S. C.

2. The nature of it is *contractus ex turpi causa, et contra bonos mores*. *Winchcombe v. Bishop of Winchester*, Hob. 167.

3. If a man contract with the patron's wife to be presented for money, and he is presented accordingly by the husband, it is simony within the 31st Eliz., and makes the presentation void. *Rez v. Bishop of Norwich*, 1 Ro. 236.

4. Upon a simoniacal contract, although the grant be utterly void, yet if there be a presentment thereupon, it is simony, and when the spiritual court has sentenced it, the common law courts give credit thereto. *Baker v. Rogers*, Cro. Eliz. 788, 789.

5. The sale of an advowson, with a covenant to present such a person as the bargainee shall nominate, the church being at that time full of an incumbent by usurpation, and a *quare impedit*, then pending to remove him, by which he is afterwards removed, held simony.* *Walker v. Hamersly*, Skin. 90. 3 Salk. [*1278] 323.

6. Though the incumbent had no notice of a corrupt agreement made between W R, and the grantee of the next avoidance. *Anon.* 3 Salk. 325.

7. The parson's presentation may be simoniacal, though neither he nor the patron knew of it. *Rez v. Trussel*, 1 Sid. 329.

8. If a patron contract with one for simony, and present another without simony, it is not within the statute. *Winchcombe v. Bishop of Winchester*, Hob. 167.

9. If a stranger contract with the patron simoniacally, it makes the presentation void. 1 Ro. 236.

10. A parson being sick, the father (the son being present) contracted with the patron for the next avoidance, for 100l.; this was held not to be simony, for the father is bound to provide for the son; but if the father himself had contracted for a benefice to the intent another should present him, that is simony. *Smith v. Shelbourn*, Cro. Eliz. 686.

11. If the patron for money present to a benefice with cure, every such presentation, and the admission, institution, and induction thereon, are void, although the presentee be not party nor privy to it. *Case of Simony*, 12 Co. 74.

12. And though the statute inflicts a penalty by forfeiture, and does not declare the contract void, yet, such contracts being against law, are always void. *Bartlett v. Vinor*, Carth. 252.

13. He who is in a benefice by a simoniacal contract is disabled to enjoy it legally. *Rex v. Bishop of Norwich*, Cro. Jac. 385. 535.

14. One who is party or privy to the simony is perpetually disabled. 2 Ro. 83.

15. A presentation for simony without admission is within the statute. *Winchcombe v. Bishop of Winchester*, Hob. 167.

16. If the simoniacal clerk resign, and another be presented, and die, the king has thereby lost his turn. S. C. Hob. 167.

17. Simony makes the church void as well between the parties as strangers; but not to an usurper, or to the grantee of the next avoidance, who presented by simony. *Winchcombe v. Bishop of Winchester*, Hob. 167, 168. Cro. Jac. 385. 535.

18. If a party for money procure another to be made rector, the money cannot be recovered, as the contract is simoniacal. *Toddridge v. Macalley*, W. Jo. 341.

19. Simony is not pardoned by the word "offences," in a general pardon, because it is *malum in se*. *Anon.* 3 Salk. 265. pl. 6.

20. Though the king pardon the simony, yet the presentation remains void. *Winchcombe v. Bishop of Winchester*, Hob. 167. *Thornby v. Fleetwood*, Com. 220.

21. A prohibition was granted to the ecclesiastical court upon a suit there for tithes, because the presentment belonged to the crown by the 31 El. for simony. Mo. 777.

22. Where the patron is an infant, and the simoniacal contract was made with his mother, he need not be named in a *quare impedit*. *Anon.* 3 Salk. 324. pl. 3.

23. Simony cannot be intended; and therefore, if defendant intends to avail himself of it, he must specially plead and show it. *Babington v. Wood*, W. Jo. 220.

24. Simony could not at common law be pleaded to avoid a bond. *Oldbury v. Gregory*, Mo. 564.

SLANDER.

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I. RESPECTING SLANDER GENERALLY ;—

(a) *What words are actionable*.

1. In actions for slander, two things are necessary ; first, that the person scandalized be certain ; second, that the scandal be apparent from the words themselves. 4 Co. 17 a.

2. Words spoken by way of interrogation are actionable ; as, if A say to B, " Did you not hear that C is guilty of treason ? " this is tantamount to a scandalous publication. *Earl of Northampton's case*, 12 Co. 132. Cro. El. 273.

3. Adjective words are actionable ; if they import an act done ; *aliter*, if they import an inclination only : so, words spoken adjectively are actionable if they slander a man in his office or trade, &c. ; as, to say of a judge, " he is corrupt ; " of a clergyman, " he has made a seditious sermon ; " or of a merchant, " he is a bankrupt, knave, &c. " *Brittbridge's case*, 4 Co. 18 b.

4. Words which injure a person in his profession, or bring him in danger of punishment, are actionable. 3 Mod. *ibid.* 27.

5. For scandalous words, if there may be consequential damages, an action lies. *Carter*, 1

6. A man claims contract of marriage with a woman, by which she loses her marriage ; action lies against him, though he claims title to her himself. *Sheppard v. Wakeman*, 1 Lev. 53.

7. If it appear by all the words that the person is scandalized, though it be only by circumlocution, or by description, still an action lies. 2 Ro. 156.

8. They need not contain a direct and positive assertion. *Anon.* 11 Mod. 60. 61.

9. So, though the party be not named, but only signified. *Hob.* 89.

10. Words actionable ought to import in themselves precise slander, without ambiguity. *Cro. Jac.* 107.

11. Slander ought to be direct, that no reasonable intendment can be made against it. *Cro. Jac.* 184.

12. Case lies for damage by scandal as well as by expense, though the indictment was insufficient. *Jones v. Gwynn*, 10 Mod. 217.

13. Words are to be taken in their natural sense, and according to the apprehension of the bye-standers, and the old rule of *mitiori sensu* is exploded. *Somers v. House*, Holt, 39. 1 Saund. 242 a. *Skin.* 183. 10 Mod. 198.

14. These actions were at first so far discontinued, as that whenever the words were capable of two constructions, the court always took them *mitiori sensu*. 10 Mod. 197.

15. The rule of taking words in *mitiori sensu* was only adopted where the words in their natural import were doubtful, and equally to be understood in the one sense as well as the other. *Skin.* 364.

16. Actions for defamation are now encouraged. *Castle v. Bailey*, Com. 530.

(b) *What are not*.

1. Anciently, no action lay for words unless the slander concerned life. *King v. Lake*, 2 Vent. 28.

2. Held, no action lies for words in the disjunctive. *Cro. Eliz.* 780. *Mo.* 182.

3. So, for words spoken in French, &c., where no one understands them but the party speaking. *Anon.* Moore, 182.

4. Where there is no intention of slander, an action will not lie. *Brook v. Sir H. Montague*, *Cro. Jac.* 91.

5.* To say a man is excommunicated is not actionable. *Skin.* [*1281] 124.

6. So, " common extortioner," unless party was an officer. *Moore*, 182.

7. " Thou art a barrator," unless it be spoken of an attorney. *Marston v. Dennis*, 2 Sid. 7. *Hob.* 140.

8. " Thou shouldst have sat on the pillo-

ry, if thou hadst had thy deserts." *Moore*, 243.

9. Adulterer, knave, villain, pick-pocket, or rogue, not actionable. *Moore*, 29. *Cro. Jac.* 204. *Str.* 304. 2 *L.d. Raym.* 1417. *Stanhope v. Blith*, 4 Co. 15 a. 2 *Lev.* 62.

10. No action lies for slander when published of another in the course of a proceeding in court. 2 *And.* 28, 29.

11. For exhibiting slanderous words in the Star Chamber, nor upon his saying, in other places, that the matter of his bill was true. *Moore*, 705.

II. RELATIVE TO THE OFFENCE OR IMPUTATION CHARGED OR CONVEYED BY THE SLANDER;—

(a) *Treason and disaffection to government*;—

1. What words are actionable.

1. For the words "thou art an enemy to the state," an action lies. *Chaster v. Peter*, *Cro. Eliz.* 602.

2. So, "he hath set his hand to bring the late king to justice." *Hank v. Rowe*, 1 *Sid.* 131.

3. "Pierce said that Lewes said there is no prince in England." *Lewes v. Waller*, 1 *Ro.* 444.

4. "It is well known that I am a true subject, but thou serveest no true subject, and that thy own conscience doth accuse thee." *Waldegrave v. Agar*, *Cro. Eliz.* 191.

5. "As sure as God governs the world he has committed treason." *Dacy v. Clinck*, 1 *Sid.* 52.

6. "He is a clipper, and his neck shall pay for it;" so, "thou art a clipper, and deserve to be hanged for it." *Moyden v. Mycocks*, *Skin.* 183. *T. Jones*, 235.

7. "In Black-Bull yard you could procure broad money for gold, and clip it;" because it imports the act done. *Speed v. Perry*, 2 *Salk.* 697.

8. "Traitorly knave, or rogue," is actionable; so, "branded rogue." *Marke v. Cubit*, *Aleyn*, 35. 1 *Sid.* 103.

9. "He has the Pretender's picture in his room, and I saw him drink his health, &c." *Fry v. Carne*, 8 *Mod.* 283.

2. What are not.

1. "Thou art a rebel against the king." *Glanville v. Gully*, 1 *Sid.* 132.

2. "Thou art no true subject to the king, and that I will prove." *Smith v. Turnor*, *Cro. Jac.* 202.

(b) *Murder*;—

1. What words are actionable.

1. "He is infected of the murder and doth smell of it," are actionable words. 3 *Dy.* 317. pl. 8.

2. An action lies for saying, "G B is the man who killed my husband." *Button v. Heyward*, 8 *Mod.* 24.

3. "He hath broken two or three of his

father's ribs, of which he shortly after died, and I will complain to a justice of him; he may be hanged for the murder, though it were done twenty years since." *Phillips v. Kingston*, 1 *Vent.* 117.

4. That he procured one to kill or rob another, though he be neither killed or robbed. *Moore*, 186. 409.

5. "He hath killed J S," without averring that J S is dead. 1 *Sid.* 52.

6. Tibbot and one Gough agreed to have hired a man to kill me; and that Gough should show me to the hired man to kill me." *Tibbot v. Haynes*, *Cro. Eliz.* 191. 4 Co. 1^c b.

7. "Thou art a black shaghead murdering-rogue." *Green v. Lincoln*, *W. Jo.* 226.

8. "If Sir John Sid might have his will, he would kill all the true subjects in England, and the king too; and he is a maintainer of papists and rebellious persons." *Cro. Jac.* 407. *Hob.* 181. 186. 1 *Ro.* 427.

9. To say he killed a man aboard of a ship, and if he had not bought it off for a piece of money, he had suffered for it, is actionable; for it shall be taken that the killing imputed to him was a felonious killing, as otherwise he could not suffer for it. *Bowfield v. Lurton*, 2 *Show.* 78.

10. "He hath poisoned J. S." *Cro. Jac.* 343.

11. So, for saying "thou murderer." *Winter v. Barnam*, *Owen*, 33.

12. It is actionable to say, "my lady C offered to give poison to one to kill the child within her body." 4 Co. 16 b. *Mo.* 418.

13. "William Keymors had gotten A B his maidservant with child with four children, and after, he killed them." *Keymors v. Hallet*, *W. Jones*, 141.

14. "I hope she did not murder her child;" the defendant answered, "but she did, and blood requires blood." *Nailer v. Clarke*, *T. Jones*, 211.

2. What are not.

1. "Thy son is a murderer;" no action lies, without alleging that there was no other son. *Harvey v. Chamberlain*, *Palm.* 283.

2. "For my ground, A H seeks my life; and if I could find J S, I do not doubt but within two days to arrest him for suspicion of felony;" held that the first words are not actionable; but for the last words the action lay, because for suspicion of felony, he may be imprisoned, and his life drawn in question. *Hext v. Yeomans*, 4 Co. 15 b.

3. "Thou hast poisoned Smith," (for it might be unwillingly), *quendam Sam. Smith, ad tunc, defuncti, innuendo*. *Miles v. Jacob*, *Hob.* 6. 268.

4. "Thy husband was the occasion of the death of A." *Stelton v. Barth*, 2 *Sid.* 71.

5. "He is a brabblor and a quarrelor, for he gave his champion counsel to make a deed of gift of his goods to kill me, and then

to fly out of the country, but God preserved me," is not actionable; because the mere intent, without an act, is not punishable by law. *Eaton v. Allen*, 4 Co. 16 b.

6. "She had a child, and either she or somebody else has made it away." *Falkner v. Cooper*, (Bridgman, C. J. contra,) Carter, 55.

7. "Thy son has murdered my child," held too general. *Cro. Jac.* 635.

8. "Plaintiff having a wife still living, the defendant said to him "thou hast killed my wife," held not actionable; otherwise if she had been dead. *Snag v. Gie*, 4 Co. 15 a.

9. "J S told me that he had heard say that thou didst poison thy first husband." *Moore*, 408.

(c) *Attempt to murder, &c.*

1. "He went about to kill me;" an action lies. *Warner v. Cropwell*, 3 Leon. 231.

2. So, "If I had consented to M C, T H had not been alive." 4 Co. 16 b.

3. "He assaulted my wife with an intent to ravish her," or "to rob her." *Langly v. Clark*, 1 Sid. 76. 100.

(d) *Theft, burglary, &c.;—*

1. What words are actionable.

1. Held that an action lay for calling a man "thief" after a general or special pardon. *Cuddington v. Wilkins*, Hob. 67. 81, 82. *Ow.* 150. *Moore*, 863. *Keilw.* 26. 1 Sid. 52.

2. The words "C was in W gaol, and tried for his life, and would have been hanged, had it not been for L, for breaking open the granary of farmer A, and stealing his bacon;" held actionable. *Carpenter v. Tarrent*, C. T. Hardw. 339.

3. "Thou art a thief, and hast stolen my dung" actionable, because in common parlance it is understood of dung in a heap, which is a chattel. *Yearworth v. Pierce*, Ayleyn. 31.

4. "You are a rogue, and broke open a house at Oxford, and your grandfather was forced to bring over 30l. to make up the breach;" for a man who heard them could not intend other than that he meant a felonious breaking of the house. *Somers v. House*, Skin. 364. Comb. 232.

5. "He was in prison for stealing horses;" otherwise "upon suspicion." *Moore* 866.

6. "She is as very a thief as any that robs by the highway side." *Lady Ratcliffe v. Shubley*, *Cro. Eliz.* 224.

7. "Arys is a thief, he has stolen my corn, and given me no satisfaction." *Arys v. Higgins*, W. Jones, 43 *Moore*, 883.

8. "When wilt thou bring home my husband's sheep thou has stolen." *Moore*, 418.

9. "Have you brought home the 40l. you stole." 2 Ro. 165. *Palm.* 66. *Cro. Jac.* 568.

10. "Thou hast stolen a load of hop poles." *Guildesford v. Ward*, *Cro. Eliz.* 225.

11. "Such a one told me that J S stole, &c." *Mayott v. Gibbons*, 2 Ro. 166.

12.* "He set upon him in the highway, and took his purse from [*1283] him, and would have cut him in the middle had not the plaintiff run away." *Lawrence v. Woodward*, W. Jones, 302.

13. "They did lie in wait to rob him, and did set upon him to rob him, and by reason of the hue and cry were fain to run away upon one horse." *Leuknor v. Crouchley*, W. Jones, 195.

14. "Thou hast stolen our bees (innuendo a stock of bees,) they are hidden under the old woman's hemsack, and thou art a thief." *Tybbes v. Smith*, T. Raym. 33.

15. "Thou hast stolen my corn out of my barn," though it might be only petit larceny. Hob. 184. *Moore*, 863. *Cro. Jac.* 442. 457. 673.

16. "I dealt not so unkindly with you you stole my stack of corn." *Cooper v. Hawkerwell*, 2 Mod. 58.

17. "He stole the colonel's cupboard cloth," though there is no precedent discourse laid in the declaration either of the colonel or his cloth. *Anon.* 3 Mod. 280.

18. "Thou art a thief, and hast stolen my trees;" for it shall be intended such trees whereof theft may be committed. Cited in *Tibbs v. Smith*, T. Raym. 33.

19. "He was arraigned at the Warwick assizes for stealing twelve hogs, and if he had not made use of the means he did, it would have gone hard with him." *Haley v. Stanton* W. Jones, 299.

20. "J B stole my box wood." 2 Ld. Raym. 959. *Salk.* 695. *Baker v. Pierce*, 6 Mod. 23. *Holt*, 654.

21. "Thou art a thievish rogue, for thou hast stolen my faggots." *Cro. Jac.* 600.

22. "Thou hast been in a gaol for stealing a pan." *Shovel v. Haman*, *Cro. Jac.* 154.

23. "Go tell thy landlord he is a thief." *W. Jo.* 376.

24. So, "M stole a sheep of his; (innuendo the defendant's,) and it is not the first he stole by a hundred." *Muck's case*, 8 Mod. 30.

25. "You are a break-lock and a pick-lock, and keep pistols in your house, and I will arraign you, and have you whipped, &c. for it." *Peat v. Parry*, Comb. 52.

26. "Thou hast robbed the church, and stolen the lead of it." *Cro. Jac.* 133.

27. "You are a rogue, and robbed the Hockley butcher, &c." *Smith v. Williams*, Comb. 247.

28. "Thou didst steal a sack," spoken positively, though by way of accusation before a justice. *Semb. Scarlet, v. Stiles*, Hob. 192.

2. What are not.

1. "Thou art a filching fellow, and didst

filch from J D. 100L. *Bradshaw v. Walker*, Hob. 249.

2. "Thou hast stolen half an acre of corn," meaning corn severed. Moore, 398.

3. "Thou art a thief, and hast stolen a tree." *Coote v. Clerk*, Hob. 77.

4. "Thou art a thievish knave, and hast stolen my wood." Cro. Jac. 65. 116.

5. "Thou art a thief, and hast stolen four cart loads of my fuzes." *Godard v. Gilbert*, W. Jones, 11. Hob. 331.

6. "Thou art a thief, for thou hast stolen me a hundred of slate." 1 Ro. 286.

7. "You have stolen the shutters of my window." *Hall v. Hammond*, 1 Sid. 104.

8. "The plaintiff hath been in prison for stealing P's horse." Moore 401.

9. "He has been whipped, or burnt in the hand or shoulder for sheep." *Churley v. Hill*, W. Jo. 308.

10. "He is in a gaol for stealing a mare." *Steward v. Bishop*, Hob. 177.

11. "Thou art a sacrilegious person, and committest sacrilege every day." *Gaudy v. Smith*, 1 Lev. 250. 1 Sid. 376. S. C.

12. "So, for Welch words, which, upon examination of witnesses, appear to be of a dubious sense, and to signify more properly bearing away, than stealing." *Gibbs v. Jenkins*, Hob. 191.

(e) *Perjury, or subornation of perjury* :—

1. What words are actionable.

1. "J S is forsworn, and his oath appears on record," an action lies. *Oborne v. Brooke*, Aleyn, 7.

2. "He hath forsworn himself in the quarter sessions." *Drake v. Corderoy*, W. Jo. 307.

3. Or, at the court of request, &c. 1 Leon. 127, 128. Mo. 404. 2 Ro. 471.

4. "An action lies for saying, [*1284] "you are" forsworn in your answer;" and is good without alleging that the cause was within the jurisdiction of the court in which the answer was. *Goodwin v. Browne*, 2 Show. 33.

5. "She is a forsworn whore, and a perjured whore, and forswore herself at Waterman's hall, concerning the servant of J S." *Wales v. Norton*, Hard. 7.

6. For a general charge of perjury. 1 Ro. 227. Mo. 365. Cro. El. 609. 222. T. Raym. 51. Cro. Jac. 102. 107. 204. 436. 613. 3 Leon. 151. T. Jo. 5 Hob. 283.

7. "Thou hast taken a false oath in the consistory court at E." *Plaice v. Howe*, Cro. Eliz. 185. 1 Leon. 131.

8. "T J has made a false oath against me before a judge." *Golding v. Wemnall*, W. Jo. 352.

9. "Thou art mainsworn," which in the north is perjured, without averring the sense, or that it was spoken in their presence who understood it, because it is English. *Anon*, Hob. 126.

10. So, to charge subornation of perjury. Cro. Jac. 158. Mo. 182. 1 Leon. 101.

2. What are not.

1. "I have indicted B of perjury, and do not doubt but to prove him a perjured person." *Bull v. May*, 1 Sid. 220.

2. "He was disproved by the oath of A before the justices," innuendo in his oath before them; those words cannot be supplied by the innuendo. Moore, 407.

3. "Mr. B is a perjured old knave, and that is to be proved by a stake parting the land of H. Martin and Mr. Wright," held not actionable; for the subsequent words qualify the first words. *Buttridge's case*, 4 Co. 18 b. Mo. 666. S. C.

4. "You live by swearing and forswearing." *Hare v. Meller*, 3 Leon. 163.

5. To say of another, "he is forsworn," is not actionable, unless it be with reference to a judicial proceeding. *Stanhope v. Blithe*, 4 Co. 15 a. 1 Sid. 48. Mo. 365.

6. "Thou art forsworn in Collet court," *Skinner v. Trobe*, Cro. Jac. 190. 436.

7. "Thou wert detected of perjury in the Star Chamber." *Weaver v. Cariden*, 4 Co. 16 a.

8. "He has delivered untruths in his answer in Chancery." Cro. Eliz. 500.

9. "J S is a foresworn knave, for he swore that the wood was worth 40s. where it was dear at 13s. 4d." *Apthorp v. Cockerell*, 1 Ro. 287.

(f) *Forgery* :—

1. What words are actionable.

1. Words charging forgery are actionable. 1 Sid. 16. T. Raym. 4. *Twaite v. Shaw*, Gilb. 206. 1 Ro. 431. 1 Vent. 3. Cro. El. 234.

2. "Thou hast forged a privy seal, and thereupon durst not break up thy commission." *Baal v. Bagerley*, W. Jo. 325.

3. "Nuttal, that was Solomon Smith's clerk, is a knave and a rogue, and I will prove it, and he is in Newgate, and is to be hanged for counterfeiting the king's hand and seal." *Nuttal v. Page*, T. Raym. 17.

2. What are not.

1. "Thou hast forged a warrant or a writing." *Cassebilly v. Brit*, 1 Sid. 16. 155.

2. "He showed me a bill of 46l. unsealed (innuendo the said bill) and after showed it me sealed, and he has forged the said seal to the said writing." *Harvey v. Duckin*, Hob. 45. 268.

3. "He forged my lord L's hand to a letter against the bishop of L., for which he was committed." *Break v. Doughty*, 3 Leon. 231.

4. "He hath forged this warrant," innuendo, the sheriff's warrant. *Thomas v. Axworth*, Hob. 2. 3.

5. "Thou hast forged my hand; thou art a forger; thou didst forge a writing." *Anon*. 3 Leon. 231.

(g) *Fraud and cheating*.—

1. What words are actionable.

1. A false knave, and worthy to stand in the pillory. *Lucas v. Cotton*, Moore, 79.

2. To say "thievish knave" is not; but "knavish pirate" is; because triable in the admiralty, and by commission of oyer and terminer, for his life. *Adams's case*, Lat. 47.

2. What are not.

1. "Thou hast nothing but [*1295] what thou hast* got by cheating and cozening," without averring he was of a trade, not actionable. *Bromfield v. Snook*, 12 Mod. 307.

2. "He is a rogue and a cheating knave, and he hath cheated his mother-in-law out of an estate in Norfolk, and I will put him up at the high cross for it." *Carter*, 1.

3. "You cheated J S, and stood bawd to your daughter," &c., not actionable. *Davis v. Miller*, Stra. 1169.

4. It is not actionable to say to a man, "you are a swindler;" unless it were spoken of him in his trade or profession. 1 Saund. 246 a. 2 Saund. 307 a.

5. "Thou art a cheating knave;" unless special damage be alleged. 1 Sid. 35. 48. Stra. 696.

6. "He is a cozening knave, for he sold me a saphir for a diamond." *Cro. Jac.* 339. 536. Moore, 261. 855.

7. "Barretor," unless spoken of an attorney. Moore, 180.

8. So, at one time, an action lay for calling a man thief, traitor, or villain, generally, but not at present. *Anon.* Dall. 17. pl. 7.

(h) *Felony*.—

1. What words are actionable.

1. "I charge him with felony. *Smith v. Hoghead*, W. Jones, 302. 1 Vent. 264.

2. "Bear witness I arrest thee of felony." 2 Ro. 141.

3. "Thou hast the plate of J S, and we will charge thee with that felony." *Chamberlain v. White*, Cro. Jac. 647.

2. What are not.

1. "I charge him with felony, for taking money out of the pocket of H. Stacy." *Poland v. Mason*, Hob. 305. 326.

2. "I arrest you for felony." *Davy v. Fitch*, Hob. 219.

3. "He was indicted for felony," without averring that he was not indicted; *tamen quere*. *Bland v. Edmonds*, Hob. 219.

4. An action does not lie for saying "charge him with felony," or "I charge," &c., because they are not positive. *King's case*, Lat. 175.

5. The words, "you are as bad as thy wife, when she stole my cushion," were adjudged not actionable without an allegation

that the felony was committed. *Upton v. Pinfold*, Com. 268.

6. Words *prima facie*, imputing felony are not actionable, if explained by subsequent words. *Brittridge's case*, 4 Co. 18 b.

7. "Mr. B did burn my barn, (innuendo a barn full of corn.) with his own hands, and none but he; held not actionable; as it was not felony to burn a barn which had no corn in it, unless it were parcel of a dwelling-house, and the innuendo will not avail when the words themselves are not actionable. *Barham v. Netherell*, 4 Co. 20. n. 1 Ro. 255. S. C.

(i) *Maintenance and receiving of thieves*, &c.;—

1. What words are actionable.

1. "Thou art a maintainer of thieves to steal my master's goods." *Bennett v. Tabrain*, Cro. Jac. 629.

2. "Sir Simon Clarke maintained Faulkner, a jesuit, knowing him to be a jesuit." *Clarke v. Loggin*, W. Jones, 68. Lat. 1.

2. What are not.

1. "Thou didst and dost buy stolen goods, &c.," not actionable, because it does not appear that the party was consenting to the stealing. *Creswell v. Ventres*, Aleyn, 5.

2. "Thou maintainest thieves and pirates." *Palm*, 278.

3. "He is a great rogue, and deserves to be hanged as well as G., who was condemned for stealing at Newgate sessions; he bid J S steal what goods he could, and he would receive them;" an action does not lie. *Bush v. Smith*, T. Jones, 157.

(j) *Incontinence*.—

1. What words are actionable.

1. To say of a woman, "J S did get her with child, and she had a child by him," whereby she lost her marriage with J D, is actionable; because, if the woman had a bastard, she was punishable by the stat. 18 Eliz. c. 3; and though the words were a spiritual slander, yet the loss of marriage was temporal. *Davis v. Gardiner*, 4 Co. 16 b.

2. But in such case special damage must be alleged. 2 Sid. [*1286] 21.; but see 1 Ro. 420. Cro. Jac. 162. 406. 2 Sid. 7.

3. "Thou art a whore, and I will cast thee out of thy living," spoken of a feme copyholder *dum casta*. *Boys v. Boys*, 1 Sid. 214. 2 Ro. 284. 4 Co. 16 b.

4. So, the word "whore" is actionable in London by custom; but it ought to appear to be in London by the declaration returned; and if removed before declaration, by affidavit. *Watson v. Clarke*, Comb. 138, 139. *Oxford v. Cross*, 4 Co. 18 a.

5. "Thou art a bawd, and keepest a bawdy-house." 1 Sid. 24. 2 Sid. 15. 34.

6. "Thou art a false knave, a wretch, and a whoremonger;" action lies. Moore, 10.

7. To say "you are a pimp and a bawd

and fetch young gentlewomen to young gentlemen," is actionable without special damage. *Gavell v. Berked*, 1 Mod. 32.

2. What are not.

1. For spiritual defamation, as calling one a whore, bawd, heretic, or adulterer, &c., no action lies in the common law courts without special damage. *Davis v. Gardiner*, 4 Co. 16 b. Cro. El. 502. 2 Show. 25. *Graves v. Blanchett*, 6 Mod. 148, &c. *Savil v. Kirby*, 10 Mod. 385. 2 Ld. Raym. 1004. Andr. 375. 1 Sid. 61.

3. "She had a child, whereby she lost the love of her parents," held not actionable after verdict. *Barnes v. Bridell*, 1 Lev. 261.

3. So, to say of a woman, "thou hadst a bastard," without alleging special damage. *Palm*. 298. Salk. 694. 696. Cro. El. 502. *Byron v. Eames*, 12 Mod. 106. Comb. 26. 28. 29. 391.

4. For saying "that one had two bastards thirty-six years ago," because within that time there had been a general pardon. *Randal v. Bell*, 2 Ro. 24.

5. To say of a dancing mistress, that "she is an hermaphrodite," is not actionable, unless followed by special damage. *Wetherhead v. Brookborne*, 2 Show. 18.

6. "She has married the husband of another woman." Aleyn, 37.

7. The words, "she is B. Harden's common whore," are not in themselves actionable; and it is not sufficient to lay the special damage by a general allegation, viz. "by which words several that courted her in marriage did forbear," &c., but such a one in particular. *Osborn v. Wright*, 2 Mod. 296. 2 Show. 482. Lutw. [539.] Comb. 28. 28.

8. No action lies for the words, "he keeps a bawdy-house." Cro. Eliz. 643.

(k) *Popery*;

1. What words are actionable.

1. To say a man is a popish priest was held actionable. *Marriot and Knightly's case*, Skin. 113.

2. "Thou art a papist, and not the queen's friend." Cited in *Waldegrave v. Agles*, Cro. Eliz. 192.

3. "I have heard that a maid of Sir J K's, when he was last sick, looked through the keyhole and saw a priest administer to him the eucharist and extreme unction," were adjudged to be actionable upon error brought. *Marriot and Knightly's case*, Skin. 98. 112.

2. What are not.

"He is a schismatick and recusant," without special damage. *Tasbrough's case*, 2 Ro. 43.

(l) *Infectious disease*;

1. What words are actionable.

1. An action lies for charging an innkeeper with having an infectious disease, by which she loses her guests. 4 Co. 16 b.

2. So, for saying one has the pox (meaning the French pox.) Hob. 219.

3. The words "pocky whore" are actionable. 1 Ld. Raym. 710. *Clifton v. Wells*, 12 Mod. 633. 1 Sid. 50. 324. 2 Sid. 4. 36.

4. "Thou art a leprous knave." Cro. Jac. 144. 430.

2. What are not.

1. It is not actionable to say, "A has had the pox." *Taylor v. Hall*, Stra. 1189. Ro. Abr. 48.

2. So, "I never came home and pored my wife;" because merely negative. *Clerk v. Dyer*, 8 Mod. 290.

3. So, to say, "thou art a pocky rascal," for it cannot by innuendo be made to mean, that he was infected with the French disease. *Jackson v. Hall*, 2 Show. 285. Moore, 573. *Sed quare*.

(m)* *Infamous propensities*. [*1287]

Words are actionable that charge a man with infamous propensities, as "you will lie with a cow again as you did, and deserve to be hanged, &c." *Potworite v. Barrel*, 1 Sid. 290. Cro. Eliz. 250. 2 Ld. Raym. 813.

(n) *Witchcraft*;

1. What words are actionable.

1. Formerly it was actionable to say, "she is a witch, &c." W. Jones, 197. 325. 2 Ro. 86. Cro. Jac. 150. 306. T. Raym. 35. 1 Sid. 52. 53. Cro. El. 571.

2. So, to say, "witch, I will hang you for it." *Snagter v. Davies*, 1 Lev. 255.

3. For saying, "Mr. L is a witch, and I will prove him so; and I have seen him and his imps and evil spirits in the night appear to me, and he did unwitch my child." 1 Ro. 255.

4. "The devil appears to thee every night, in the likeness of a black man, upon a black horse, and thou conferrest with him, and whatsoever thou askest of him he gives it thee, and that is the reason thou hast so much money." Hob. 129. Mo. 868.

2. What are not.

1. Words imputing acts of witchcraft were not actionable till after the stat. of 1 Jac. 1 Sid. 424. 2 Ro. 343. 3 Leon. 171. Comb. 246.

2. "She is a sorcerer, enchantress, or a witch, and can witch and unwitch," not actionable, because not accused of any offence within the statute. Aleyn, 37. *Mutton's case*, 13 Co. 59.

3. But the stat. 1 Jac. 1. c. 12. is repealed by the 9 Geo. 2. c. 5., and by that and later statutes no one can now be prosecuted for witchcraft; but any one pretending to exercise any witchcraft or sorcery is liable to imprisonment, &c.

(o) *Insolvency*.

1. "Thou art a bankrupt," spoken of one who is no merchant. *Slater v. Frank*, Hob. 126.

2. So, to say, "he is a broken rascal, and has broke twice." *Lat. 114.*

(p) *Trespass.*

1. "Men cannot have their cattle going upon the common, but B and his children will kill them with B's dogs," is not actionable. *Hawley v. Barker, 2 Dy. 118. pl. 19.*

2. "I will indict Richard Rawlins at the next sessions, and he shall lose his estate, and it shall go hard with him for life; but his estate he shall surely lose, for marking my sheep;" not actionable. *Rawlins v. Hill, T. Raym. 12.*

III. RELATIVE TO THE PARTICULAR PERSON BY WHOM THE SLANDER WAS UTTERED.

1. No action lies against a counsellor who gives slanderous matter in evidence. *Nicholas v. Badger, Moore, 428.*

2. An action on the case will not lie for scandalous words spoken in the House of Commons. *Kendall v. John, Fort. 109.*

IV. RELATIVE TO THE PARTICULAR PERSON, PROFESSION, OR BUSINESS, WITH REFERENCE TO WHICH THE SLANDER WAS UTTERED;—

(a) *In general.*

1. Words that hurt the credit of tradesmen are actionable. *Arne v. Johnson, 10 Mod. 111.*

2. Scandalous words relating to a profession are actionable, be the profession ever so mean. *Terry v. Hooper, 1 Lev. 115.*

(b) *Attorney;—*

1. What words are actionable.

1. The following words, "I never forged any man's hand, but you are a forging rogue," when spoken of an attorney, held actionable. *Anon. Com. 262.*

2. For saying, "this is a counterfeit warrant made by him." *2 Ro. 266.*

3. "He is a cozening lawyer." *2 Ro. 149. Cro. Jac. 586.*

4. "Your attorney is a bribing knave, and has taken £20 of you to cozen me." *Moore, 855. Hob. 9. 468.*

5. "He is a knave or forging knave." *2 Ro. 84. 149. Lat. 20. Cro. Jac. 586.*

6. "He is a rogue, &c., he is no attorney." *Hardwick v. Chandler, Stra. 1138.*

7. "He sets people together [*1286] by the ears," and I will have him indicted for a common barretor." *Annisson v. Bliffield, Carter, 214.*

8. "He deserves to lose his ears." *Lat. 228. Moore, 401.*

9. "He cannot read a declaration," is actionable, without stating a special damage. *Jones v. Powell, 1 Mod. 272. T. Raym. 196. 1 Vent. 98.*

10. "He hath no more law than Mr. C.'s bull." *Baker v. Morfue, 1 Sid. 327.*

11. So, any slander which imputes to him an ignorance of his profession, although he does not thereby sustain any special damage. *Jones v. Powell, 1 Mod. 272.*

12. So, for saying "thou art a champer-tor," though it be a word of art; for it shall be presumed to be understood, because English. *Hob. 117. Moore, 867.*

13. "You are well known to be a corrupt man, and to deal corruptly," being spoken of a sworn attorney, are actionable; because it does hurt him in his oath, and also in the duty of his profession whereby he acquires his living; otherwise, if the preceding discourse had been, that the plaintiff was an usurer, or was an executor and would not perform the testament, &c. *Birchley's case, 4 Co. 16 a.*

14. That he could prove him guilty of perjury and forgery, and that he deserved to be transported, whereby he was refused to be admitted a solicitor in Chancery. *Lloyd v. Jones, W. Kely. 57.*

2. What are not.

1. "He cannot read a declaration," not actionable without colloquium of his profession. *Powell v. Jones, 1 Lev. 297.*

2. "You are a paltry lawyer." *Cro. Jac. 267.*

3. "Thou art a common maintainer of suits, and I will have thee thrown over the bar." *Box v. Barnaby, Hob. 117. Mo. 867.*

4. "You are a presbyterian, and design to practise against the king and his interest." *T. Jones, 23.*

5. "I have matter enough against him, for Mr. Hartly hath found forgery against him, and can prove it," though spoken of an attorney. *Powel v. Ward, Hob. 305. 327.*

6. "He is a base rogue, &c.," spoken of a scrivener, unless with an averment. *2 Ro. 91.*

(c) *Clergyman;—*

1. What words are actionable.

1. It is actionable to say of a clergyman, "he is a heretic, &c.," whereby he loses his preferment. *4 Co. 16 b.*

2. Of a parson, that he was a drunkard, a whoremaster, &c., actionable, because thereby he may be degraded, which is a temporal damage. *Dod v. Robinson, Aleyn, 63.*

2. What are not.

"He is a covetous and malicious bishop." *Moore, 38.*

(d) *Counsell.*

1. An action lies for saying of a counsellor, steward of court, "by his warrants he hath deceived many." *Anon. 1 And. 269.*

2. So, for saying "he is a daffadownilly." Cited in *Annisson v. Bliffield, Carter, 214.*

3. "Thou a barrister? Thou art no barrister; thou art a barretor: thou wert put from the bar, and thou darrest not show thyself there. Thou study law? thou hast as much wit as a daw." *Dison v. Bestney, 13 Co. 71.*

(e) *Deputy-lieutenant.*

1. "He is a papist," spoken of a deputy-lieutenant. *Roe v. Sir Thomas Clarges, 3 Mod. 26.*

2. To say of a deputy-lieutenant, justice

of the peace, and candidate for a seat in parliament, "do not vote for him, for he is a jacobite, who intends to bring in the Pretender," is actionable. *Hov v. Price*, 7 Mod. 107. Salk. 694. 2 Show. 140 *notis*.

(f) *Judge or justice of the peace*;—

1. What words are actionable.

1. To say of a judge, "he is a corrupt judge," is actionable. *Birchley's case*, 4 Co. 16 a.

2. "Thou art a forsworn justice, not fit to sit upon the bench." 1 Sid. 432. 1 Vent. 50. *Kirle v. Osgood*, 1 Mod. 23.

3. To a justice of peace in the time of sessions, "you have perverted justice, [*1289] tice, and to your shame I will prove it." Moore, 409.

4. Of a justice of the peace, "Sir N. P. hath taken out some depositions which were taken in a case, and inserted others that were never taken." 2 Ro. 153. Palm. 67.

5. So, for these words, "he is a jacobite, and is for bringing in the prince of Wales and popery, &c." 2 Ld. Raym. 812.

6. "He is privy to a felony." Moore. 401. 686.

7. "He discharged by agreement A B, who had stolen plaintiff's goods." 2 And. 47. Moore, 704.

8. "He is a false and corrupt man, a hypocrite, &c." *Broughton's case*, 1 And. 119, 120. Moore, 141. S. C. Cro. Jac. 65.

9. "He covereth and hideth felonies, and is not worthy to be a justice of the peace." *Stackley v. Bulhead*, 4 Co. 16 a.

10. "He hath received money of a thief that was brought before him for stealing, and to let him go." Moore, 686. 965.

11. "He makes use of the king's commission to force men out of their estates," is actionable. *Newton v. Stubbs*, 3 Mod. 71.

12. "J P is a knave, and a busy knave, for searching after me and other honest men of my sort, and I will make him give me satisfaction for plundering me." *Semb. Prouse v. Wilcox*, 3 Mod. 163.

13. Of a justice of the peace and deputy-lieutenant for the county, "he is a papist." *Roe v. Clarges*, 2 Show. 140. 251.

14. "He is a forsworn justice of peace." *Carn v. Osgood*, 1 Lev. 280.

15. "He is a rascal, &c.," spoken of him in the execution of his office. 2 Ld. Raym. 1369. Stra. 1168. *Ashton v. Blagrove*, 8 Mod. 270.

16. "Sir J K is a buffle-headed fellow, and doth not understand law; he is not fit to talk law with me; I have baffled him, and he hath not done my client justice." *Rez v. Derby*, 3 Mod. 139.

17. "Thou art a common barretor," Hob. 140.

2. What are not.

1. "He hath but one manor, and that he got by swearing and forswearing," is not actionable, though plaintiff alleged he was a

justice of the peace, and surveyor of the duchy of L, and had divers other offices; for the words are too general, and the defendant does not charge the plaintiff with swearing or forswearing; for he might recover a manor by swearing and forswearing, and yet not be assenting to it. *Stanhope v. Blithe*, 4 Co. 15 a.

2. "He is not worth a groat, and is gone to the dogs," not actionable. 1 Vent. 253.

3. Calling a justice of the peace "fool, ass, beetle-headed justice," not actionable. *Bill v. Neal*, 1 Lev. 52. Salk. 695.

4. "He is a buffle-headed fellow, doth not understand the law, and hath not done justice," said of a magistrate. 11 Mod. 167.

5. To a magistrate, "thou thirstest after blood." Moore, 418.

6. Of the chancellor of a diocese, "there goes your rare chancellor to suborn witnesses to swear against the parson." *Walsley v. Russell*, 6 Mod. 200.

(g) *Member of parliament*.

1. If words are slanderous and actionable in a common case, they are not the less so because they are spoken of a candidate for a seat in parliament. 1 Saund. 243. n. [A].

2. So, to say of one who had been a member of parliament, "your master is a papist; when he is at home he goes to church, but when he is at London he goes to mass; Sir J. C. and he were both pensioners at the same time of the long parliament." *Sir L. Walden v. Mitchell*, 2 Vent. 265.

3. If, during the election of a member of parliament, a voter in the presence of the candidate hold up money in his hand, and say, "these guineas are Mr. A's. (the candidate,) they were given to me to vote for him; he has bought my vote, and he shall have it." the words are actionable. *Bendish v. Lindsay*, 11 Mod. 194.

(h) *Merchant or person carrying on a trade or business*;—

1. What words are actionable.

1. To say of a trader, "he is a bankrupt," is actionable, although no special* damage accrue. *Anon.* 2 Show. [*1290] 123. Comb. 74.

2. To a merchant, "thou art a bankrupt knave." 1 Ro. 22. Palm. 151.

3. Of a shoemaker, "he is a bankrupt." Cro. Eliz. 268.

4. "Johnson is broken, and he dares not be at the trial," spoken of a merchant. 2 Ro. 145. Palm. 63. Cro. Car. 563.

5. "Thou art a cheating merchant." 1 Sid. 433.

6. "He will be a bankrupt." 2 Ro. 145. 1 Dy. 72. pl. 6.

7. Of a woollen-draper, "you are a cheating fellow, and keep a false book, &c." 1 Vent. 117. 263.

8. "False knave and worthy of the pillory," spoken of a merchant, sufficient to support action. *Lucas v. Cotton*, 1 And. 12.

9. So, for words "false extortioner, and dealest falsely with all thy neighbours." *Id. ibid.*

10. For saying of a merchant, "he is a beggarly or pitiful fellow, not worth a groat;" or "he is a broken merchant." *Holt, 39. Comb. 292. T. Jo. 140. 2 Show. 295. 1 Sid. 424, 425. Leycroft v. Dumkin, W. Jo. 321. T. Raym. 184.*

11. "He has nothing but rotten goods in his shop," with a *colloquium* of his trade. *12 Mod. 420.*

12. "Many merchants have lately failed, and I expect no otherwise of Daniel Vivian." *T. Raym. 207. Harrison v. Thornborough, 10 Mod. 196.*

13. To call a tradesman "a cheat," an action will lie if he speaks of his profession, but to speak it generally it will not. *T. Raym. 62.*

14. "He owes more money than he is worth, he is run away and is broke," spoken of an husbandman. *Dobson v. Thornistone, 3 Mod. 112. Comb. 28.*

15. "He is a rogue, a papist dog, and a pitiful fellow, and never a rogue in town has a bonfire before his door but he," spoken of a merchant who made a bonfire at the coronation of king James. *Peke v. Meller, 3 Mod. 103.*

16. Of a substantial citizen, "thou art a beggarly rascal, go pay thy debts." *T. Jones, 200.*

17. "He is a sorry fellow, &c., he compounded his debts, &c.," spoken of a tradesman. *2 Ld. Raym. 1480.*

18. "He is broken and run away, and never will return again," spoken of a carpenter. *Chapman v. Lamphire, 3 Mod. 155.*

19. "Deal not with him, he is broke, there is neither entertainment for man or horse," spoken of an innkeeper. *T. Raym. 231.*

20. So, for representing a tavern to be a bawdy-house. *Plunket v. Gilmore, 8 Mod. 215.*

21. "You are a soldier, I saw you in your red coat doing duty, your word is not to be taken," spoken of an upholsterer, held actionable, because implying a design to defraud his creditors, by reason that a soldier is a privileged person. *10 Mod. 111.*

22. It is actionable to call a merchant "bankrupt," though he was so formerly. *Cro. Jac. 578.*

23. So, to say to a milliner, "thou art a beggarly fellow, and not worth a groat," without special damage. *Simpson v. Barlow, 12 Mod. 591.*

2. What are not.

1. "Bankrupt," will not bear an action, unless the plaintiff be a tradesman, and so laid in the declaration. *1 Leon. 336. 1 Sid. 299.*

2. To a merchant, "that he keeps a false debt book, unless it be said that he thereby deceived his customers." *Moore, 400.*

3. "He has received forty days' wages for work that might have been done in ten days, and is a rogue for his pains," of a carpenter, not actionable. *Lancaster v. French, Stra. 797.*

4. To say, "thou art a regrater, and did regrate, by selling at 10s. when you bought at 10s." *2 Show. 32.*

5. "A propping pilfering merchant, and hath pilfered away my corn." *Moore, 403.*

6. Of a butcher, that a cow died of calving, though laid *per quod* he lost his customers. *Salk. 693. Comb. 161.*

7. "You are a cheat," spoken of a tradesman, without laying a *colloquium* that it was of and concerning his trade. *Salk. 694. Bennet v. Wells, 12 Mod. 420. Savage v. Robury, 5 Mod. 398.*

8. Of a maltster, "he has cozened all the farmers in the country," without a *colloquium* of his trade. *Reeve v. Holgate, 2 Lev. 62.*

9.* Of an innkeeper, that "he is a caterpillar, and hath lived by [*1291] polling his guests." *Moore, 179.*

10. "Your master harboured thieves and received stolen goods, and there are yet some in this house," spoken of an innkeeper. *2 Ro. 136.*

11. Of a farmer, "he has cheated in corn." *T. Jones, 156.*

12. "Cheating knave," of a morcer, without a *colloquium* of his business. *Smedley v. Heath, 1 Lev. 250.*

(i) Officers in general;—

1. What words are actionable.

1. Words which reflect on a man in office, though there is no danger of losing the office, will bear an action. *Woodruff v. Weoley, Carter, 1.*

2. So, for saying of the customer of a port, &c. that he takes bribes and is corrupted. *1 Sid. 342. 2 Ro. 23.*

3. "Thou dost serve false warrants and deceivest the people." *Cro. Eliz. 192.*

4. "You made a false record as if true." *1 And. 121. Cro. Eliz. 192.*

5. "He is a knave, and hath cheated the parish of 20l." spoken of a churchwarden, action lies. *Woodruff v. Weoley, Carter, 1.*

6. To say of a person who has an office of public trust under the government "he is a papist," is actionable. *Roe v. Clarges, Skin. 68. 88.*

7. "A great number trusting to Heale's warrants have been deceived." *Giddye v. Heale, Moore, 695.*

8. "Thou art a juryman, and hast been the overthrow of me by thy subtle means." *Anon. Moore, 876. pl. 1226.*

9. "Mr. deceiver hath cozened the king, and hath dealt falsely with him," spoken of the king's receiver. *2 Ro. 148. Palm. 69. Hob. 267.*

10. In offices of profit, words importing want of ability are actionable. *How v. Print, Salk. 696.*

11. To say of a man that has been in an office, that he has behaved himself corruptly in it, is actionable. *Walden v. Mitchell*, 2 Vent. 266.

12. So, to say of a corporation, "when-ever a burges of it puts on his gown, Satan enters into him," is actionable, or an indictment will lie; for it is slander on government. *Rez v. Baker*, 1 Mod. 35.

2. What are not.

1. An action on the case will not lie for saying to a mayor, "You, Mr. Mayor, I don't care a fart for you; you, Mr. Mayor, are a rogue and rascal." *Rez v. Langley*, 6 Mod. 125.

2. "The mayor of Tiverton hath cozened the town and county." *Mayor of Tiverton's case*, W. Jo. 308.

3. "Thou sellest corn by false measure," spoken of one that is no common ridder, nor badger, nor yet alleged to be spoken of him, whilst he was baily, nor of his master's corn, nor to his master's damage. *Bray v. Hayne*, Hob. 76.

(j) Surgeon.

1. An action will lie for words imputing ignorance to an apothecary in the practice of his profession. *Tutty v. Alewin*, 11 Mod. 221.

2. "She is an ignorant woman, and of small practice, and very unfortunate in her way; there are few that she goes to but lie desperately ill or die under her hands." *Wharton v. Brooke*, 1 Vent. 21.

3. "Thou art no good subject, for thou hast poisoned such a man's wound, to the intent to get more money of him." *Anon. Sav.* 126. 1 And. 269.

(k) Surveyor.

"Thou art a cheating knave, &c." spoken of a surveyor. *Loudon v. Eastgate*, 2 Ro. 72.

V. PROCEEDINGS IN THE ACTION;—

(a) Parties to the action;—

1. Plaintiffs.

1. Two or more partners may join, whether there has been special damage or not. 2 Saund. 307 a.

2. If one says, "A or B did, &c.," either A or B may bring an action, with an averment that neither of them did, &c. 10 Mod. 198.

3. The wife was called "whore," and that she was "the defendant's whore," the husband and she brought the action, and concluded *ad damnum ipsorum*; it [*1292] was held good, without alleging* special damage. *Baldwin v. Flower*, 3 Mod. 120.

2. Defendants.

Action for words cannot be brought against two, for words cannot be joined. *Chamberlaine v. Willmore*, Palm. 313. 1 Bulst. 15. 2 Saund. 117 a.

(b) Declaration.

1. In an action for words said to have been

spoken on the 28th of January last, a declaration entitled of Hilary term generally, without any special memorandum, is good. *Pepys v. Wyne*, 2 Show. 307.

2. A declaration in an action upon the case for words by an attorney must show a precedent communication of him as attorney. *Yardley v. Ellill*, Hob. 8.

3. But when one calls an attorney "knave," or "forging knave, &c." and the subsequent words intend it of his profession, there needs no *colloquium* of his profession. Aleyn, 13.

4. If the words are only actionable as being spoken of a tradesman, &c., the declaration must aver they were spoken in relation to his trade, and the averment must be proved. 1 Saund. 243. n. (3.) 2 Saund. 307 a. n. (1.)

5. An allegation that *præd. Jana adtunc et ibidem colloquium habens cum servo quer. is* sufficient, as the *adtunc* refers to the whole clause. *Upton v. Pinfold*, Com. 267.

6. If it appears from the words themselves that they were spoken of a magistrate in his office, they are actionable without a *colloquium*. 1 Saund. 307 a.

7. The words themselves must be stated, and not the purport. 1 Saund. 242. n. [a.]

8. A declaration stating that the defendant "spoke these false and scandalous words to the effect following," is bad for uncertainty. *Newton v. Stubbs*, 2 Show. 436. Holt, 350. 3 Mod. 71, 72.

9. A declaration in an action on the case for words *quod crimen felonie imposuit* upon the plaintiff generally, is good. *Saunders v. Edwards*, 1 Sid. 95. T. Raym. 61.

10. The court will not arrest the judgment in an action for words in one count, though some of them be not actionable; *aliter*, where there are two counts, and none of the words in one are actionable, and a general verdict for the plaintiff. *Lloyd v. Morris*, Willes, 443.

11. If the slander was in a foreign language, the plaintiff must aver that the hearers understood such language. 1 Saund. 242. n. (1.)

12. The declaration must be set out in the original tongue, and a translation must also be given. 1 Saund. 242. n. [a.] 242 a. n. [b.]

13. "Thou art a healer of felons," which in the west is "smotherer or coverer of felons;" the declaration is good, without averment of the sense, or presence of those who understood it, because it is English. *Anon.* Hob. 126.

14. So, for calling one "idoner," in Welsh, which is perjured, without averring the sense; but it must be averred to be spoken in their presence who understood Welsh. Hob. 126. 191.

15. A declaration in slander, laying the words in Latin, was held good, although it was not averred that the auditors understood the Latin language. *Newton v. Stubbs*, 2 Show. 435.

16. "My master was not content to take my living from me, but sent his man A to kill me;" the declaration was held bad for want of an innuendo. *Moore*, 63.

17. An innuendo will not make general words understood of the plaintiff, without an averment to make it certain. *Johnes v. Daxers*, Cro. Eliz. 496.

18. The office of an innuendo is to designate a person who has been named in certain before, and in effect it stands in place of *prædictus*; nor can it alter or extend the real meaning of the words themselves. *James v. Rutlech*, 4 Co. 17 a.

19. Slander laid to be spoken of one A, B, innuendo the plaintiff, is not sufficient, without averring that A B was the person spoken of. *Osborne v. Key*, 2 Show. 59.

20. An action for saying "he fired his house," (innuendo voluntarily,) is bad, for an innuendo cannot enlarge the sense. *Anon.* 11 Mod. 210.

21. "Hang him, hang him, he is full of pox; I marvel you will eat or drink with him; I will prove that he is full [*1293] of the pox, (innuendo the French pox;)" held that this innuendo did not do its proper office, for it endeavoured to extend the general words "the pox" to the French pox, and by imagining an intent not apparent by any precedent words to which the innuendo should refer. *James v. Rutlech*, 4 Co. 17 a. But at the time this case was decided, the now exploded doctrine that the words should be taken in *mitiori sensu* prevailed.

22. Where the declaration averred that the defendant said "that the plaintiff murdered the child of A," innuendo a certain child of A, lately deceased, the judgment for the plaintiff was reversed on error; for it does not appear that the child was dead at the time of speaking the words; instead of "lately deceased," it ought to have been, "then deceased." *Prichard v. Hawkins*, 13 Co. 71.

23. For words against a justice of the peace, &c., he ought to declare that he was a justice at the time of speaking. *Boldroe v. Porter*, Yelv. 21.

24. In an action for words, whereby the plaintiff lost her marriage, it is not necessary to allege that she was capable of contracting marriage. *Roberts v. Holgrave*, W. Kely. 64.

25. Case for calling a woman "whore," by which she lost her marriage, will not lie without showing who the person was. *Welchell v. Clarkson*, 12 Mod. 597.

26. "Forsworn" will not bear an action as equivalent with "perjured," without showing the court and suit in which, &c. *Core v. Morton*, Yelv. 27.

27. "Your son is a thief, innuendo, &c.," held actionable, because the court shall not intend any other son than the plaintiff; but to say "Your landlord (without a surname) is a thief," is not actionable, without aver-

ment he had no other landlord. *Person v. Dawson*, Aleyn, 32.

28. A declaration in an action for saying, "There goes A, who is one of those that stole B's deer," must aver that a deer was stolen from B, and that the deer was tame. *Ogden v. Turner*, 6 Mod. 104.

29. If an action be brought for the following words, "Thou art a sheep-stealing rogue, and farmer Parker told me so;" it is not necessary to aver in the declaration that farmer Parker did not tell the defendant so. *Gardiner v. Atwater*, Say. 265, 266.

30. The declaration must show a publication, but no particular words are necessary for that purpose. 1 Saund. 242. n. (1).

31. Words alleged to be spoken in *præsentia diversorum*, is as good as if in *audita*, &c. *Hall v. Hennerly*, Cro. Eliz. 487.

32. Malice must be shown; but the word "maliciously" is not exclusively proper; the omission is helped after verdict. 1 Saund. 242 a. ld. n. (2).

33. In an action for words charging one with receiving stolen goods, it is necessary to allege a *scienter*. *Stevenson v. Higgins*, 2 Keb. 338. pl. 4.

34. An averment of the falsity of the charge is not necessary, the gist of the action being whether the words were spoken falsely and maliciously. *Carpenter v. Tenant*, C. T. Hardw. 339.

35. Special damage need not be laid if the words are actionable in themselves; but no evidence of it can be given in any case, unless it be laid in the declaration. 1 Saund. 243 c. d.

(c) Defence and pleas.

1. A plea of *non damnificatus* to an action for calling plaintiff "a false thief," is bad. 1 Dy. 26. pl. 171.

2. The defendant may plead not guilty as to part, and justify the rest. 1 Saund. 244 c.

3. Or, by stat. Anne, not guilty to the whole, and in a further plea justify part. 1 Saund. 244 c.

4. If words *prima facie* importing felony, or otherwise sounding in slander, have been used in a different sense, the defendant may plead it specially. *Cromwell v. Denny*, 4 Co. 12 b.

5. The truth of words cannot be given in evidence on not guilty. *Underwood v. Parks*, Stra. 1200.

6. In an action for words, upon not guilty pleaded, whether the defendant can be admitted to give evidence of the truth of the words spoken (when they import a felony) in mitigation of damages, see *Smith v. Richardson*, Com. 552, 553, and note.

7. In an action for the slander of a common person, if J S publish that he has heard J N say that "J S was a" [*1294] traitor or thief," J S may, if the truth be so, justify in an action on the case

brought against him. *Earl of Northampton's case*, 12 Co. 132. 1 Saund. 264 b.

8. But if he publish that he has heard generally, without naming a certain author, that "J S was a traitor or thief," he cannot justify, because he has not given to the party grieved any cause of action against any other but himself. *Id. ibid.*

9. In such case, the plea must give the very words used, and not their substance, though he need only prove the material part. 1 Saund. 244. b. n. [n].

10. Where many words contain one signification, and the party answers all in substance, though not in the words, it is good. *Emott v. Cole*, Cro. Eliz. 255.

11. The plea of justification must confess the speaking. 1 Saund. 244 b.

12. An indictment for murder against A is no justification for calling him a "murderer." 2 Dy. 236. pl. 26.

13. Nor that a robbery was committed, and common fame charged him with it, a justification for calling him "thief." 2 Dy. 236. pl. 26.

14. A justification for words, "thou wert forsworn at a leet," that he preferred a thing not true, is not good. *Wild v. Coopman*, Moore, 537.

15. In an action of slander for calling the plaintiff "thief," the defendant cannot plead in justification that the plaintiff "received a thief." *Staple v. Heydon*, 6 Mod. 10.

16. The justification must wholly meet the facts stated in the slander. 1 Saund. 244 c.

17. If the defendant justify part, and say nothing as to some of the words which are actionable, the justification is bad. *Wild v. Coopman*, Mo. 537.

18. A justification must not be general, but must specify particularly the facts on which it is founded. 1 Saund. 244 c. 244 b. n. [m].

19. The declaration was in case for words, interpreting them; the defendant pleads in bar another action for the same words without interpretation, and judgment against him; and held good. *Gardner v. Helvis*, 3 Lev. 248.

20. If words are actionable at first, the damages after do not give a cause of action, and therefore the statute of limitations of two years is a good bar in that case. *Saunders v. Edwards*, T. Raym. 61.

21. But where the words at the time of the speaking are not actionable, but by reason of them the party afterwards loses his preferment, or sustains damage, in that case the statute of limitations of two years is no bar. *Id. ibid.*

(d) *Replication.*

To a plea of justification, *de injuria sua propria* is proper. 1 Saund. 244 c.

(e) *Evidence.*

1. Proof of calling plaintiff a thief will

support a declaration for calling him a strong thief. 1 Dy. 75. pl. 21.

2. The witness may read the words, if he wrote them down immediately. *Holt*, 295, 296.

3. If the plaintiff ascribe a particular meaning by an innuendo, he is bound to prove them spoken in that sense. 1 Saund. 307 a.

4. If two trades are averred, it will be sufficient to prove one, if the words apply. 1 Saund. 243. b. n. [g]. 2 Saund. 307 b. n. [a].

5. In action for words *per quod maritragium amisit*, upon evidence, the plaintiff proved only part of the words; it was held to be well enough, if the plaintiff proved the loss of his marriage, by reason of any of the words in the declaration. *Geary v. Connop*, Skin. 333. *Holt*, 39.

6. In case for words, whereby the plaintiff lost her marriage with J N, evidence cannot be admitted of a loss of marriage with another person. 2 Ld. Raym. 1007.

7. When words are not actionable of themselves, in an action for consequential damages, the plaintiff may give evidence of particular damages. *Browning v. Newman*, Stra. 666.

8. Under the general issue "not guilty," the truth of the words cannot be given in evidence, but must be pleaded specially; nor can it be given in evidence in mitigation of damages. 1 Saund. 130, 131. *Sed vide Brown v. Gibbons*, 2 Ld. Raym. 631.

9. But defendant may show the truth of the words not laid in declaration but* proved by plaintiff to show [*1295] the *animus*. 1 Saund. 243. c. n. [i].

10. It may be shown under the general issue that the words were spoken in an innocent sense, and not the malicious one imputed, as that the words were spoken as counsel, or in confidence, and without malice; or in giving fairly the character of a servant; that they were read innocently out of a history as a story; that they were spoke through concern, or in a sense not defamatory, or as a member of parliament in his place. 1 Saund 130, 131. n. [e].

11. The defendant may, however, plead all such matters if he pleases. 1 Saund. 131.

12. The defendant may also prove under it in mitigation of damages rumours previously current, but not facts to negative the presumption of malice. 1 Saund. 131. n. [f].

13. He may also prove that the substance of the slander was contained in a newspaper, without producing it; but such evidence cannot be given, if there is a justification on the record as well as the general issue. 1 Saund. 131 a. n. [f].

14. The defendant cannot give in evidence under it that such slander was communicated by a third person; nor can he give evidence of plaintiff's general bad character in mitigation of damages. *Id. ibid.*

(f) *Verdict and damages.*

1. If an action be brought for these words, "there is a nest of thieves, and Sir J. B. is master of them, and a strong thief himself," and it be found that all the words were spoken, except the word "strong," judgment shall be for the plaintiff. *Sir J. Bridge's case*, Dall. 10. 11 Mod. 96. n. 1 Dy. 75. pl. 21.

2. When some counts are for words actionable *per se*, and others for special damage, care must be taken that the verdict be not a general one. 1 Saund. 246.

3. When the action is brought for words, some of which will maintain an action, and some not, damages may be given entirely if they are all contained in one count. 2 Saund. 171 b. Mo. 141. *Read v. Marshall*, 8 Mod. 26. Willes, 443.

4. Though it is otherwise of many things which together support the action, and part is insufficiently alleged. *Broughton's case*, Mo. 141. Moore, 706.

5. Entire damages may be given on several sets of words laid to have been spoken on the same day, but not if the words are laid to have been spoken on different days. *Knightley v. Marrow*, 2 Show. 306.

6. But if there be several counts, and the words laid in some are not actionable, a general verdict is taken, judgment may be arrested or reversed. 2 Saund. 171 b. c. Willes, 443. *Stebbing v. Warner*, 11 Mod. 255.

7. When an action was brought for calling a woman "whore," and there were also other words stated which were actionable, the judgment was arrested, entire damages having been given, although the actionable words were laid with a *per quod*. *Graves v. Blanchett*, 6 Mod. 148.

8. In an action for words by baron and feme, joint damages must be given to both, unless special damages are laid to the husband. *Chilcot and Wife, v. Davis*, Gilb. 287.

(g) *Costs.*

1. If the words are not actionable of themselves, and the special damage be the cause of action, the plaintiff shall have full costs, though the damages be under 40s. 1 Saund. 246. 246 a. 8 Mod. 372. *Browne v. Gibbons*, 1 Salk. 206. 7 Mod. 129. 2 Ld. Raym. 831. S. C. *Roberts v. Holywell*, W. Kely. 64. Ib. 71. *Bass v. Hickford*, Andr. 375. *Turner v. Horton*, Willes, 438.

2. But if the words are actionable in themselves, and the special damage is laid by way of aggravation, the plaintiff shall have no more costs than damages, if the latter be under 40s. 1 Saund. 246 a. Andr. 375. *Stra. 936. Perry v. Perry*, W. Kely. 71. *Berry v. Perry*, 2 Ld. Raym. 1588. 2 Barnard. 79. 84. 113. 155. *Turner v. Horton*, 2 Barnes, 104. 111. 124.

3. Where there are several counts, some for words actionable *per se*, and others not actionable, and a general conclusion laying

special damages, if the jury find a general verdict, under 40s.,* the plaintiff will be entitled to full costs. 1 [*1296] Saund. 246 a.

4. In counts baron, &c., full costs shall be given in actions for words, though the damages are under 40s. *Littlewood v. Smith*, 1 Ld. Raym. 182.

5. In cases within the statute 21 Jac. 1. c. 16., the fact of defendant's having pleaded specially, will not entitle plaintiff, (if the special damage is not proved) to full costs. 1 Saund. 246 a. n. [p]. 8 Mod. 372. 1 Barnes, 105. *Anon. Ca. Prac. C. P. 22.*

6. If the full costs are taxed when there should be no more costs than damages, the execution will be set aside with costs. *Dover v. Robinson*, 1 Barnes, 105.

7. In an action for words, if special damages are laid, the defendant shall have full costs. *Denny v. Wigly*, Ca. Prac. C. P. 137.

(h) *Arrest of judgment.*

1. If there are several counts, and the words laid in some are actionable, and in others not, judgment may be arrested, if the damages are entire, and the verdict general. 2 Saund. 171. b. c.

2. So, where a judgment by default was entered up for the full costs, when there ought to have been no more costs than damages, it was held that judgment must be set aside *in toto*. *Lampen v. Hatch*, W. Kely. 61.

VI. RELATIVE TO PROCEEDINGS IN THE COURT OF THE CONSTABLE AND MARSHAL.

A person cannot be sued in the court of the constable and marshal, for saying to knight "you are a scandal to the name of gentleman and to the order knighthood." *Chambers v. Jennings*, 7 Mod. 125.

VII. RELATIVE TO PROCEEDINGS IN THE PIEPOWDER COURT.

An action on the case for words lies in the court of piepowder, although he does not declare *quod malitiose dixit*. *Anon. Moore*, 459.

VIII. RELATIVE TO PROCEEDINGS IN THE SPIRITUAL COURT.

1. If any one defames and scandals the title of a parson to tithes, although he is not punishable by the common law, he is punishable in the spiritual court. *Gwyn v. Merryweather*. 2 Row. 440.

2. Prohibition shall be granted to the spiritual court, where a libel is for words spoken of a clergyman, which are actionable at common law. *Halle v. Downes*, Com. 309.

3. If a parson call a married man "cuckold," his wife may libel the slanderer in the spiritual court. 2 Show. 294.

4. If the words do not directly charge the party with being a whore they are not such whereon the jurisdiction of the spiritual

court ought to be disallowed. *Steward v. Allen*, 1 Com. 235.

5. A prohibition was granted on a libel for saying "he has no sense, is a dunce and a blockhead; I wonder the bishop would lay his hands on such a fellow; he deserves to have his gown pulled over his ears;" because a parson is not punishable in the spiritual court for being a dunce or a blockhead, more than another man. *Cazeter v. Parsons*, 11 Mod. 141. n.

IX. RELATIVE TO PROCEEDINGS BY INDICTMENT OR INFORMATION;—

(a) What words are indictable.

1. An indictment of information will lie for some words, for which an action will not. *Rex v. Darby*, 3 Mod. 139. Comb. 66 S. C.

2. If actionable, they are in general not indictable. *Sem.* Comb. 13.

3. But all actions for slandering a justice of peace in his office may be turned into indictments. Comb. 46.

4. Calling a justice of the peace a rogue and liar, is indictable. *Noaks v. Revel*, 1 Stra. 420.

5. So for saying of a justice of peace, in the execution of his office, "he is a buffe-headed fellow, ignorant fellow, and has not done justice, &c.," an indictment or information lies. *Anon.* Comb. 46. 65, 86. *Sed vide* 2 Ld. Raym. 1030.

6. To say "the last grand jury that presented me are damned perjured rogues," is an indictable offence. *Rex v. Spiller*, 2 Show. 209.

7. An indictment will lie for saying of a corporation "whenever a Burgess of it puts on his gown, Satan enters into" [*1297] him," for it is a scandal on the government. *Rex v. Baker*, 1 Mod. 35.

8. An indictment lies for libelling the East India Company, although the words of imputation were against one of its directors only. *Rex v. Jennour*, 7 Mod. 400.

(b) What are not.

1. Words are not indictable unless they have a direct and immediate tendency (and not by construction or implication) to a breach of the peace. *Rex v. Langley*, cited 10 Mod. 186.

2. An indictment for saying to a justice of peace in execution of his office, "you speak to me here, but dare not do so in another place," was quashed. *Rex v. Walden*, 12 Mod. 414.

3. One was indicted for saying to justices at their sessions, when brought before them by warrant, "this is no justice of peace's business; you shall not try this matter; have a care what you do; I have blood in me if I had you in another place: judgment was arrested because the words were not indictable, as not carrying with them any necessary intendment of a challenge, or intent to break

the peace, especially when spoken by a wheelwright. *Reg. v. Nun*, 10 Mod. 186, 187.

4. "You do not right," spoken to a justice of peace, by one brought before him for non-payment of servant's wages, held not indictable; especially not being spoken to him in the execution of his office. *Rex v. Leafie*, Andr. 226.

5. So for saying of a justice of peace "that he would judge in any cause brought before him according to his affection." *Reg. v. Soley*, cited 10 Mod. 187.

6. Of a justice of peace, "he deserved to be hanged for making such a numskull order." *Reg. v. Lyceassell*, 10 Mod. 187.

7. An indictment does not lie for scandalous words spoken of a mayor, &c. *Rex v. Langley*, 2 Ld. Raym. 1029. Comb. 414.

8. Nor if spoken to a mayor, unless he was in the execution of his office. *Rex v. Langley*, 3 Salk. 190.

9. It is not an indictable offence to speak contemptuously to an alderman of London, though at the time of the words spoken he is acting officially by holding a wardmote. *Rex v. Rogers*, 7 Mod. 29.

10. An indictment will not lie for saying of a justice of the peace in his absence "he is a fool, an ass, and a coxcomb, and understands no more how to make a warrant than a stick-head." *Rex v. Wrightson*, 11 Mod. 166. 10 Mod. 186. *Sed vide* Salk. 698.

11. Or "he is a buffe-headed fellow, does not understand the law, and hath not done justice," held not indictable. *Rex v. Darby*, cited 11 Mod. 167. n.

12. Or for saying "he is a rogue, and a forsworn rogue." *Rex v. Pocock*, 7 Mod. 310.

13. A man cannot be indicted for saying of a justice of peace, "he understands not the statutes of excise." *Anon.* 1 Vent. 10. 16.

14. Of a justice, not spoken to him, held not indictable. *Rex v. Pocock*, Stra. 1157.

15. "The mayor and aldermen of A are a pack of as great villains as any that rob on the highway," not indictable. *Rex v. Grandfield*, 12 Mod. 98.

16. An indictment will not lie for saying of a justice of the peace, "you are an informing rogue, rascal, and villain." *Rex v. Shafes*, 11 Mod. 195.

17. Such an indictment may be quashed on demurrer. 11 Mod. 167. n. Salk. 697.

(c) Form of the indictment.

1. In an indictment for saying "the grand jury that presented me are perjured rogues," it is not necessary to aver that the presentment was found on probable evidence. *Rex v. Spiller*, 2 Show. 209, 210.

2. An indictment *quia* defendant *dixit* *diversas falsas et scandalosas verba* of a magistrate, is bad. 1 Ro. 79.

3. An indictment charging words to have

been spoken in *auditu legiorum*, is good. *Rez v. Spiller*, 2 Show. 209.

(d) *Defence.*

Though words may be justified in an action, they cannot in an indictment. *Cropp v. Tinsley*, Holt. 422.

[*1298] X. WHEN THE PARTY MAY BE BOUND TO HIS GOOD BEHAVIOUR.

1. One was bound to his good behaviour for speaking provoking words in Westminster Hall, as, "you lie, &c." 1 Lev. 107.

2. Any one who speaks unmannerly or scandalous words to or of a mayor, or justice of the peace, &c., may be bound to his good behaviour. *Rez v. Langley*, 6 Mod. 125. Balk. 698. *Anon.* 1 Vent. 10. 16.

SMUGGLING.

1. Smuggling by the captain of a ship on his own account is barratry. 2 Saund. 202.

2. In smuggling goods, all present and aiding are principals, and equally liable to the whole penalty. *King v. Manning*, Com. 616.

3. If one smuggler has no arms, he is not within the statute 9 Geo. 2. c. 35. s. 10, though the others have. *Rez v. Fletcher*, Stra. 1166.

4. A notorious smuggler was discharged on *habeas corpus*, because not tried within two terms after the indictment found. *Rez v. Walker*, 8 Mod. 4, 5.

SOLDIER.

1. At common law, every officer or common soldier was as liable to be arrested as a tradesman or any other person whatever. *Anon.* 1 Vent. 251.

2. But now a soldier is privileged from being held to special bail by act of parliament. 10 Mod. 4. 111.

3. A soldier cannot be taken on an *ex-communicato capiendo*; if he is, he will be discharged. *Anon.* 11 Mod. 191.

4. This privilege extends to troopers and to gunners. *Johnson v. Louth*, 10 Mod. 346, 347. Stra. 7. S. C.

5. An out-pensioner of Chelsea College was allowed to be held to bail, as not being a soldier within the meaning of the statute. *Bowler v. Owen*, Ca. Prac. C. P. 77. 1 Barnes, 311.

6. If a person is enlisted and qualified to act, though he does not do duty, yet he must be discharged on common bail if arrested. *Prac. Ca. K. B.* 205. Stra. 2.

7. But if a person enlists into the army, after verdict against him, he may be taken in execution. *Mascal v. Davys*, 11 Mod. 234, and *Mason v. Vowson*, 11 Mod. 252.

8. Where the original cause of action did not amount to 10*l.*, but, with costs, did, a soldier might be arrested on judgment; but this is now altered by stat. 13 Geo. 2. 1 Barnes, 311, 312, 313.

9. An action lies for arresting a sold'r contrary to the mutiny act, and the she'f may return that the defendant is listed. 2 Ld. Raym. 1246.

10. The agent of a regiment is but a servant to the colonel. 1 Ld. Raym. 101.

11. Clerks and attornies of the courts at Westminster ought not to be pressed for soldiers. *Venable's case* Cro. Car. 11.

12. Finding an able man any time after listing, is sufficient to entitle to the benefit of the listing act, if the man continue in the service. *Anon.* 11 Mod. 235.

13. Soldiers deserting may be tried for felony under 7 H. 7. 2 And. 151.

14. A house that entertains lodgers, is not a public house within the acts for billeting soldiers. 1 Ld. Raym. 479.

15. Among soldiers, possession of goods for a certain time after taking from the enemy alters the property. *Assievis v. Cambridge*, 10 Mod. 79.

16. Leave of absence to a soldier is a good consideration in *assumpsit*. 1 Ld. Raym. 312.

17. In an indictment under statute 32 G. 3. c. 70. for endeavouring to seduce soldiers from their allegiance, it is not necessary to set out the means used. *Winmore v. Greenbank*, Willes, 583.

SPECIFICK PERFORMANCE.

1. In case of a contract for lands, a bill lies in equity against the vendor for a specifick performance. *Atch.* [*1299] *erley v. Vernon*, 10 Mod. 537.

2. If the vendor sell and convey the land afterwards to another, having notice of the preceding contract, the second vendee may, in such case, be compelled to a specifick performance. 8 C. 10 Mod. 527, 528.

3. The vendor may bring his bill for a specifick performance, as well as the vendee. *Lewis v. Lechmere*, 10 Mod. 505.

4. A sheriff that refuses to assign a bail-bond, is not only liable to an action at law, but may be compelled in Chancery to a specifick performance. *Kitton v. Fagg*, 10 Mod. 289.

[See *ante*, tit. *EQUITY*, Vol. I. p. 579.]

SPIRITUAL COURT.

1. When the spiritual court shall have jurisdiction, the whole cause ought to be spiritual. *Kenn's case*, 9 Co. 44 a.

2. The spiritual court has cognisance de *reparatione coporis sive navis ecclesie*. *Jefrey v. Kenshley and Forster*, 5 Co. 66 b.

3. To spiritual defamation there are three incidents: 1st. That it concern matters merely of ecclesiastical cognizance, as calling one heretic, schismatic, adulterer, &c. 2nd. That it concern matters merely spiritual; for if it relates to any thing determinable at common law, the ecclesiastical judge cannot take cognizance of it. 3d. That the

party cannot sue there for damages or amends, but only for punishment of the sin *pro salute animæ*. *Palmer v. Thorpe*, 4 Co. 20 a.

[See *ante*, ECCLESIASTICAL COURT, Vol. I. p. 555.]

SPRING GUN.

A trespasser having notice, cannot maintain an action for an injury sustained by a spring gun. 1 Saund. 34 a. n. [d.] *Not v. Wilks*, 3 B. & A. 304.

STABBING.

One Oldfield stabbed a justice of the peace, but before he came into Westminster Hall; held, that he should not have his right hand cut off. *Oldfield v. Gerlings*, 12 Co. 71.

[See *ante*, tit. MURDER, Vol. II. p. 959. pl. 33.]

STABLE-KEEPER.

If a person deliver his horse to a stable-keeper, to be by him safely kept, at a reasonable rate, and to be safely delivered, and the horse, by the negligence of the stable-keeper, be taken out of the stable, and so immoderately rode as to be spoiled, an action lies for his neglect in not safely keeping the horse according to the contract. *Stamyon v. Davis*, 6 Mod. 225. Holt, 13.

STAMP.

1. A deed is good though executed before it is stamped. *Rex v. Bishop of Chester*, Stra. 624.

2. Motion to set aside two verdicts, because the distringassess were not stamped, &c., but denied, because they were stamped before the *postea* was brought in. (9 & 10 W. 3. c. 25. s. 59.) *Taylor v. Lake*, 8 Mod. 226. Stra. 595. S. C.

3. A receipt, though void for want of a stamp, may be shown to a witness to refresh his memory. 1 Saund. 325. n. [b.]

STAR CHAMBER

1. Upon a conviction in the Star Chamber of a defendant of several misdemeanors, and damages awarded to the plaintiff, held that no process could issue out of that court to levy the damages upon the goods and lands of the defendant, and that that court could only keep the defendant in prison until he paid them. *Hayward v. Whitbroke*, 13 Co. 64.

2.* Neither the Star Chamber [*1300] nor Chancery awards any messenger to arrest the body until contempt; but first a subpoena, &c., goes. *High Commission case*, 12 Co. 49.

[See *ante*, tit. COURT, div. (g) Vol. I. p. 399.]

STATUTE.

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I. OF THE OBJECT OF ACTS OF PARLIAMENT.

1. It is the proper business of acts of parliament to make alterations in the common law. *Thornby v. Fleetwood*, 10 Mod. 411.
2. That is the most reasonable law, which provides for the majority of the people, though some individuals suffer by it. *Stowell v. Lord Zouch*, Plow. 369. 371.
3. Statutes are made to remedy common mischiefs, and not those which seldom happen. *Dice v. Mansingham*, Plow. 63. 173. 306.

II. RELATIVE TO THE MAKING OF ACTS OF PARLIAMENT.

1. The usual practice in passing bills is, to add several provisos, every of which takes off from the enacting part, in whatsoever part of the bill it may be placed. *Lyn v. Wyn*, Orl. Bridg. 128.
2. In acts of parliament on the rolls there are no points, commas, colons, semicolons, or other notes or signs of division, they are added by the printer. *Crooke's case*, 1 Show. 210.
3. When there is no act passed, nor record made of it, it is as none, though the journal be full. *Saint John v. Saint John*, Hob. 78. 111.
4. The journals of parliament are not records. *Rex v. Knollys*, 1 Ld. Raym. 15. Hob. 110.
5. They are but remembrances, and are not absolutely necessary, nor have they always been. *Rex v. Countess of Arundel*, Hob. 110.
6. An act that the king, with the assent of the lords, or with the assent of the com-

mons, is not an act of parliament. *The Prince's case*, Jenk. 177. 8 Co. 20 b.

III. OF ORDINANCES, OR CHARTERS.

1. The ordinance *de terris mensurandis* is a statute. 1 Ld. Raym. 638.
2. For the difference between an act of parliament and an ordinance of parliament, see W. Jo. 103.
3. The charter 11 E. 3. was made by authority of parliament. *The Prince's case*, 8 Co. 16 a.

4. The king may by ordinance erect a fair, market, warren, park, or forest, without granting it to any. Hob. 15.

5. The words, authority of parliament, in an act of charter, are sufficient to make an act of parliament. *The Prince's case*, 8 Co. 20 a.

IV. RELATIVE TO THE DISTINCTION BETWEEN PUBLIC AND PRIVATE ACTS.

1. All statutes that concern the king are general statutes. *Needler v. Bishop of Winchester*, Hob. 226. Plow. 231.
2. Statutes which concern grants made by the king are general laws, as well as those which concern grants made to the king. *Needler v. Bishop of Winchester*, Hob. 227.
3. A statute for discharging poor prisoners is a public act. *Jones v. Azen*, 1 Ld. Raym. 120.
4. Though a statute concerns a particular thing, and be private in its nature, yet, if the forfeiture be to the king, this makes it a public act. *Rex v. Buggs*, Skin. 429.
5. One chapter of an act of parliament may be both a general and particular law, in respect of the several clauses. *Needler v. Bishop of Winchester*, Hob. 228.
6. Statutes which concern the revenue are publick, though, in respect of particular persons therein named, they may be private. *Anon.* 12 Mod. 249.
7. Statutes of composition are private acts. *Platt v. Hill*, 1 Ld. Raym. 382. 398.
- 8.* Private acts are not inrolled without suit, as general [*1302] acts are. *Rex v. Countess of Arundel*, Hob. 109.

V. WHAT ACTS ARE VOID.

1. When a public or private act of parliament is against common right and reason, or repugnant or impossible to be performed, the common law adjudges such act to be void. *Bonham's case*, 8 Co. 118 a. *Cromwell's case*, 4 Co. 12 b.
2. A statute made against natural equity, as to make a man judge in his own cause, is void. *Day v. Savage*, Hob. 87. *Thornby v. Fleetwood*, 10 Mod. 115.
3. So, a saving clause in an act of parliament, which is repugnant to the body of the act, is void. 3 Dy. 313. pl. 91. *Case of Alton v. Woods*, 1 Co. 40 b.
4. An act stating that the king, with the assent of the lords, has enacted it, is void; because it does not appear in the body of

the act that the commons have assented. Mo. 824. Jenk. 177.

VI. WHO ARE BOUND BY THEM.

1. Every subject of the realm is party and privy to an act of parliament. Plow. 59. 396.

2. A statute includes every man's consent, as well to come as present. *Duncombe v. Wingfield*, Hob. 256.

3. They bind the tenants in ancient demesne, and lords' villains, though they contribute not to knight's fees. *Cox v. Barnsly*, Hob. 48.

4. But an act of parliament between particular persons shall not bind strangers. Skin. 97.

VII. HOW THE KING IS AFFECTED BY AN ACT OF PARLIAMENT.

1. The king is favoured in the exposition of statutes; and nothing shall be taken by equity against the king. Plow. 239. 244.

2. General words in an act do not bar the king of any prerogative, estate, title, or interest. *Magdalen College case*, 11 Co. 66 b. 8 Mod. 6. 8. 4 Mod. 209. 2 Leon. 51.

3. No act of parliament can bind the king from any prerogative which is sole and inseparable to his person; but he may dispense with it by a *non obstante*; but in things which are not incident solely and inseparable to the person of the king, but belong to every subject, and may be severed, an act of parliament may absolutely bind the king. *Case of Non obstante*, 12 Co. 12.

4. General penal statutes do not bind the king. 1 Ro. 161.

5. Statutes that direct amendments, &c. on the challenge of the party, do not extend to the king. *Rex v. Tuchin*, 2 Ld. Raym. 1066.

6. If the king has an interest at common law, and a statute is made which takes away the liberty of all men, yet the king's liberty is not taken away, unless he is specially named in the act. Plow. 240.

7. But an act of parliament which gives a right to the king shall bind him, as to the manner of enjoying or using that right, as well as a subject. 1 Show. 211.

8. Where the king claims, in respect of his natural capacity, as heir of a subject *per formam doni*, he shall be bound by an act of parliament; but where the claim is in his royal and political capacity, a general act shall not bind him, unless he be expressly named, except in special cases. *Case of a fine levied by the King*, 7 Co. 32 a.

9. The king is bound by the statute *de donis*, as well as a common person. Plow. 227. 236, 237, 238. 248, 249. 251, 252.

VIII. POWER OF THE KING TO DISPENSE WITH AN ACT OF PARLIAMENT.

1. The king can release an action popular. 1 Ro. 33.

2. A person disabled by a statute cannot

be enabled by the king. *Culliford v. Cardonell*, in note, Com. 2.

3. An act of parliament, which generally prohibits a thing upon a penalty, which is popular, or only given to the king, may be inconvenient to diverse particular persons, in respect of person, place, time, &c.; for this cause, the law has given power to the king to dispense with it as to particular persons. *Thomas v. Sorrell*, Vaugh. 347.

IX.* HOW IT AFFECTS IRELAND [*1303] AND OTHER COUNTRIES.

1. Distinct kingdoms cannot be united, but by mutual acts of parliament. *Craw v. Ramsey*, Vaugh. 300.

2. An act of parliament made before the union does not extend to Ireland, unless expressly named. Salk. 510. 2 And. 116.

3. The statutes of England do not touch Berwick, Man, &c., except by special words. 2 And. 116.

4. An act of parliament in Ireland cannot effect a thing which could not be done without an act of parliament in England. *Craw v. Ramsey*, Vaugh. 289.

X. OF THE RELATION OF ACTS OF PARLIAMENT.

1. A statute shall have relation to the first day of the session in which it is made, unless otherwise provided. 1 And. 295. *Rex v. Countess of Arundel*, Hob. 111. 222.

2. And although there are words in it declaring that "it shall take effect from the passing of the act." *Sotless v. Homes*, 2 Mod. 241. *notis*.

3. If a statute confirm all grants made since such a day, it must be understood only of grants made before the parliament began, for it relates to that time. *Needler v. Bishop of Winchester*, Hob. 222.

4. But a clause in a statute expressly directing its commencement from a particular day, will make it relate to that day, and prevent its relation to the first day of the session. *Rex v. Gull*, 1 Ld. Raym. 371. Comb. 413. S. C.

XI. RELATIVE TO THE DURATION OF AN ACT OF PARLIAMENT.

1. An act to continue for three years, and thence to the end of the next session of parliament, the next session is to commence after the end of the three years. 1 Lev. 265.

2. The 13 Eliz. c. 8. being made to continue for five years, and from thence to the end of the first session of the parliament next ensuing, was holden to mean the first session of a new parliament then in being. 3 Dy. 376. pl. 22.

3. *Uogue ad* in the continuance of a parliament, includes the day. 1 Ld. Raym. 210.

4. If a statute is made to continue to such a day, and then another act is made before the expiration of the former, to continue it

for ever, it is all one as if the former act had been perpetual at first. *Lutw.* [77].

5. Declaratory clauses may be perpetual, though the act be expired. *W. Kely.* 7.

6. The statute of H. 7. c. 1. and 3 H. 8. c. 5. are perpetual acts. *Soldier's case*, 6 Co. 27 a.

XII. OF THE SUSPENSION OF AN ACT.

The *habeas corpus* act being suspended, the court declared they had no discretionary power to bail, &c. *Rez v. Lord Orrery*, 8 Mod. 96. 97.

XIII. OF THE REPEAL OF AN ACT.

1. Upon the repeal of a statute that repealed a former statute, the first statute is revived again. *Thornby v. Fleetwood*, 10 Mod. 412. Comb. 216. S. C. 1 Ro. 92. S. C.

2. A later statute, contrary to a former statute, takes away the force of the first statute, without express negative words. 1 Rho. 91.

3. But an affirmative statute shall not repeal a precedent affirmative law, unless the subsequent statute is contrary to the precedent law: such contrariety may be, 1st, in quality; 2, in matter; 3d, in respect of the form prescribed. *Foster's case*, 11 Co. 56 b. *Heyden v. Carroll*, 3 Ridgw. 599.

4. But two affirmative statutes may stand in points in which they do not contradict each other. *Heyden v. Carroll*, 3 Ridgw. 599.

5. A statute inflicting a less punishment is a virtual repeal of a statute inflicting a greater punishment on the same crime. *Rez v. Cator*, 6 Mod. 181. n.

6. Repeals by implication are not to be allowed of, where it is possible to make statutes consistent. *Thornby v. Fleetwood*, 10 Mod. 118. Com. 217. S. C.

7. And where it is not, the latter statute should be so interpreted as to repeal as little as possible of a precedent one. S. C. 10 Mod. 118.

[*1304] 8. A repealed act of parliament is of no more effect than if it had never been made. *Hill v. Good*, Vaugh. 325.

9. Though the time in a temporary law is expired, yet, if it be continued, facts may be said to be done by virtue of the first law. *Rez v. Morgan*, Stra. 1066.

10. An expired statute shall be revived if clearly identified, although the commencement of it be misrecited in the reviving statute. *Trakure v. Pearce*, 2 Show. 302.

XIV. RELATIVE TO THE CONSTRUCTION AND EXPOSITION OF ACTS OF PARLIAMENT;—

(a) In general.

1. All acts of parliament are parcel of the laws of England, and shall be expounded by the common-law judges according to the laws of England, and not by the civilians and canonists, although the acts concern ecclesiastical and spiritual jurisdiction. *Per-*

ter v. Rochester, 13 Co. 4. Hob. 83, 84. S. P.

2. Statutes must have a reasonable construction. 4 Mod. 271.

3. Care must be taken to put such a construction upon the whole as may make the parts consistent with each other. *Roper v. Ratcliffe*, 10 Mod. 239. 483.

4. Every statute consists of two parts, viz. the words and the sense. *Plow.* 363. 465.

5. The judges have a power over laws, especially statute laws, according to reason and best convenience, to mould them to the truest and best use. *Ld. Sheffield v. Ratcliffe*, Hob. 346. 10 Mod. 412. S. P.

6. The life of a statute does not consist in the words, but in the sense and meaning of it. *Plow.* 82. 363. 465.

7. The style of an act is a means to find out the general scope and intent of it. *Plow.* 203.

8. The preamble of an act is a key to open the minds of the makers of it. *Plow.* 369. *Company of Merchant Adventurers v. Ribowse*, 3 Mod. 129. *Callihorp v. Axtell*, 3 Mod. 169.

9. If the words of the enacting part of a statute be doubtful, they may be explained by the title or preamble; but the plain words of an enacting clause are not to be restrained by the title or preamble. *Cobham v. Cooke*, Willes. 395.

10. Where an act of parliament is dubious, long usage is a just medium to expound it by; and the meaning of things spoken and written must be such as has been constantly received by common acceptance. *Sheppard v. Gosnold*, Vaugh. 169.

11. But where usage is against the obvious meaning of an act by the vulgar and common acceptance of words, then it is rather an oppression than exposition of the act. *Vaugh.* 170. S. C.

12. Words void for the purpose for which they were introduced, may be used to expound other doubtful words. *Orl. Bridg.* 40.

13. Where the words are doubtful, that exposition ought to prevail which will render the act the most effectual. *Reg. v. Simpson*, 10 Mod. 343. 346.

14. Acts made *pro bono publico*, are to be expounded so as to attain their end. *Pierce v. Hopper*, Stra. 253. 258.

15. In the construction of a statute the intent and scope of it are to be considered. 2 Ro. 175. *Buller v. Baker*, 3 Co. 25 a. *Roper v. Ratcliffe*, 10 Mod. 239. 3 Mod. 63. *Plow.* 53. 57. 205. 231. 464. *Lyn v. Wym*, *Orl. Bridg.* 133.

16. Where more operations than one are intended by an act of parliament, the law will make a priority according to the subject-matter, and the intent of the act. *Col-lingwood v. Pace*, *Orl. Bridg.* 455.

17. Relative words in an act of parliament

will make the thing to pass as well as if it had been particularly expressed in the act itself. *Wheatly v. Thomas*, T. Raym. 54, 55.

18. Affirmatives in statutes which are introductory of new laws, imply a negative of all which is not within the purview. *Slade v. Drake*, Hob. 298, lb. 215.

19. A penal statute speaking in the plural number, may comprehend cases in the singular number. *Partridge v. Strange*, Plow. 86.

20. It is never to be intended that words are put into statutes in vain. *Partridge v. Strange*, Plow. 80.

21. Where restrictive words are found at the end of the last sentence, [*1305] which* are properly applicable to the several sentences preceding, they shall extend to the whole. *Scott v. Schawrtz*, Com. 684.

22. Where a statute creates a new interest, it shall be governed by the like law such interests were governed before. *Lane v. Sir Robert Cotton*, 12 Mod. 486.

23. The best construction of a statute is to expound it as near the rules of the common law as may be. 1 Saund. 240. Hob. 97, 98. *Palmer v. Allcock*, 3 Mod. 63. *Rex v. Jackson*, 8 Mod. 8. Holt, 477. 10 Mod. 234. Skin. 221. Gilb. Rep. 320.

24. As far as it is consistent with preserving the end and design of the act. 10 Mod. 245. 345. 359, 360. 379. 395. 411. *Arther v. Bokenham*, 11 Mod. 161. *Murrey v. Eyton*, T. Raym. 355, 356.

25. The words are always to be understood in a legal sense, unless the subject-matter of the act apparently hinders it. *Roper v. Ratcliffe*, 10 Mod. 234.

26. The construction must be the same at law as in equity. *Kenney v. Browne*, 3 Ridgw. 516.

27. Statutes ought not to be so expounded as to elude the force of them. *Reg. v. Simpson*, 10 Mod. 344. Hob. 93. 97.

28. No such exposition of a statute ought to be made as destroys the text itself. *Earl of Leicester v. Heydon*, Plow. 396.

29. The general words of a statute, especially if obscure or ambiguous, may be qualified or restrained by subsequent clauses or sentences. *Petty v. Goddard*, Orl. Bridg. 40. 8 Mod. 8.

30. So, a general subsequent clause may be restrained by a preceding one. *Roper v. Ratcliffe*, 10 Mod. 242. 485.

31. A qualified construction may be given to general words in an act of parliament. *Lyn v. Wyn*, Orl. Bridg. 147.

32. As, to avoid an apparent injury. 8 Mod. 7.

33. When there is a particular remedy given by act of parliament in a particular case, the act shall not be extended to overthrow or alter the common law but in that

particular case. *Cornwallis v. Hood*, Carter, 36.

(b) *With reference to each other.*

1. A latter statute in the affirmative shall not take away a former act; and *eo potius* if the former be particular, and the latter general. *Gregory's case*, 6 Co. 19 d.

2. Statutes of explanation must be construed only according to the words, and not with any equity or intendment. Cro. Car. 34.

3. An act lately made may be within the equity of a statute made long since. *Vernon's case*, 4 Co. 1. a. *Lane v. Cotton*, Com. 106.

4. The law will not allow general words to revoke or alter any particular statute, where such words may have their proper operation without such revocation or alteration. *Lyn v. Wyn*, Orl. Bridg. 127.

5. An act of confirmation will not aid a thing that is void, unless there are enacting words in it. 1 Ro. 152.

(c) *With reference to exceptions therein.*

1. That which is excepted out of an act is out of the provisions of the act, and is as fully exempted out of the act as if the act had never been made. Plow. 361.

2. Savings or exceptions in statutes must not be so expounded so as quite to overthrow the purview. *Thornby v. Fleetwood*, 10 Mod. 115. 408.

3. Where the king's grant is void in its creation, a saving of that grant in an act of parliament shall not aid it. *Thomas v. Sorrell*, Vaugh. 332.

4. Provisoos in an act of parliament do not always amount to a condition. Carter, 11.

(d) *With respect to different expressions used in statutes.*

1. Where a statute begins with particular words of an inferior nature, and concludes with general words, the general words shall never be extended to any thing of a higher nature. *Burton v. Morris*, Hob. 183.

2. Thus the general words of a statute, beginning with inferior persons, &c. do not extend to superior persons. *Archbishop of Canterbury's case*, 2 Co. 46 a.

3. "King" includes all his successors. *Soldier's case*, 6 Co. 27 a.] *1306] 2 And. 151. Jenk. 271. S. C.

4. In an act of parliament personal actions are included in the word "goods," as well as goods in possession. *Ford and Shelden's case*, 12 Co. 1.

5. Where a statute directs things of a public nature, as that a public officer may do, &c., this is tantamount to *shall*; and if he does not do it, an information lies. Skin. 370. Salk 309. Com. 220.

6. A gift by parliament to the heir of J S, who is a person attainted, is good, and must be intended such person as might have been his heir, being only a description of the person implied. *Wheatly v. Thomas*, T. Raym. 55.

7. An estate in reversion has been in all construction of deeds taken for an estate in future, and not in possession; *a fortiori* in an act of parliament. *Lyn v. Wyn*, Orl. Bridg. 131.

8. When matters of record or specialities entered into with ceremony are made void by statute, the meaning (commonly) is no more than that they may be avoided in a proper manner; for acts of parliament always suppose necessary incidents. *Reg. v. Corporation of Buckingham*, 10 Mod. 180.

9. Otherwise, when the act relates to a matter in pais. 10 Mod. 180.

10. Thus, if a statute say that outlawry, &c., so done shall be void, still it ought to be avoided by writ of error. 1 Ro. 159.

11. If a statute made for rebuilding a city destroyed by fire enact that no buildings shall be erected within the limits of the city but according to certain directions in the act, it only extends to buildings on old foundations, and not to erections entirely new. *Carter v. Firmin*, 4 Mod. 151.

12. If a statute impose a duty on "all houses and edifices whatsoever," with directions on non-payment of the duty to distrain, houses in the possession of a corporation, though unfinished and never occupied by any tenants whatsoever, are liable to the duty; and the officer, on demanding payment from the corporation, may on refusal distrain the goods, as well on the premises as elsewhere. *The Company of Ironmongers v. Naylor*, 2 Mod. 186.

13. A statute requires contracts for stock to be registered with the name of the person for whose benefit they were made; a register with an entry, "this is for my benefit, &c.," is sufficient. 2 Ld. Saym. 1350.

14. A statute makes contracts relating to stock, &c., void, unless they are to be performed within three days; a contract to be performed upon request is avoided, unless a request be made, &c. 1 Ld. Raym. 317. 637.

15. If a statute enact, "that whosoever shall not make the wares belonging to saddlery sufficiently and substantially, shall be liable to such a penalty," and describe the manner in which the leather shall be made, a saddler who uses leather not dressed according to the statute is not liable to the penalty, if the buyer is satisfied with the commodity. *Saddlers' Company v. Jones*, 6 Mod. 166.

16. A penal statute ordering the penalty to be levied on the goods of the offender by distress, shall be construed to mean by distress and sale. *Morley v. Stacker*, 6 Mod. 83.

17. A statute imposing a duty on "every fire-hearth and stove in any house," extends to smiths' forges, although there is a proviso exempting "any blowing-house, stamp-furnace, or kiln," from the payment of such duty. *Bell v. Knight*, 2 Mod. 182.

18. If a statute impose a duty on all

hearths, except in cottages let under a certain rent, *quare* whether the landlords of such cottages are liable. 2 Show. 559.

19. If a statute enact, that "all manors, messuages, lands, tenements, possessions, reversions, rights, interests, &c., and all other things of what nature soever," shall be forfeited on an attainder of high treason, lands in tail are forfeited, for they shall be included in the general words "other things of what nature soever." *Brown v. Waite*, 2 Mod. 131.

20. If a statute declare "that the skins of sheep being tanned or tawed, and every salt hide, shall be reputed and taken to be leather," and there are two kinds of tawing, the one dry, which leaves the fur upon the skin, the other wet, which takes it off by a preparation of salt and alum, a sheep-skin prepared with* white alum [*1307] is leather, within the meaning of the statute. *Saddlers' Company v. Jones*, 6 Mod. 166.

(e) *What statutes are to be construed liberally, and what strictly.*

1. Statutes made for the advancement of religion must receive as strong an interpretation for the attainment of that end as possible, though the words are imperfect. 10 Mod. 117. 356. 410. *Colt v. Bishop of Coventry*, Hob. 157.

2. Statutes made in suppression of fraud are to be construed liberally for that purpose. *Thyne's case*, 3 Co. 80 b.

3. In any case where a statute intends to remedy a wrong or mischief, it is to be extended to all cases within the same mischief. 2 Ro. 246. *Saunders v. Plummer*, Orl. Bridg. 226.

4. Though they are not within the express words. 2 And. 57, 58. 123. 149.

5. Statutes in explanation are always construed beneficially. *Case of Dean and Chapter of Norwich*, 3 Co. 73 a.

6. Statutes against Magna Charta are to be construed strictly. Holt, 513.

7. Nothing shall be taken by equity against the king. Plow. 244.

8. Statutes that give costs are to be taken strictly. *Cone v. Bowles*, 1 Salk. 205.

9. When an act of parliament alters the common laws, the meaning shall not be strained beyond the words, except in cases of public utility, when the end of the act appears to be larger than the words themselves. Vaugh. 179.

10. When the words of a statute extend not to an inconvenience rarely happening, but do to those which often happen, it is good reason not to strain the words further than they will reach, by saying it is *casus omissus*, and that the law intended *quis frequentius accidit*. *Bole v. Horton*, Vaugh. 373.

11. But where the words of a law do extend to an inconvenience seldom happening, there it shall extend to it as well as if it happens more frequently. Id. ibid.

12. It is a principle in law, that *penal statutes* shall be taken strictly, and not extended by equity to the prejudice of those upon whom the penalty is inflicted, but shall be taken favourably for them. *Plow.* 17. 46, 47. 86. 2 Ro. 323. *Going v. Deering*, 3 Mod. 157. *Ratcliffe v. Roper*, 10 Mod. 93.

13. Yet statutes that are remedial laws, or designed for the advancement of the publick good, though penal in some respects, or to some persons, may be extended by equity. 10 Mod. 95. 117. 242. 281, 282. 356. 410. *Plow.* 59.

14. Especially if it appears that the intent of the legislature was such. *Plow.* 82.

15. Felonies or other capital crimes shall not be made or created by doubtful and ambiguous words in a statute. *Hob.* 270. 291.

16. The directions of a penal statute must be strictly pursued. *Franklyn's case*, 1 Mod. 68.

17. When a statute ousts clergy, it is ousted only so far, and in such cases, and to such persons as are expressly comprised within the statute; for, in *favorem vitæ*, or *privilegii clericalis*, such statutes are construed literally and strictly. *Rez v. Whistler*, 11 Mod. 28. n.

18. In penal laws computation of time is generally taken inclusively. *Reg. v. Green*, 10 Mod. 212.

19. Where all men are limited by statutes to a certain time, no time shall be gained by exposition or equity beyond the express words. *Plow.* 371.

20. *Private statutes* are to be construed strictly according to the letter. *Wroth v. Countess of Sussex*, 3 Leon. 133.

XV. RELATIVE TO THE OPERATION OF ACTS OF PARLIAMENT;—

(a) *In general.*

1. Whatsoever is declared by an act of parliament to be against God's law, we must admit it so, for by a law, *viz.* (by act of parliament), it is so declared. *Hill v. Good*, *Vaugh.* 827.

2. Where a statute gives a remedy for any thing, it shall be presumed there was no remedy before at the common law. *Hunt v. Watton*, T. Raym. 260.

3. Whatever is a necessary and unavoidable consequence of an act of parliament, is to be esteemed a part of the act, as much as if it was inserted *totidem* verbis*.

[*1308] *Thornby v. Fleetwood*, 10 Mod. 410, 411. Com. 215. S. C.

4. General words of statutes shall not be construed so as to take away the particular customs of London, because they are confirmed by act of parliament. *Hutchins v. Player*, *Orl. Bridg.* 319.

5. A statute directing that scavengers shall be chosen in London and Westminster and the liberties thereof, according to the ancient usages of those cities, and appointing a new form of election in all other places, destroys a custom in the borough of Southwark to

elect scavengers in a way contrary to the directions of the statute. *Mayor of London v. Gutford*, 2 Mod. 39.

6. General words in a statute do not enable contrary to rules of law. *Grange v. Tising*, *Orl. Bridg.* 108.

7. General words in an act of parliament do not comprehend an estate tail. *Murray v. Eyton*, T. Raym. 322.

8. Where a privilege of freedom from a restraint is once totally acquired, it shall not be taken away by general words of a statute, or by an act of a third person to which he who has the privilege of freedom is not consenting. *Bainbridge v. Gardiner*, *Orl. Bridg.* 404.

9. Where a statute gives land to the king his heirs and successors, he shall be said to be seized thereof in right of his crown. *Plow.* 105.

10. Where a statute makes an offence felony, accessories (properly) are within it, though not named; *aliter*, where an offence at common law is thereby only made more penal. *Salk.* 542, 543.

11. There is no estoppel against an act of parliament. *Lyn v. Wyn*, *Orl. Bridg.* 134.

(b) *When they have a retrospective operation.*

1. A statute cannot have a retrospective operation; and therefore the 29 Car. 2. c. 3., which makes certain agreements void, unless they are reduced into writing, does not extend to a parol agreement made previous to the commencement of the statute. *Gilmore v. Executor of Shooter*, 2 Mod. 310, 311.

2. An affirmative statute shall not by intendment alter a former law. *Hughes v. Hughes*, *Carter*, 136.

3. Statutes in the affirmative shall not alter a precedent power or interest; *secus*, in the negative. *Stukely v. Butler*, *Hob.* 173.

4. A penal statute cannot have a retrospective operation, and therefore if a man covenant to do a thing, and it is afterwards prohibited, yet the covenant is binding. *Brason v. Dean*, 3 Mod. 39.

5. A devise of lands to charitable uses made antecedent to the statute of mortmain is good, although the testator did not die until after the statute commenced. *Ashburnham v. Bradshaw*, 7 Mod. 239.

XVI. WHO IS ENTITLED TO THE PENALTY GIVEN BY AN ACT.

1. Where a statute gives a penalty, and does not say to whom, (in general) the crown shall have it. *Thornby v. Fleetwood*, 10 Mod. 121. 358. 364. 409. Com. 211. S. C.

2. But where a penalty or forfeiture is given by statute without saying who shall have it, if it be given in lieu of something to which that party was before entitled by way of damage, the penalty shall follow the loss, and the party grieved shall have it. S. C. 10 Mod. 121. 1 Ro. 90.

3. If a statute command an act to be done,

or prohibit the doing of it, for the advantage of any person, that person shall impliedly have remedy at law to recover the advantage given to him, or to have satisfaction for the injury done him by disobeying the directions of the statute; and therefore, by the statute of wills (32 Hen. 8. c. 1.), if money be devised out of lands, the devisee shall have an action of debt against the owner of the lands to recover it. *Anon.* 6 Mod. 27. *Attorney-General v. White*, Com. 435.

4. So, if a statute distributes a penalty, a moiety to the informer, &c., the crown shall have the whole where there is no informer. *Reg. v. Franklyn*, 2 Ld. Raym. 1039.

XVII. OF PLEADING AN ACT OF PARLIAMENT;—
(a) *When an act of parliament must be shown in pleading.*

1. Courts will not in general [*1309] take notice* of an act of parliament unless shown. 2 Saund. 155 a.

2. A particular statute cannot be taken notice of by the court except it be pleaded. *Needler v. Bishop of Winchester*, Hob. 227.

3. A private statute cannot be given in evidence on the general issue, but must be specially pleaded. 2 Show. 318.

4. An act of pardon, though it may be given in evidence upon the general issue, is not to be taken notice of by the court in collateral cases, unless the act directs it. *Ingram v. Foot*, 1 Ld. Raym. 709.

5. The specification acts must be pleaded. 1 Ld. Raym. 324.

6. The statute of 1 Eliz. is a private act, and must be pleaded. *Elmer v. Gale*, 5 Co. 2 a.

7. But general or public statutes need not be pleaded. Hob. 227. 2 Mod. 99.

8. Statutes concerning the king and queen being general statutes which concern the whole realm, the court is bound to take notice of them without being pleaded. Plow. 231. *Cromwell's case*, 4 Co. 12 b.

9. The general interest that the people have in the king and his rights, is the reason why the law accounts all statutes which concern him general statutes, and takes notice of them, though they be not pleaded. *Needler v. Bishop of Winchester*, Hob. 226.

10. The statutes 13 Eliz. c. 10. and 18 Eliz. c. 11. are general laws. *Dumport's case*, 4 Co. 119 b.

11. The acts 22 Ed. 4. and 35 Hen. 8. are general acts. *Barrington's case*, 8. Co. 136 b. 2 Brownl. 289. 322. Godb. 169. 1 Ro. 135. S. C.

12. The statutes of tithes need not be recited, nor of hue and cry. *Mallack v. Sparling*, 1 Show. 337.

13. Though the courts are bound to take judicial notice of a public act, yet the party protecting himself by it must state facts which bring his case within it, or he cannot demur. 2 Saund. 155.

(b) *How it should be pleaded.*

1. Where an act prohibits the doing of a thing, and afterwards a penalty is given by another act, he who sues for the forfeiture shall recite both the acts. Plow. 206.

2. It is the duty of the plaintiff to prove that he has brought it within time, and the defendant need not plead the statute. 2 Saund. 63. 63 a.

3. It is sufficient to allege an offence in the words of a statute. *College of Physicians v. Salmon*, 1 Ld. Raym. 682. *Flitham v. Andworth*, 2 Ld. Raym. 764.

4. Long and difficult statutes may be pleaded generally. 1 Ld. Raym. 120.

5. When a statute is made at a sessions, &c. held by prerogation, the most concise and sure way is to plead *quod ad session. parliamenti*, &c. Lutw. [54.]

6. In acts of parliament, the several clauses are as so many several acts, and may be pleaded with an *inter alia*: an act of parliament may be in part a public, in part a private act. Orl. Bridg. 515.

7. If part of a general statute be only recited, the court shall take notice of any other part which makes for the pleader. Hob. 310.

8. "Divers exciseable liquors" is too general. *Chance v. Adams*, 1 Ld. Raym. 78.

9. *Diversis temporibus* is too general on a penal statute. Id. ibid.

10. The judges are to take notice judicially of all parliaments and their sessions. T. Raym. 191.

11. Where a statute creates a new thing in writing, it must be so pleaded; but where it only adds to a common law matter, it need not be set forth in a declaration, but must in a plea. Salk. 519.

12. Although a public statute need not be recited, yet if the party in pleading it undertake to recite it, and mistake in a material point, it is incurable; but if he recite so much of it as will serve to maintain his own action truly, and mistake the rest, this will not vitiate the pleadings. *Earl of Shaftesbury v. Lord Digby*, 2 Mod. 99. Hob. 316. T. Raym. 191.

13. In pleading a private act of parliament, a mistake in the day of the commencement of the parliament will be fatal. Mo. 651.

14. The title or preamble is no part of an act, but if in pleading you describe an act by the title, a variance is fatal. Holt, 662, 663. 2 Salk. 331. *Mills v. Wilkins*, Salk. 609. *Contra*, 6 Mod. [*1310] 63. 1 Ld. Raym. 77. *Chance v. Adams*, Palm. 565.

15. Judgment was arrested because the statute was alleged as made 6 Will. 3. when the queen was living. *Anon.* 2 Ld. Raym. 1224.

16. The statute 2 Edw. 6. for not setting out tithes, was declared upon as made the

2d November anno 2 & 3 Edw. 6.; for this cause judgment was arrested. Moore, 302.

17. The statute of 23 Eliz. against popish recusants, was pleaded as a statute made 29 Eliz., and therefore misrecited. Lutw. [452.]

18. A declaration on the statute 29 Eliz. c. 4. by a sheriff for his fees on an execution, stating it to have been made at a session of parliament by prorogation held at Westminster 15th February, 29 Eliz., is bad on demurrer, although the statute is published in the printed copies of the statutes to have been so held, for it appears by the roll that the parliament begun 29th October, and was adjourned from that time to the 15th February, and then continued till it was dissolved; but being a particular statute, of which the judges will take no notice unless it be pleaded, this misrecital is aided by a verdict; for the defendant to have taken advantage of it, ought to have pleaded *null tiel record*. *Spring v. Eze*, 2 Mod. 241.

XVIII. RELATIVE TO THE PROCEEDING ON A STATUTE BY ACTION OF DEBT;—

(a) *When it lies.*

1. Where an action is given by a statute for an offence which existed before at common law, the plaintiff may choose which way to proceed. 3 Leon. 140, 141. 170.

3. Where the non-acceptance of an office is penal by statute, the party may also by non-acceptance of it incur the penalty of a bye-law. *City of London v. Vanacre*, 12 Mod. 269. 273.

3. When a statute creates a duty and no remedy, an action of debt lies. *Walden v. Urey*, Lat. 51. Salk 415. *Attorney-General v. White*, Com. 435.

4. A person to whom a penalty is given by a statute, may have debt for it. *Royal College of Physicians v. Salmon*, 1 Ld. Raym. 682.

5. If no indictment is directed by the statute, a penalty to the king must be sued for as a debt. Sira. 828.

6. Debt lies against an officer on the 25 Car. c. 2., for refusing to take the oaths. *Godden v. Hales*, 2 Show. 475.

7. Debt lies upon the act against a cutler for keeping more than one apprentice. *Cutler's Company v. Hartley*, Comb. 224.

8. Debt lies against a sheriff for the reward given by the act of parliament for the conviction of clippers and coiners. *Rignol v. Rogers*, 12 Mod. 310.

9. Debt upon the statute 2 Eliz. 6. for tithes, can be brought without deed, and is good if it only states that plaintiff is proprietor. *Bobington v. Matthews*, 1 Re. 13.

(b) *In what court.*

1. A statute gave a penalty to be recovered by action, bill, or plaint, and in any court of record; held the four courts of re-

cord at Westminster only are meant. *Gregory's case*, 6 Co. 19 b. Moore, 412. 599. S. C. *Sed vide* 1 Ro. 51.

2. And not before justices of the peace, nor leets, piepowder, nor corporation courts. Moore, 221.

3. Where a statute gives a new action, it cannot be brought in an inferior court; otherwise it is where a statute gives an old action in a new case. Hob. 48. 1 Keb. 554. pl. 65.

4. A statute giving jurisdiction to an inferior court does not thereby exclude the jurisdiction of the king's bench. *Smith's case*, 1 Mod. 45.

5. An action of debt *qui tam* cannot be commenced before justices of assize. *Pheasant v. Finch*, T. Raym. 394.

6. Penal statutes are not within the cognizance of the sessions of the peace. Gilb. 104. *Contra, Rex v. Gall*, 1 Ld. 372, 373.

7. But debt upon the statute of 23 Eliz. c. 1., for not coming to church, may be brought in K. B., notwithstanding the statute of 21 Jac. c. 4, *Pheasant v. Finch*, T. Raym. 394.

8. An action will lie on the 5 Eliz. c. 4., in the courts in Westminster Hall. *Forrest q. t. v. Wife*, 2 Mod. 246.

(c)* *In what county.* [*1311]

1. All popular actions on statutes made before 21 Jac. 1. must be in the county where the fact was done. *King v. Gall*, 12 Mod. 223.

2. An action on the statute for exercising a trade, lies not at Westminster, out of the proper county. Holt, 38.

3. Debt upon a penal statute arising in Middlesex may be brought by a common informer in B. R. *Williams v. Dudley*, 2 Ld. Raym. 872.

(d) *Preliminaries to bringing the action.*

The statute of 21 Jac. 1. c. 4., which requires an affidavit of the offence having been committed within a year before a penal action can be brought, does not extend to actions for penalties inflicted by subsequent statutes. *Harris v. Reily*, 7 Mod. 909.

(e) *Within what time it should be brought.*

1. When a statute gives a penalty to the king and informer, and the informer does not sue within the year, the king may sue for the whole penalty at any time within two years. *Rex v. Franklin*, 6 Mod. 220. 2 Ld. Raym. 1039. S. C.

2. If a statute give a penalty to the party grieved within three months, and, on his neglecting to sue for it within that time, to any person who will sue for the same, *quære*, whether a stranger who sues for the whole penalty be a common informer within 31 Eliz. c. 5., and thereby bound to bring his action within a year. *Culliford v. Blandford*, 4 Mod. 129.

(f) *When the action must be qui tam.*

1. Where a statute creates an offence, and adds no penalty, the action brought against the offender must be *qui tam*, &c.; and so it may be where a penalty is given, for it is a contempt to the law, and a fine is due. *Norris v. Mauduit*, 5 Mod. 313.

2. Action upon the statute of apparel to answer as well to our lord the king as to the party, is bad, because there is no contempt to the king. *Moore*, 63.

3. Actions upon general statutes relating to the public must be *qui tam*. *Andr*. 119.

4. Where a statute gives a sum certain for the benefit of the party grieved, there it shall not be *qui tam*. *Norris v. Mordit*, Comb. 431, 432. *Holt*, 610, 611.

5. Where a statute gives a penalty to a stranger, and he sues, he is a common informer; *aliter*, if to the party grieved. *Salk*. 30.

(g) *Process.*

1. A penal action may be commenced by *latitat*. 2 *Saund*. 1 c.

2. When a penalty is given by a statute to a prosecutor, so as he sues within such a time, a *latitat* sued forth is a sufficient commencement of the suit. 4 Mod. 130.

3. Where a statute gives a remedy by original writ, it is not maintainable by bill, except in a *præsumere*. *Moore*, 247. 412.

4. Where a statute gives a penalty to be recovered before justices, and prescribes no method, it ought to be by bill. *Anon*. *Salk*. 606.

5. Suits upon penal statutes cannot be by plaint, as upon 5 *Eliz*. for trade. *Cro*. *Eliz*. 544.

(h) *Bail.*

In all actions on penal statutes common bail suffices. *Anon*. 12 Mod. 231. *Rex v. Cromer*, 1 *Keb*. 631. pl. 15. 1 *Keb*. 658. pl. 41.

(i) *How the declaration should be.*

1. In debt on a penal statute, a declaration "*quod cum*," &c., is good enough. *Mallock v. Sparing*, 1 *Show*. 337. *Contra*, *Dunstall q. t. v. Dunstall*, 2 *Show*. 27.

2. It differs not from debt upon bond: but it would be otherwise, if it were in an information. *Mallock v. Sparing*, 1 *Show*. 337.

3. A declaration in debt upon the statute of 14 *Hen*. 8. for practising physic at Westminster, not being approved under the seal of the college, is bad if it do not say that it was within seven miles of London. *College of Physicians v. Bush*, 4 Mod. 47.

4. Debt brought upon a statute by which the forfeiture is divided into [*1312] three* parts, one to the king, one to the informer, and one to the poor of the parish; no parish being mentioned in the declaration, it is ill. *Skin*. 83.

5. In an action *qui tam* on a statute, it is

sufficient to say that a person is not qualified, without showing that he had not 100l. a year, or any other estate which makes a qualification. *Bluet v. Needs*, Com. 522.

6. In an action for a penalty under the bribery act (2 *G*. 2. c. 24.), it is sufficient to state that the defendant corrupted A B (a voter, &c.) to vote for C D, by giving him a sum of money as a gift or reward for his the said A B's giving his vote, &c., without saying that he gave A B that sum for the purpose of bribing him to give his vote, &c. *Mead v. Robinson*, Willcs, 427.

7. In debt on the statute 2 *E*. 6. c. 13. for not setting out tithes, if it is not shown in the declaration that the defendant had not agreed with the parson, it is ill on demurrer, but good after verdict. *Austin v. Burreco*, Comb. 283, 284.

8. A declaration against a hundred, that robbers robbed the plaintiff's servants in his company, is well, if agreeable to the fact. *Willan v. Hundred of Stancliffe*, 2 *Ld*. Raym. 904.

9. On the statute of Winchester, one may have debt, or one may declare for damages only. Comb. 422.

10. An action upon the statute of 5 *Eliz*. of trades, must say *contra pacem*. 1 *Keb*. 848. pl. 48.

11. In an action on the statute of *H*. 6. *contra pacem* were left out, and yet held good. *Cro*. *Eliz*. 186.

12. An action *qui tam* may conclude *et inde producit sectam*, and shall not abate for want of those words "*tam pro domino rege quam pro seipso*." *Waller v. Laughton*, 10 Mod. 253.

13. Debt on the statute of 1 *Eliz*. c. 2. and 23 *Eliz*. c. 1. for not coming to church, concluding *per quod actio accrevit eidem domino rege et qua et habend.* for himself and the plaintiff, is good. *Anon*. 2 Mod. 100.

14. Where a statute creates an offence, you must conclude *contra formam statuti*; otherwise if it was an offence before. *Bennet v. Tulbot*, 5 Mod. 308. *Salk*. 505.

15. *Contra formam statuti* may be rejected as surplusage when there is no statute, or when the part of the trespass is at common law, or where the statute only restores the common law. *Bennet v. Talbois*, 1 *Ld*. Raym. 150. *Holt*, 662. *Salk*. 505.

16. *Contra formam statuti predicti* is ill when the statute is misrecited. *Birt q. t. v. Rothwell*, 1 *Ld*. Raym. 343.

17. There is a difference when the action or information is grounded on an act of parliament, and the conclusion is *contra formam statuti predicti*, there the action or information is not good, if the statute is misrecited; but if the conclusion be *contra formam statuti in hujusmodi casu edit. et provisi*, there it may be good, notwithstanding the misrecital. *Rex v. Wild*, T. Raym. 192.

18. A declaration upon the statute of

Winton rightly concludes "contrary to the form of the statute," &c., and this, although there are several statutes upon the same subject. *Merrick v. The Hundred of Ossulston*, C. T. Hardw. 409.

(j) *Abatement of the action.*

1. Debt upon a penal statute is not gone by the death of the king. Hutt. 82.

2. If an informer die after answer, the attorney-general can reply and prosecute the suit upon a penal law. *Moore*, 541. 599. 11 Co. 59 b.

(k) *Oyer.*

Oyer is not demandable of a private act of parliament. 1 Saund. 9 c. n. (l.)

(l) *Defence and plea, or demurrer.*

1. A former recovery cannot be given in evidence on *nul debet* in a *qui tam*. *Breden v. Harman*, Stra. 701. T. Raym. 391, 392. 466. *Okeden v. Reynell*, T. Jones, 187.

2. Where the plaintiff misrecites a general statute, the defendant is to demur, and not to plead *nul tiel record*, but if it be a private act the defendant is to plead *nul tiel record*, and not demur. Hoit, 662. 3 Salk. 296. 330.

3. Whether the statute 31 Eliz. c. 5. of limitation of popular actions, extends to cases when the informer has the whole penalty, see *Chance v. Adams*, 1 Ld. Raym. 78.

[*1313] (m)* *Evidence.*

A printed statute is not evidence upon *nul tiel record* pleaded. Salk. 566.

(n) *Nolle prosequi.*

1. An action popular is vested in the informer, and the king or his attorney cannot enter a *nolle prosequi* as to the informer. 1 Leon. 119.

2. After a popular action brought under 23 Eliz., if the attorney-general enters *ultarius non vult prosequi*, or will not reply to the defendant's special plea, the informer may prosecute for his part. *Foster's case*, 11 Co. 56 b. 2 Bulstr. 324. 1 Ro. 88. S. C.

(o) *Judgment.*

1. Where a statute gives a penalty to be forfeited after conviction, one who has judgment against him on demurrer is convicted as well as if there had been a verdict against him. *Rex v. Doctor Foster*, 1 Ro. 89, 90.

2. Judgment was arrested in a *qui tam* action, because issue was joined only on behalf of the informer, and not also of the king. *Reynell v. Heale*, 1 Vent. 122.

(p) *Costs.*

A common informer shall pay costs notwithstanding the suit is carried on for the benefit of a corporation entitled to the penalty. *Elde v. Stephens*, 2 Ld. Raym. 1333.

(q) *Error.*

A writ of error lies in the Exchequer

Chamber. 2 Saund. 101 d. *Contra, Whetton v. Preston*, 1 Keb. 828. pl. 5.

XIX. WHEN DETINUE LIES.

Debt or detinue will lie for goods forfeited by act of parliament. *Roberts v. Withered*, 5 Mod. 193.

XX. WHEN PROHIBITION LIES.

If a statute have words prohibitory, as well as a penalty annexed, a prohibition will lie; *secus*, if it have only a penalty. *Jones v. Jones*, Hob 187.

XXI. WHEN PROCEEDINGS MAY BE TAKEN IN THE SPIRITUAL COURT.

1. Where a statute makes a thing a temporal offence which is so by canon law, the spiritual court may also proceed to deprivation. *Bishop of Saint David's v. Lucy*, 12 Mod. 239.

2. A statute appoints a speedy remedy against quakers for tithes, viz. on complaint before justices of peace; this is only an additional remedy, and does not take away the jurisdiction of the spiritual court; but where the statute alters the offence and makes it of a higher degree, as in case of polygamy, after a man has been tried for it, or where a man is adjudged the reputed father of a bastard child, the spiritual court cannot proceed. *Rex v. Sancky and Tipper*, 12 Mod. 165. See also *Bishop of Saint David's v. Lucy*, 12 Mod. 239.

XXII. RELATIVE TO PROCEEDING BY INDICTMENT OR INFORMATION;—

(a) *When it lies.*

1. An indictment will lie on a prohibitory clause in a statute. 2 Show. 451. *Rex v. Robinson*, 11 Mod. 140. n. Cro. Eliz. 955.

2. If in an act of parliament there be a prohibitory clause, and another which gives a penalty, an information lies on the prohibitory clause, and the party may decline to proceed for the penalty. *Attorney-General v. White*, Com. 436. *Contra*, 1 Vent. 63.

3. Whenever a statute makes a thing criminal, an information will lie upon that statute, though not given by express words. *Troy's case*, 1 Mod. 6.

4. Where a particular method is directed by a statute to recover a forfeiture, either by action of debt or information, an indictment will not lie. 3 Salk. 350. *Rex v. Hurst*, 11 Mod. 140. Cro. Jac. 644.

5. But where a new offence is prohibited by a general prohibitory clause in a statute, an indictment will lie. 1 Mod. 34. *notis*.

6. So, if a statute prescribe a particular mode of punishing an old offence, such particular mode is cumulative, and does not take away the common law method of proceeding by indictment. 1 Mod. 34. *notis*.

7.* Wherever a statute creates a new offence, and prescribes [*1314] a particular mode of punishing it, the method so prescribed and not the

common law method by indictment must be pursued. *Rex v. Marriott*, 11 Mod. 140. n. *Rex v. Pensaz*, 11 Mod. 174. Salk. 460. *Rex v. Marriott*, 4 Mod. 144. *Hartley v. Hooker*, 1 Mod. 34. *notis. Sed vide Croftan's case*, 1 Mod. 34. 1 Vent. 63. *Rex v. Comings*, 5 Mod. 179.

8. But where an offence is punishable by an indictment at common law, and a statute prescribes a particular remedy, either the common law or the particular remedy may be pursued, at the option of the party. *Rex v. Royal*, 11 Mod. 140. *Rex v. Dixon and Wife*, 10 Mod. 337.

(b) *In what court it should be.*

An information brought on a penal statute by the attorney-general at the courts at Westminster, was held void, because confined to the courts below. Carth. 466.

(c) *How it should be.*

1. An indictment on a statute must be laid in the words of it. Gilb. 277.

2. Where the statute is not truly set forth, the indictment shall be quashed. *Rex v. Hicheringill*, 11 Mod. 113.

3. An information for maintenance *contra formam statuti*, is sent to Chester by *mittimus* to be tried, describing it *contra formam statuti facti*, &c. as in 32 Hen. 8. c. 9., and the verdict was set aside for the variance. *Rex v. Higginson*, 1 Ld. Raym. 537.

4. Where a statute takes notice of a common law offence, and adds a further penalty, an indictment thereon may well conclude *contra formam statuti*. *Rex v. Bethel*, 6 Mod. 17.

5. Where one statute makes the offence, and the other gives the penalty, the information ought to conclude *contra formam statutorum*; but if one statute only continues a former one, though there be more, or if the information be expressly drawn upon one statute only, *contra formam statuti* is sufficient. *Rex v. West, Owen*, 135.

(d) *Punishment.*

1. Where a particular punishment is directed by a statute, that punishment must be pursued, and no other can be inflicted upon the offender. *Sir John Knight's case*, 3 Mod. 118.

2. When the legislature puts terms upon an offender, no inferior court can hold any other term to be an equivalent. *Lord Duf-fus's case*, Com. 440.

XXIII. OF THE OFFENCE OF OBSTRUCTING THE EXECUTION OF AN ACT.

Obstructing the execution of an act of parliament is indictable at common law. 1 Saund. 135 b. n. [c.]

XXIV. DECISIONS UPON PARTICULAR STATUTES, CHRONOLOGICALLY ARRANGED.

9 Hen. 3. (*Magna Charta*.)

Cap. 1.

A man may prescribe to hold a keot oftener,
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and at other times, than are mentioned in that statute, because it is in the affirmative. *Partridge's case*, Cro. Eliz. 125.

Cap. 7.

The wife cannot depart and return again for the residue of the forty days. *Colt v. Bishop of Coventry*, Hob. 153.

Cap. 8.

This statute extends only to the king, and not to common persons, and is repealed by the statute of 33 Hen. 8. c. 39. *Davy v. Pepps*, Plow. 439, 440.

Cap. 10.

The 9 Hen. 3. c. 10. does not extend to give remedy against the king for encroachment, because he is not named. *Willson v. Berkeley*, Plow. 244.

Cap. 11.

This statute does not bind the king. S. C. Plow. 236. 240. 244.

Cap. 12.

By the equity of this statute, the judges may adjourn assizes before themselves at Westminster. *Hill v. Grange*, Plow. 178.

Cap. 21.

1. Before this statute, the king might afforest the woods of others, and thereby the subject was restrained from cutting down his own woods without license. The case of *Mines*, Plow. 322.

2.* Also before this statute the king by his prerogative might [*1315] take trees out of the woods of others for the repairs of his castles. Id. *ibid*.

Cap. 29.

1. The body of a free man cannot be made subject to imprisonment by contract, but only by judgment. *Foster v. Jackson*, Hob. 61.

2. Whoever against the law imprisons a man is an offender against *Magna Charta*. 11 Mod. 250.

3. This statute concerning the trial of a party by his peers is to be understood of treason and felony, and accessories to them, &c., and does not extend to contempts. *Lord Vaux's case*, 12 Co. 93.

4. As to the proceedings of peers in legal proceedings, see *Countess of Shrewsbury's case*, 12 Co. 94. How. St. Trials, 170.

20 H. 3. (*Statute of Merton*.)

Cap. 2.

This statute is explanatory of the common law. *Buckley v. Thomas*, Plow. 127.

Cap. 3.

Redisseisin extends to a feme covert. *Moore v. Hussey*, Hob. 96.

Cap. 4.

1. This statute, which gave the owner of the soil power to approve common, did not consider whether the lord was equally bound to pasture with his tenants or not, but it considered that the lord should approve his own ground, so as the commoners had sufficient. *North v. Cee, Vaughn*, 256, 257.

2. What were the inconveniences before this act which were thereby remedied, see Vaugh. 257.

3. The lord shall have no common in the land improved. 2 Leon. 44, 45.

Cap. 5.

This act binds the king though not named. *Willion v. Berkley*, Plow. 236.

Cap. 6.

1. It extends to a feme covert. *Moore v. Hussey*, Hob. 94. 96.

2. But not to infants who are ravishers. *Stowel v. Lord Zouch*, Plow. 364.

Cap. 10.

By this act a party was empowered to make his attorney to do his suit in the king's court. *Willion v. Berkley*, Plow. 236.

52 H. 3. (*Marlbridge*.)

Cap. 4.

It does not extend to prohibit distresses from being driven out of the county where they are taken, when the seignory and tenancy are in different counties. *Reniger v. Fogossa*, Plow. 9. 18. 204.

Cap. 6.

1. The king cannot have the benefit of collusion found generally hereupon, without the special cause thereof. *Winbisk v. Tailbois*, Plow. 49.

2. It is extended by equity to a lease for a gift in tail to the issue. S. C. Plow. 53.

3. And to a feoffment made to the second son, the first being dead, and also to a fine. S. C. Plow. 59.

4. Also extended by equity to a feoffment made to the collateral heir. *Partridge v. Strange*, Plow. 82.

Cap. 9.

This act does not extend to land held of the king, in which case all the co-partners shall do the suit, and not the eldest only. *Willion v. Berkley*, Plow. 240.

Cap. 15.

1. This statute (of distresses in the king's highway) is intended for rents or services, and not for toll, or such things whereof no distress can be but in the king's highway. *Smith v. Shepperd*, Cro. Eliz. 710.

2. The remedy given by the statute of Marlbridge is the only remedy that can be pursued for taking an excessive distress. *Rex v. Leginhamp*, 1 Mod. 71.

3 Edu. 1. (or *Westminster*, 1.)

Cap. 4. (*Of wreck*.)

See *Hales v. Petit*, Plow. 466.

Cap. 10.

This statute, of choosing coroners, does not oblige to choose knights. *Borough and Holcroft's case*, 2 Leon. 160, 161.

Cap.* 13.

[*1316] Held to extend to a monk. Hob. 91.

Cap. 20.

1. This act (*de malefactoribus in parais*), extends to no other trespass in a park be-

sides hunting. *Partridge v. Strange*, Plow. 88.

2. It extends to a feme covert. *Moore v. Hussey*, Hob. 95. 97.

3. But not to *malefactoribus in forestis*. *Buckley v. Thomas*, Plow. 124.

4. Aiders are not within this statute. *Rex v. Whister*, 11 Mod. 26.

Cap. 25.

This statute (of maintenance) includes a lease for years. *Partridge v. Strange*, Plow. 80.

Cap. 28.

The writ and count hereupon may be general. *Winbisk v. Tailbois*, Plow. 51.

Cap. 39.

1. In a counterplea of voucher, one may counterplead without reciting the statute. *Partridge v. Strange*, Plow. 81.

2. By equity hereof, it is a good counterplea to say that his predecessor was the first that abated. *Hill v. Grange*, Plow. 178.

Cap. 43.

This extends not to a writ of partition, nor to essoins cast before appearance. Hob. 8.

6 Edu. 1. (*Statute of Gloucester*.)

Cap. 1.

1. Upon a feoffment to divers persons, the survivor not agreeing to the feoffment, shall be excused of damages in a writ of entry. *Shading v. Morgan*, Plow. 204.

2. It restrained warranties from binding as at common law. *Bole v. Horton*, Vaugh. 366. 377.

3. By equity hereof, a lineal warranty is no bar to the issue in tail without assets. *Buckley v. Thomas*, Plow. 127. 178.

4. Before this statute, all warranties which descended to the heirs of the warrantors were bars to them, except they were warranties which commenced by disseisin. *Bole v. Horton*, Vaugh. 366.

5. The reason why the warranty of tenant in tail with assets binds the right of the estate tail, is in no respect from the statute *de donis*, but by the equity of this statute by which the warranty of the tenant *per curiam* bars not the heir for his mother's land, if his father leaves not assets to descend. *Bole v. Horton*, Vaugh. 365.

6. What the law was before the statute, see *Moore v. Hussey*, Hob. 98.

7. Trespass *vi et armis* will not lie against the feoffee. Id. ibid.

Cap. 5.

1. The court which had jurisdiction to hold plea in waste before this statute, shall have it now, as well in those cases where an action of waste is given by this statute, as in other cases at common law. *Greene v. Cole*, 2 Saund. 254.

2. By equity hereof, waste lies against

him who holds *ex legatione*. *Reniger v. Fogossa*, Plow. 10.

3. And also against him who holds but for a year, or for half a year, or for twenty weeks. *Hill v. Grange*, Plow. 178. 467.

4. It is not a penal statute within the intent of the provisions in the statute of jeofails, although it gives treble damages. *Greene v. Cole*, 2 Saund. 258.

Cap. 12.

A foreign plea in a personal action is not aided by this statute. *Pitt v. Knight*, 1 Saund. 98.

7 *Edw.* 1.

1. This statute (*de religiosis*) disables the church from taking lands by any manner of conveyance. *Roper v. Ratcliffe*, 10 Mod. 236.

2. It does not extend to a recovery by feigned title. *Wimbish v. Thilbois*, Plow. 43.

3. A lease for years not within the danger of it. *Partridge v. Strange*, Plow. 87.

4. It does not extend to prohibit religious men from taking lands of the king. Plow. 240.

5. If the church brought their action for such lands as they desired to purchase, and judgment was suffered to go by default, this was held to be out of the statute. 10 Mod. 236.

10. *Edw.* 1. (*Of Rudland*.)

This is no statute, but only an ordinance. Plow. 208, 209.

11* *Edw.* 1. (*Acton Burnel*).

[*1317] 1. By equity hereof, the lands of the consuror of a statute-merchant being extended too high, shall be delivered to the extenders, at the rate they set upon them. *Partridge v. Strange*, Plow. 89. 137. 205.

2. Recognizances for debt were taken before this statute by the chancellor, two chief justices, and justices itinerant; and they are not hindered by this statute from taking them as they did before. *Edgecomb v. Dee*, Vaugh. 102.

13 *Edw.* 1. *Westminster* 2. *stat.* 1.)

Cap. 1. (*De donis*.)

1. The statute called the statute *de donis* was designed to secure the estate of the ancestor to the issue. 10 Mod. 375. 469. 476. 478.

2. It extends to restrain the issue in tail from alienation, as well as the immediate donee. *Reniger v. Fogossa*, Plow. 13. 178. *vide* 244.

3. The donee in tail is hereby expressly restrained from all power of alienation, whereby the lands entailed may not revert to the donor for want of issue in tail. *Bole v. Horton*, Vaugh. 371.

4. It is extended by equity to other estates not specified in the statute. *Wimbish v. Thilbois*, Plow. 53. 244. 248. 251.

5. It was intended not to restrain the

alienation of any estates but such as were fee-simples at the common law. *Bole v. Horton*, Vaugh. 370. See Plow. 53. 244.

6. The king is bound as well as a common person. Plow. 227. 236. 237. 238. 248. 251. 252.

7. Every thing that is contrary to the will of the donor is reformed, and every thing that is his will is made a law. *Willion v. Berkley*, Plow. 251.

8. It does not extend to copyholds. 1 Saund. 348. n. [c].

9. It declares a fine levied of entailed lands to be *ipso jure* null; yet it has been interpreted to mean voidable only. *Ld. Say and Sele's case*, 10 Mod. 43. 179. 245.

10. So that such a fine would make a discontinuance. *Reg. v. Buckingham*, 10 Mod. 179. 245.

11. This statute intended not to preserve the estate for the issue, or the reversion for the donor, absolutely against all warranties, but against the alienation with or without warranty of the donee and tenant in tail only. *Bole v. Horton*, Vaugh. 369.

12. Therefore if tenant for life alien with warranty, which descends upon the reversioner, that is not restrained by the statute, but left at the common law. S. C. Vaugh. 370.

13. By this statute the warranty of tenant in tail will not bar the donor or his heir of the reversion. *Id.* *ibid.*

14. All issues in tail within this statute are to claim by the writ purposely formed there for them, which is a *formedon* in the descender. *Bole v. Horton*, Vaugh. 369.

15. This statute has been expounded in several instances by the rules of the common law. *Thornby v. Fleetwood*, 10 Mod. 360.

16. It is now much altered by subsequent statutes and judgments that have been given in the courts of law. *Woodright v. Wright*, 10 Mod. 375.

Cap. 2.

The writ of deliverance cannot be sued out of any other court than that which is limited by the statute. *Stradling v. Morgan*, Plow. 206.

Cap. 3.

1. A feme covert being received hereby, may pray in aid or vouch. *Reniger v. Fogossa*, Plow. 13.

2. He in reversion being received, upon default of tenant for life, shall show specially how he came to the reversion. *Wimbish v. Thilbois*, Plow. 43.

3. He in remainder shall be received by equity hereof. S. C. Plow. 53.

4. A *cui ante divorcium* lies by the equity hereof. S. C. Plow. 58, 59. 178.

5. It does not extend to give receipt to the king. *Willion v. Berkley*, Plow. 241. 553.

Cap. 5.

1. The queen shall not recover damages

in a *quære impedit* by that statute. *Rugberd v. Reg.*, Cro. Eliz. 162.

2.* It does not give remedy to a [*1318] feme covert who has an advowson by purchase. *Wimbish v. Tailbois*, Plow. 58.

3. It extends to none but those that are heirs, or in degree of heirs, and in by descent. *Lord Stanhope v. Bishop of Lincoln*, Hob. 238, 239.

4. No purchaser, though an infant or feme covert, is relieved. *Lord Stanhope v. Bishop of Lincoln*, Hob. 239, 240.

5. At common law, infant heirs were by usurpation driven to a writ of right; but if an infant heir suffer an usurpation, and another avoidance fall during nonage, he may have a *quære impedit* presently, though the statute says *post quam statem*. S. C. Hob. 238, 240.

6. If a guardian suffer usurpation and surrender to his ward, he can have no *quære impedit* until twenty-one. S. C. Hob. 240.

7. An infant in *ventre sa mere* shall be relieved at the next turn after his birth. Id. *ibid*.

8. A grantee of the next avoidance and he in the remainder are within the statute. Id. *ibid*.

9. A purchaser who comes in *loco heredis* may be relieved. Id. *ibid*.

10. The issue in tail is relieved against an usurpation by tenant in tail. S. C. Hob. 241.

11. An heir of full age is not relieved against an usurpation suffered by his own lessee. S. C. Hob. 241, 244.

12. If a bishop in possession suffer an usurpation, the successor cannot have a *quære impedit*. S. C. Hob. 241.

13. If an infant come to age within six months after usurpation, and remove not the incumbent by suit, he is out of the statute. Id. *ibid*.

14. The statute changes not the possession of the advowson, but the remedy. S. C. Hob. 241, 244.

15. The king cannot remove the incumbent after induction without suit, but after his death he may present again; but a common person in that case is put to suit. S. C. Hob. 242.

16. Though the statute give nothing but a possession actionable, yet a liberty to present is within the intent. Id. *ibid*.

17. If an heir relievable within this statute die without heir, the lord by escheat shall not present nor have a *quære impedit*. S. C. Hob. 243.

18. Advowsons by purchase are not within the remedy or purview of the act. *Willson v. Berkley*, Plow. 236.

19. A plenary within this statute must be *ex presentatione*, and not *ex collatione*. Cro. Eliz. 207, 208.

20. Plenary not pleadable hereby against

the king though he does not pursue the *quære impedit* within ten months. *Willson v. Berkley*, Plow. 244.

Cap. 11.

1. Accountants found in arrears before auditors must be committed to prison immediately, or not at all. *Reniger v. Fugues*, Plow. 17.

2. It extends to support an action against a gaoler for the escape of one who was committed upon condemnation for debt. *Hill v. Grange*, Plow. 178.

3. Accountants found in arrears to be sent to the next gaol, though it be in another county. *Stradling v. Morgan*, Plow. 206.

4. It does not extend to punish an infant bailiff or receiver who is found in arrears before auditors. *Stoned v. Lord Zouch*, Plow. 364.

5. An accountant found in arrear before one auditor only cannot be committed to gaol. *Earl of Leicester v. Heydon*, Plow. 393.

Cap. 12.

1. This act does not extend to the heir who abets his mother to bring an appeal. *Partridge v. Strange*, Plow. 38, 304.

2. It extends to an appeal of rape. *Buckley v. Thomas*, Plow. 124.

Cap. 14.

An action of waste does not lie in ancient demeane, because they cannot make a writ to the sheriff on a default at the grand distress to inquire of the waste as the statute directs. *Greene v. Cole*, 2 Saund. 354.

Cap. 16.

It does not extend to restrain the king; but he shall have the wardship, though the ancestor held of him by priority. *Willson v. Berkley*, Plow. 240.

Cap. 18.

1. The sheriff is directed to extend a moiety of the debtor's land upon an *elegit*. *Atchley v. Vernon*, 10 Mod. 528.

2.* This statute, which provides that process shall be made [*1319] to the sheriff, by equity extends to every other immediate officer to every court of record. *Fulwood's case*, 4 Co. 64 b.

3. It is extended by equity to an *elegit* of the moiety of rent. *Hill v. Grange*, Plow. 178.

Cap. 19.

1. The ordinary was not chargeable for the debts of intestates before this statute; and as to who had the disposal of intestate's goods before this statute, see *Graybrook v. Fox*, Plow. 277, 280.

2. By equity hereof debt lay against administrators before the statute of 31 Ed. 3. cap. 11. S. C. Plow. 278, 280.

Cap. 20.

If the demandant in a *cessavit* dies, the heir shall not have a *cessavit* thereby. *Fulmerston v. Steward*, Plow. 110.

Cap. 24.

The writ of *quare ejecit infra terminum* was given by this statute for the recovery of the term against the feoffee; for an ejectment lay not against him, he coming to the land by feoffment. *Vaugh.* 127.

Cap. 30.

This statute, (of finding a verdict specially,) is extended by equity to other cases besides assizes. *Pollard v. Jekyl*, *Plow.* 92.

Cap. 34.

1. If a man commit a rape, he shall have judgment of life and member. *Rex v. Whistler*, 11 Mod. 27.

2. By this statute every inquisition is traversable. *Anon.* 11 Mod. 27.

Cap. 40.

1. This act does not restrain the feoffee of the purchaser from vouching. *Plow.* 46, 47.

2. The king shall take advantage hereof, though not named. *Wimbish v. Tailbois*, *Plow.* 243.

Cap. 46.

1. Where fences made upon just approval are thrown down, this statute gives a remedy against the adjoining towns, if they do not indict such as are guilty of the fact. *Reg. v. Gruethorp*, 10 Mod. 157.

2. But an action will not lie upon this statute before a reasonable time has been allowed for indicting the offenders; and, according to Lord Coke (2 Inst. 406.), a year and a day should be allowed. *Id.* *ibid.*

3. This statute does not extend to every lord (of waste), but to such only as have a right to approve. 10 Mod. 158.

4. The act provides no remedy for cutting down timber trees. *Crewick's case*, *Skin.* 94. *Res v. Inhabitants of Bittorn*, *T. Raym.* 487.

Cap. 49.

This act (of champerty) includes a lease for years. *Partridge v. Strange*, *Plow.* 80.

13 Edw. 1. stat. 2. (Of Wintons.)

Cap. 1.

1. The statute 13 Edw. 1. st. 2. c. 1., commonly called the statute of hue and cry, although in the printed book it begins, "forasmuch as from day to day robberies, murders, and burning of houses, &c.," yet in the parliament roll it is only burnings generally. *Earl of Shaftesbury v. Lord Digby*, 3 Mod. 99.

2. If a robbery be committed in the morning before day, or in the evening after day, when men use to travel, the hundred is liable; otherwise, if at midnight, or after. *Ridley v. Hundred of Warrington*, *Cro. Eliz.* 270.

3. An action upon the statute of hue and cry lies not against the hundred for a robbery committed in the house. *Gardiner v.*

Hundred of Reading, 3 Leon. 262. *Anon.* *Cro. El.* 753.

4. A man who occupies and holds lands in his own hands within the hundred, though he had no houses, nor even lodged in the hundred, is an inhabitant within the intent of the act, and shall be chargeable to the robbery committed there. *Leigh v. Chapman*, 2 Saund. 423.

5. A servant robbed of his master's money may sue on the statute of hue and cry, though he cannot release. *Coombs v. Hundred of Bradley*, 12 Mod. 54.

6. Either the master or servant may maintain the action. *Coombs v. Hundred of Bradley*, *Holt*, 37, 38.

7. A common carrier who is answerable for the goods to the owner, may maintain an action for the robbery of them.* *Pinkney v. Hundred of [1320] Rotel*, 2 Saund. 380.

8. The servant if he be robbed, must be sworn, and not the master. *Green's case*, *Cro. Eliz.* 142.

9. Respecting the form of the oath, see *Bank's case*, 12 Co. 62.

10. In an action upon this statute, it is not necessary to set forth more in the declaration than is pertinent to the action. 2 Vent. 215.

11. The plaintiff ought to show in his count the particulars of the goods taken and carried away, though it need not be so in the writ, and also to what person they belonged. *Pinkney v. Hundred of Rutland*, 2 Saund. 379.

12. A mistake in stating the parish in an action for robbery on the statute of Winchester is immaterial, if the parish be within the hundred. *Bucknell's case*, *Owen*, 7.

13. The statutes of hue and cry are not considered penal. *And.* 119.

13 Edw. 1. stat. 3. (*De mercatoribus*.)

If a statute have but one seal, it is void by that act, and also as an obligation. *Cro. Eliz.* 319.

Id. stat. 4. (*De circumspectis agatis*.)

This act is extended by equity to all other bishops. *Platt v. Sheriff of London*, *Plow.* 36. 18 Edw. 1. (*Westminster* 3.)

1. This statute of *quis emptores*, makes it lawful for every freeman to sell, &c. *Roper v. Radcliffe*, 9 Mod. 204.

2. It does not extend to a feoffment made by the tenant to his son and heir-apparent pending the writ. *Partridge v. Strange*, *Plow.* 83. 304.

Cap. 2.

This act does not restrain the king, but he may have the whole services of the tenancy by the hands of the feoffee of part. *Wilton v. Berkeley*, *Plow.* 240. *Keniger v. Figgess*, *Plow.* 10. 62.

21 Edw. 3. (*Champerty*.)

The statute extends to an attorney who

follows a cause to be paid in gross. *Bar v. Barnaley*, Hob. 117.

28 *Edw.* 1. c. 15.

This statute, called "*articuli super chartas*," requires fifteen days between the tests and the return of all summonses and attachments. 10 Mod. 82.

33 *Edw.* 1.

Before this statute, an action of conspiracy did not lie for any thing besides for indicting for felony and treason; but by this statute it lies for trespass, and against one only. *Skinner v. Gunton*, T. Raym. 176. 180.

34 *Edw.* 1.

The statute extends to a feme covert. *Moore v. Hussey*, Hob. 95.

9 *Edw.* 2.

1. This statute does not restrain the king's power at common law; but he may still make sheriffs without the judges. *Colt v. Bishop of Coventry*, Hob. 146. 214.

2. It was meant to ease the sovereign of labour, not to deprive him of power. S. C. Hob. 146.

12 *Edw.* 2.

Cap 5.

1. That statute extends not to coroners. *Stogs v. Sir J. Spencer*, Cro. Eliz. 703, 704.

2. The original writ ought to have the sheriff's name to the return; but the defendant shall take no advantage after appearance of such misprision. *Stainer v. James*, Cro. Eliz. 310. 767.

17 *Edw.* 2.

1. The king shall have the wardship of lands in tail held by knight's service in capite. *Reniger v. Fugassa*, Plow. 11.

2. This statute is to be intended to give the king a prerogative only where lands holden of him, and the lands holden of another, descend to one and the same heir. *Stradling v. Morgan*, Plow. 204. See also *Fulmerston v. Steward*, Plow. 109. 204.

2 *Edw.* 3.

Cap. 2.

The sheriff need not be in person to remove a force. *Levett v. Furrar*, Cro. Eliz. 294.

4 *Edw.* 3.

Cap. 7.

1. An action lies by executors upon this statute for cutting and carrying away corn.

1 Vent. 187.

[*1321] 2.* This statute has always been expounded largely. Ib. 187.

3. It is extended by equity to administrators. *Hill v. Grange*, Plow. 178.

9 *Ed.* 3.

Cap. 1.

1. The statutes of 9 E. 3. c. 1., and 2 & 25 E. 3. c. 2., &c., extend only to merchants, aliens, and denizens, who import and export vendible things, and do not extend to take

away the custom of a city of foreign bought and foreign sold. *City of London's case*, 8 Co. 128 a.

2. These statutes do not extend to tallow-chandlers, &c., or to manufactures made by them within the realm. Id. ibid.

3. Notwithstanding the said statutes, no one, not a freeman of the city of London, could sell any merchandise by retail without the said city. Id. ibid.

Cap. 3.

By equity hereof the administrator who comes first by distress shall answer. *Platt v. Sheriff of London*, Plow. 36. 178. 467.

25 *Ed.* 3. st. 3.

Cap. 7.

1. By the equity of this statute, the incumbent shall plead against all other patrons besides the king. *Hill v. Grange*, Plow. 178.

2. It does not enable the ordinary in any case but where he has collated by lapse, to counterplead the title of the true patron. *Elvis v. Archbishop of York*, Hob. 318, 319.

3. He that is a complete incumbent within the statute, must yet show and defend his own title, as well as counterplead his adversary's. S. C. Hob. 319. 321.

4. If the incumbent resign pending the writ, he loses the privilege of counter-pleading the patron's title. S. C. Hob. 319.

5. It extends only to a natural and complete incumbent by induction, not to a commendatory *semetris*, or temporary, but for perpetuity. *Colt v. Bishop of Coventry*, Hob. 162, 163. 319.

6. Any defendant may plead *ne disturbeas*, or show any thing to the court, as *amicus curie*. S. C. Hob. 162.

25 *Ed.* 3. st. 5. (*Treason*.)

Cap. 2.

1. It is made petty treason for a servant to kill his master. 10 Mod. 95.

2. The statute is taken strictly according to the letter. Orl. Bridg. 435.

Cap. 5.

1. What was the common law before this statute as to actions brought by executors of executors, see *Chapman v. Dalton*, Plow. 286, 287. 290.

2. By equity hereof, executors of executors may have an action of covenant on a covenant made to the first testator. *Chapman v. Dalton*, Plow. 290. See also *Partridge v. Strange*, Plow. 81.

Cap. 16.

This statute is construed to extend only to writs where the things demanded are several, as acres, but not where the thing demanded is entire, as a manor. *Fulmerston v. Steward*, Plow. 109. 205.

Cap. 19.

This act does not prevent the subject from taking the body in execution too. *Sir T. Shirley's case*, Hob. 115.

31 Ed. 3.

Cap. 11.

1. Where a man dies intestate, the ordinary shall depute the next and most lawful friends of the deceased to administer his goods. *Brunker v. Cook*, 11 Mod. 125.

2. Though executors and administrators are not compelled by the common law to answer actions of debt for simple contracts, yet the law as well as their oath oblige payment of them. *Edgcomb v. Des*, Vaugh. 96.

3. Oath is likewise taken to make a true account to the ordinary of what remains after all debts, funeral and just expenses deducted. *Id. ibid.*

Cap. 12. (Of Error.)

See *Stradling v. Morgan*, Plow. 206.

34 Ed. 3.

Cap. 1.

Justices of peace as such have cognizance of barratry under the commission [*1323] ion^e of the peace by virtue of this act. *Rex v. Gunn*, 11 Mod. 67. n., and *Rex v. Carter*, lb. 370, 371.

Cap. 7.

This statute granted attaints in personal actions. Vaugh. 146.

Cap. 14.

1. The act only extends to those cases where the king was entitled merely by office, and to the case of alienation without license and award. *Sadler's case*, 4 Co. 54 b.

2. No office was within the purview of the act, but only those found *virtute brevis*, or *commissionis*; and the act extends only to a traverse, and not to *monstrans de droit*. *Id. ibid.*

36 Ed. 3.

Cap. 13.

This act extends as well to offices found *virtute brevis sive commissionis*, as to offices found *virtute officii*, and also to *monstrans de droit*; it does not extend to any judicial record, as attainder or recovery, but only where nothing appears of record for the king but only the office; but the act extends to other cases than to the case of alienation without license and ward; and it extends generally to lands seized, &c. by office. *Sadler's case*, 4 Co. 54 b.

Cap. 15.

A declaration in English in an inferior court is void by this act. *Cro. Eliz.* 84, 85.

50 Ed. 3.

Cap. 4.

This act is to be intended of cases where the consultation is granted upon examination of the matter, and not for insufficiency of the proceedings. *Cro. Eliz.* 736.

1 Rich. 2.

Cap. 12.

1. This statute, which gives an action of

debt against the warden of the Fleet for an escape out of execution, extends to all other gaolers and sheriffs. *Jones v. Pope*, 1 Saund. 38. 10 Mod. 95. See 21 Jac. 1. c. 16.

2. Debt is not maintainable against the executors of a sheriff or gaoler for an escape out of execution. *Wheatley v. Lane*, 1 Saund. 218.

3. The plaintiff ought to show that he has recovered a judgment. *Jones v. Pope*, 1 Saund. 38, 39.

4. If judgment be reversed before action brought, the action is gone. *Id. ibid.*

5 Rich. 2.

Cap. 7.

1. The writ and count upon this statute may be general, without showing any cause why the entry of the defendant is not lawful. *Wimbish v. Tailbois*, Plow. 51.

2. An entry into one tenement only is within the penalty of the statute. *Partridge v. Strange*, Plow. 86.

6 Rich. 2.

Cap. 6.

1. He who will take benefit of entry given hereby, shall show specially how he is the person intended by the act. Plow. 42, 43.

2. If the daughter enters as next of blood, for consent to the ravisher, a son born afterwards shall not oust her. *Wimbish v. Tailbois*, Plow. 56.

3. It does not extend to give an entry to the next of blood for the consent of a feme infant to a ravisher. Plow. 364.

7 Rich. 2.

Cap. 2.

1. This stat. confirms the grants, gifts, and customs of the city of London. *Rex v. Kilderry*, 1 Saund. 311.

2. It was not the intention of the charter of king Henry 3., or of the confirmation of it, to give a liberty to use a trade without being an apprentice. *Id. ibid.*

9 Rich. 2.

Cap. 3.

The king may take advantage hereof, though not named herein. Plow. 243.

15 Rich. 2.

Cap. 1.

A justice of peace cannot sue for a fine by virtue of this statute. *Layton's case*, 11 Mod. 47.

Cap. 5. (Of Mortmain.)

1. By this statute, lands purchased by people of religion are forfeited, and thereafter^a no purchase can [*1323] be made to the use of spiritual persons. *Lord Derwentwater's case*, 9 Mod. 177.

2. This law extends to mayors, &c., of cities and boroughs, and other towns which have a perpetual commonalty. *Roper v. Radcliffe*, 9 Mod. 202.

3. But speaking of lay communities, it forbids only purchasers generally. S. C. 9. Mod. 204.

13 Hen. 4.

Cap. 7.

In a riot the sheriff must join with the justices in fining the rioters, or else it is error. *Rex v. Tempest*, T. Raym. 386.

1 Hen. 5.

Cap. 3.

1. If the title only is disturbed, it is within the danger of the statute. *Wimbish v. Thilbois*, Plow. 54. 47.

2. Forging and publishing a false deed of a lease for years, is not within the danger of the statute. Plow. 80.

3. Forging one false deed only is within the penalty of the statute. *Partridge v. Strange*, Plow. 86.

4. So, publishing only a false deed. *Partridge v. Strange*, Plow. 88.

5. It must be averred that the party published the same to trouble the possession and title of the plaintiff. Id. ibid.

Cap. 5.

1. This statute is a general law, of which the court will take notice. *Rex v. Fielding*, 12 Mod. 199.

2. It extends to a knight baronet, though a degree created since. *Sir G. Gresley's case*, Hob. 129.

3. It binds the king in indictments. *Wilkinson v. Berkeley*, Plow. 236. 240.

4. It extends to a cap. upon a statute merchant, though the statute mentions only original writs, appeals, and indictments, and the process upon them. *Sir G. Gresley's case*, Hob. 129.

2 Hen. 5.

Cap. 3.

1. This statute, (respecting the giving a copy of the libel,) does not extend to the court of admiralty. *Anon.* 12 Mod. 243.

2. It extends only to causes between party and party. T. Raym. 486.

3. It extends to proceedings in the ecclesiastical courts which are *ex officio*, as well as between party and party. *Taylor v. Brown*, T. Raym. 170.

4. The jurors aliens need not by this statute have 4*l. per annum*. 1 Leon. 35.

8 Hen. 6.

Cap. 9. (*Of forcible entries.*)

1. This act makes all mayors justices of the peace. *Layton's case*, 11 Mod. 47.

2. The writ or count hereupon shall be general, without showing title to the land. *Wimbish v. Thilbois*, Plow. 51.

Cap. 12.

1. This statute does not extend to amend proceedings in inferior courts. *Morse v. James*, 7 Mod. 245.

2. It aids faults *per vitium scriptoris*, or by the clerk's negligence, and extends to records

of other courts not removed by error. *Vita v. Vita*, Cro. Eliz. 435. *Anon.* 11 Mod. 2.

11 Hen. 6.

Cap. 3.

This act does not extend to a pernor of the profits who has only a use for years, the freehold of the use being in another. *Browning v. Boston*, Plow. 137.

23 Hen. 6.

Cap. 10.

1. This statute, relating to sheriff's bonds, is a public act, of which the court will take notice, without its being specially pleaded. *Simpson v. Ellis*, 2 Mod. 36 *notis*. *Ellis v. Yarborough*, 2 Mod. 178 *notis*. 1 Lev. 88. 2 Lev. 163. *Contra*, *Norton v. Simmes*, Hob. 13. Hob. 72. 166.

2. It shall not be extended by equity, being penal. *Dice v. Mansingham*, Plow. 63. 64. 67.

3. A simple obligation taken by the sheriff is void. S. C. Plow. 64. 67.

4. Bonds made to gaolers for ease and favour are void. *Lenthall v. Cooke*, 1 Saund. 162, 163.

5. Where a bill of Middlesex was returnable on Friday, &c., and the condition of the bond to the sheriff was, if the defendant appeared on Saturday, &c., the obligation was held void. *Bennet v. Filkins*, 1 Saund. 21, 22.

6.* A bond taken of one in [*1324] execution is void. 2 Leon. 118, 119.

7. It extends to the whole bond, though part of the condition be out of the statute. *Norton v. Simmes*, Hob. 14.

8. No bond taken by sheriff is void by this act, unless the party was in custody. 1 And. 267. And see 2 And. 122.

9. But an obligation taken of one at large is within the statute, as well as if it be taken of the prisoner himself. Plow. 69.

10. A covenant for the true imprisonment of J S, and also to pay chamber rent, is a covenant for ease and favour within this statute. *Mosdel v. Middleton*, T. Raym. 222.

11. All bonds taken of persons not bailable are void. 3 Leon. 206.

12. The mayor of a corporation is within the act. *Gaberil v. Clarke*, Cro. Eliz. 76.

13. So, the marshal of the King's Bench. *Bracebridge v. Vaughan*, Cro. Eliz. 66. *Lenthall v. Cooke*, 1 Saund. 162. 1 Lev. 254. S. C.

14. A bond to the marshal to save harmless from escapes is within this statute and void, but not a bond that the prisoner shall not escape. 2 Saund. 162, 163. 1 Lev. 254. *Lenthall v. Cooke*, 1 Lev. 254.

15. A promise is void by this act that is grounded upon a consideration that the sheriff shall let one escape. 3 Leon. 206.

16. A serjeant at mace of the house of

commons is not within the statute. *Norfolke v. Elliott*, 1 Lev. 209.

17. It does not extend to a bond made to the sheriff by the under-sheriff. Hob. 13, 14.

18. A bond taken by a gaoler of his prisoner for a true debt due to him is not within this statute. 1 Saund. 163.

19. It extends not to bonds of appearance upon an attachment out of the court of requests. Cro. Eliz. 646, 647.

20. A bond for appearance taken out of the county (although by duress,) is not within that act, because not within the sheriff's custody. Cro. Eliz. 746.

21. Taking a bar fee by custom is not within the penalty of this statute. Plow. 465.

Cap. 15.

1. The act gives 40l. to the king and the party grieved to commence within three months, or in default thereof to any other person to sue for the 40l. It is only one penalty severally distributed, being but for one offence, and the informer may sue for both. *Culliford v. Blandford*, 1 Show. 353, 354, 355.

2. An action will lie upon this statute, though the parliament was as none, because there was no act nor record of it. Hob. 78.

26 Hen. 6.

Before the statute of uses, tenant in tail makes a feoffment in fee to the use of himself and his wife in tail, and after the statute is attained of high treason and dies; the issue in tail is barred by statute 26 Hen. 8., for by that statute the tenant in tail does not forfeit only the new estate, but the right of the ancient estate is barred for ever. *Case of Forfeiture by treason*, 12 Co. 6.

31 Hen. 6.

Cap. 5.

See Hob. 214, 246.

22 Edw. 4.

Cap. 7.

1. This statute, which under certain circumstances authorizes the proprietors of grounds in forests after a felling, to enclose them without the king's license for seven years, to preserve the springing wood, extends to the grantee. *Barrington's case*, 8 Co. 136 b.

2. But does not extend to the wood of any subject in which another has a right of common. Id. ibid.

3. The commoners, as appears by the preamble, are not any of the parties between whom the act was made; therefore their right is not taken away by it. Id. ibid.

4. If the act had extended to wood in which others had a right of common, yet the wood could not be so enclosed as to exclude the commoners. Id. ibid.

1 Rich. 3.

Cap. 3.

1. Trespass lies for seizing the goods

of a felon before conviction. T. [*1325] Raym. 414.

2. Debt lies upon this statute for taking his goods before conviction or attainder, *contra forma statuti*, demanding the double value. *Hill v. Langley*, Cro. Eliz. 749.

1 Hen. 7.

Cap. 1.

A *scire facias* lies by the equity of this act to execute a remainder, and is maintainable against a pernor of profits. *Wimbish v. Tailbois*, Plow. 59 178.

3 Hen. 7.

Cap. 10.

1. This statute was designed to restrain the abuses of writs of error brought only for delay. *Holroi v. Ebesson*, 10 Mod. 275.

2. It gives costs and damages to be assessed at the discretion of the justices before whom such writs are sued. Id. ibid.

3. Although none were recoverable in the first action, as in a *formedon*. Cro. Eliz. 617.

4. Motion for allowing interest by way of damages (from the time of the first judgment), upon writs of error brought into B R., denied. 10 Mod. 274.

4 Hen. 7.

1. Infant or one beyond sea has five years after fine levied and removal of disability to make claim. *Zouch v. Barnfield*, 1 And. 170, 171, 172.

2. What interest is saved by the general words, "saving to every person not party," &c. See Id. ibid.

11 Hen. 7.

Cap. 20.

1. A gift made partly for services to the husband, and part for consanguinity to the wife, is within the act. *Ward v. Studman*, Mo. 683.

2. A being seised in fee of land in right of his wife, joined with her in a bargain and sale of it by indenture for thirty years, in consideration of 70l., remainder to themselves for life, remainder to B their son, and C his wife in tail, and to suffer a recovery for farther assurance; and it was also found *dehors* the indenture, that the said assurance was as well in consideration of the marriage of B and C as of the said 70l., and that A and his wife died; that B died leaving issue, and afterwards C, with a second husband, levied a fine *come ceo* with warrantry to a stranger; the issue after the term and within the five years may enter under this act, this being a gift by an ancestor of the husband within that statute. 2 Dy. 146. pl. 68.

3. If a feme tenant in tail *ex provisione viri* accepts a fine *sur consueance*, and thereby grants and renders to A for 1000 years, this is an alienation within the act. *Brown's case*, 3 Co. 50 b.

11 Hen. 7.

Cap. 20. (Of jointures.)

1. He who would take benefit of the entry given hereby, shall show specially how he

is the person intended by the act. *Wimbish v. Taillois*, Plow. 42.

2. Baron and feme, copyholders in fee, the baron purchases the freehold to them in tail; the baron dies, having issue, the feme suffers a common recovery; the heir may enter by that statute. *Shoebridge's case*, Cro. Eliz. 24.

3. A woman, being a jointress, makes a lease for life; it is a discontinuance and forfeiture within this statute, although without warranty. Cro. Eliz. 513.

4. So, if a jointress takes a second husband, and they convey to C and his heirs, *habendum* to him and his heirs, to the use of him and his heirs, for the life of his wife only. Cro. Eliz. 131.

5. The alienation of a feme jointress is good against herself, though not against the heir. Hob. 166.

7 Hen. 8.

Cap. 4.

1. If a common recovery had been to uses of lordships and manors before the statute of the 27 Hen. 8, the recoverers had no remedy to make the tenants attorn, (for a *quid juris clamat* would not lie upon a recovery before the statute of 27 Hen. 8.) *Dizon v. Harrison*, Vaugh. 48.

2. By equity hereof, damages shall be recovered upon a nonsuit in second deliverance. *Partridge v. Strange*, Plow. 82.

21st Hen. 8.

[*1326] The parliament 21 Hen. 8. was held at London, but is pleaded in many precedents to be held at Westminster, November 3rd. *Birt v. Bothwell*, 1 Ed. Raym. 210. 343.

Cap. 5.

1. The ordinary is not bound to pursue the statute. *Biers v. Goddard*, Hob. 250.

2. It is in the power of the ordinary to grant administration to the wife or next of kin. *Sand's case*, T. Ram. 93. 11 Mod. 126. n.

3. Or to both. *Brunker v. Cook*, 11 Mod. 126. n.

4. Administration committed may be revoked notwithstanding that statute. *Anon.* Cro. Eliz. 163.

5. If an executor be made from a day to come, the administration in the mean time must be granted according to this statute. *Biers v. Goddard*, Hob. 250.

Cap. 11.

Before this act, if goods stolen were sold in market overt by the felon, yet there was no restitution, although he was convicted; but since that it has been held otherwise. *Daviller v. Herring*, 11 Mod. 319.

Cap. 13.

1. Two parsons of a church, each having the entire cure, and both of 8*l.* *per annum* value, one dies, and the other is presented; this is a plurality within that act. *Anon.* Cro. Eliz. 351. 353.

2. It extends to a plurality where the par-

son is only instituted into one and inducted to another. *Colt v. Bishop of Coventry*, Hob. 157. 158.

3. It extends to an union of two benefices, whereof one was worth above 10*l.*, if the union were since and not before the statute. Id. *ibid.*

4. And also to the case of a commendam temporary, by force of the word "tolerations." Id. *ibid.*

5. The queen may retain a chaplain to have a plurality by parol within this act. *Whetstone v. Higford*, Cro. Eliz. 424.

6. If a bishop take two benefices, he is a parson within the act. *Colt v. Bishop of Coventry*, Hob. 157. 401.

7. A countess retains two chaplains, and after that a third, who obtains a dispensation before the first two were advanced; the dispensation is not sufficient. *Reg. v. Dury*, Cro. Eliz. 723. 839.

8. Bishoprics are, not within the words "benefices," but they avoid former livings by the common law. *Colt v. Bishop of Coventry*, Hob. 156.

9. Eight pounds *per annum* shall be according to the true value within that act. Cro. Eliz. 853.

10. What is a dignity within that act to warrant a non-residence, see *Broughton v. Gourly*, Cro. Eliz. 663.

11. Informations hereon are not to be brought before judges of assize, the act extending only to the courts of Westminster-hall. Andr. 27. 91.

12. This statute is a general statute, of which the judges must take notice without pleading. *Holland's case*, 4 Co. 75 a. *Armiger v. Holland*, Cro. Eliz. 601.

Cap. 15.

By this act, a termor was enabled to falsify such recovery as any tenant of the freehold might do by the course of common law, when he was neither privy nor party to the same, and that, notwithstanding any such recovery, he should hold and enjoy his term according to his lease against the recoveror, his heirs, and assigns. 9 Mod. 103.

Cap. 19.

In an avowry for an estray, if the defendant has a return, he shall have costs and damages, as well as for an amercement in a leet and for a heriot, although not mentioned in this act. *Haselip v. Chaplen*, Cro. Eliz. 257. 329.

23 Hen. 8.

Cap. 6.

A recognizance may be taken by any judge in any part of England. Hob. 195.

Cap. 9.

1. The metropolitan, after the death of a bishop within the province, must hold his court for the diocese within the diocese. Hob. 178.

2. The archbishop of Canterbury is restrained by the act 23 Hen. 8. c. 9., from ci

ting any one out of his own diocese or his peculiar jurisdiction, although he holds his court of arches within London.

[*1327] *Porter v. Rochester*, 13 Co. 4. See also Hob. 17. 185, 186.

3. It is never too late to move for a prohibition after sentence in any case but one, and that is to the ecclesiastical court, on this statute, where the suit is out of the diocese. *Anon.* 11 Mod. 5.

Cap. 15.

1. This act extends not to actions given by statutes. 3 Leon. 92.

2. If after appearance the plaintiff is nonsuited, he shall pay costs. *Gough v. Simpson*, 11 Mod. 277.

3. The defendant shall have costs upon that act, upon a special verdict, as well as upon a general one. Cro. Eliz. 465.

4. An executor defendant shall have costs, but if plaintiff shall pay none by this statute. *Fetherston v. Allybon*, Cro. Eliz. 503.

5. If the plaintiff bring an action for words not actionable, and be nonsuited, yet the defendant shall recover costs. Hob. 219.

6. Debt lies in the King's Bench for 16s. costs recovered in an inferior court upon a nonsuit by this statute. *Harwood v. Turborne*, Cro. Eliz. 96.

24 Hen. 8.

In causes ecclesiastical, appeals must be brought within fifteen days after sentence. *Savil v. Kirby*, 10 Mod. 386.

25 Hen. 8.

Cap. 19.

By this statute the queen may grant a *commendam* without the archbishop. Cro. Eliz. 601.

Cap. 21.

1. This statute restrains not the king's power at common law, notwithstanding the negative words "not otherwise." *Colt v. Bishop of Coventry*, Hob. 146.

2. A rector of a church dispensed with according to this statute before he is consecrated bishop, remains rector as before, after consecration. Vaugh. 24.

3. It was meant to ease the sovereign of labour, not to deprive him of power. *Colt v. Bishop of Coventry*, Hob. 146.

4. The archbishop is restrained only as to those acts which the pope did *de quasi jure*. S. C. Hob. 147. 156.

26 Hen. 8.

Cap. 13.

1. This statute gives entailed lands to the crown in case of treason, which were before preserved to the children. *Thornby v. Fleetwood*, 10 Mod. 121. *Saville v. Saville*, 11 Mod. 330.

2. Therefore a tenant in tail may be attainted of treason without corruption of blood. *Thornby v. Fleetwood*, 10 Mod. 367.

3. For a corruption of blood would produce a cessor of the estate tail; and by a cessor of the tail, the estate would be taken from the

crown, and go to the remainder-man, contrary to the meaning of the act, which gives the land to the king. *Ibid.*

4. This act and the 5 & 6 Edw. 6. c. 11. extend to all treasons whatever. 3 Dy. 287. pl. 49.

Cap. 24. (Of resumptions).

1. This statute took from the bishop of Durham the power of making justices, and gave it to the king. *Morton v. Orde*, Hob. 139.

2. It has not altered the form of the *mittimus* at the common law, but that is still continued as the bishop as it was; yet a *mittimus* may be directed to the justices immediately; they are now called the king's justices, and not the bishop's. Hob. 139.

3. It includes the successor, although not named. *Lord Darcie's case*, Cro. Eliz. 513.

28 Hen. 8.

Cap. 13.

The commission for trial of piracy is good, though the chancellor do not nominate the commissioners. Hob. 114. 146.

Cap. 16.

The 28 Hen. 8. c. 16., makes invalid all licenses, dispensations, bulls, and other instruments purchased from Rome. Vaugh. 217.

31 Hen. 8.

Cap. 1. (Of partition).

1. Ancient demeane is a good plea. T. Raym. 249.

2. Age is not grantable in it. Hob. 179.

Cap.* 13.

1. The statute extends to the [*1328] heirs of H. 8. as well as to himself. 3 Dy. 280. pl. 12.

2. The act exempted from tithes all monasteries, colleges, &c., which should come to king by dissolution, or any other means. *Hopwood v. Barefoot*, 11 Mod. 238.

3. All appropriations howsoever defective, (as those made to nunneries,) are given to the crown; for the statute meant as well those in reputation, as in truth. Hob. 148.

4. Lands discharged *quandiu in manibus propriis* are given in tail, the donee shall pay tithes. Hob. 248.

5. If the donee suffer a recovery, yet he shall pay tithes. *Ibid.*

6. If the land revert to the king, he shall be discharged. *Ibid.*

7. It did not give the king writs of right. Hob. 242.

8. The word "late" in the discharging clause of the 31 H. 8., construed according to the body of the act, extends to such religious houses as came to the crown by that act, whether before or after it; but the clause extends only to such religious houses as were vested in the crown by the 31 H. 8. *Archbishop of Canterbury's case*, 2 Co. 46 a.

9. The act gave to the king the presentation or action for it, where the successor might have had a *quare impedit*, though be-

fore W. 2. the successor could only have had a writ of right of advowson. Hob. 243.

10. It gives appropriations to the king, and continues them in him as appropriations. Hob. 307. 308.

11. The statute of 31 H. 8. extends to grants made by the king of other lands, as well as monastery lands; but 1 E. 6. confines no grants made by the king but only of chauntry lands. *Needler v. Bishop of Winchester*, Hob. 227, 228.

12. It also confirms grants made by the king, though the considerations past be untrue, and the suggestions false; *secus*, of a non obstante, or any other statute. Hob. 128. 232.

13. The statute of 31 H. 8. supplies the defects of all prerogative forms in the king's grant. Hob. 230.

14. If the grant be upon a consideration future which is not performed, the statute will not help it. Hob. 231.

15. Not naming of honours is not remedied by the statute. Hob. 231.

16. So, if the king grant lands in *perpetuum*, the statute does not help it. *Ib*.

32 Hen. 8.

Cap. 1.

1. This statute (of wills) gave a man power to convey away his lands at his will and pleasure. *Idle v. Cook*, 11 Mod. 58. *Anon.* *Ib.* 91, 92. *Arthur v. Bokenham*, *Ib.* 149.

2. Lands in ancient cities devisable by custom are not bound by statute 32 H. 8. of devises. *Eve v. Tracy*, 1 And. 147.

3. A bastard is not a child within the meaning of 32 H. 8. c. 1. s. 4. *Anon.* 3 Dy. 297. pl. 23.; 313. pl. 93.; 345. pl. 4.

Cap. 2.

1. This act (of limitations) does not bind the king. *Plow.* 244.

2. It extends only to such cases where the avowant was compelled to acknowledge a seisin by force of some ancient statute of limitations, and consequently it does not render an allegation of seisin within the limited time necessary in those cases where seisin was not required to be alleged before the statute, as in a case of a reservation or grant of a rent, where the title is founded on the deed. *Foster's case*, 8 Co. 64 b.

3. In an avowry, seisin in law is sufficient by the intent and express words of the act; the three first branches relative to writs of right,oyer, assize, &c. extending to actual seisin, and the fourth, as to avowries, to seisin in law, as well as actual seisin. *Bevil's case*, 4 Co. 8 a.

4. The statute does not extend to casual services, which by possibility may not fall within sixty years, as the services of homage and fealty, covering the hall, &c. nor to a formodon in descender, or writs of escheat, *cessavit* or *recessit*. *Id. ibid.*

Cap. 7.

This is a public act, and in assize for tithes need not be recited. 1 Dy. 85. pl. 87.

Cap.* 19. [*1329]

1. A plea that a message was demised to an alien artificer, without averring that it was a dwelling-house, or shop, is bad. *Semb.* 1 Saund. 7, 8.

2. A place need not be alleged where the party was an alien and an artificer. 1 Saund. 8.

Cap. 24.

Lands parcel of the possessions of the priory of Saint John of Jerusalem, that came to the crown by this statute, are discharged of tithes. *Fosset v. Franklin*, T. Raym. 225.

Cap. 28.

1. This act enables particular persons to make leases for three lives, or twenty-one years. *Hopwood v. Barefoot*, 11 Mod. 240.

2. It is to be understood of lands only usually demised, and the ancient rent reserved. *Bishop of Hereford v. Scory*, Cro. Eliz. 874, 875.

3. It will not warrant a new lease made upon a conditional surrender. *Suesia v. Holman*, Hob. 204.

4. If tenant in tail, the reversion in the crown, make a lease not warrantable, and the issue annex the rent, and is attainted of treason, this lease binds not the king; *secus*, if the reversion had been in a common person. *Sir W. Ellis v. Archbishop of York*, Hob. 324.

5. If the wife die without heir after the discontinuance of her husband, the entry upon the discontinuance given by this statute shall not escheat to the lord. Hob. 243. 261.

6. Strangers who have a freehold or inheritance in remainder or reversion, are relieved by entry, as well as the wife and her heirs. Hob. 261.

Cap. 30.

The statute aids discontinuance in pleadings, as well in inferior as superior courts. *Walwyn v. Smith*, 4 Mod. 87.

Cap. 34.

1. It extends not to covenants upon estates in fee, or in tail, but only for life or years. *Bingham v. Smeathwick*, Cro. Eliz. 457.

2. Lessee for years covenants to repair the house during the term, and after assigns over his estate; covenant lies against the assignee, although not named, within this statute; otherwise if it were to build a new house. *Id. ibid.*

Cap. 37.

1. This statute gives a remedy for the recovery of such debts by executors, as were due to the testator, and for which there was no remedy before, viz. where the tenants retained in their hands arrearages of rents whereby the executors could not pay the

testator's debts. *Dixon v. Harrison*, Vaugh. 48.

2. It extends to demesne lands of a manor granted by copy. 2 Leon. 153. 3 lb. 59. 263.

3. A. seised of land in fee, grants a rent-charge for life, and after infeoffs B, who made a lease to C for twenty-one years, which expiring, B leased for three years to another, upon whom the distress was taken; the question was, if for the rent incurred during the term he may distrain after the expiration upon him in the reversion; the judges were divided. Cro. Eliz. 332, 333. 547.

Cap. 38.

1. This act prohibits the impeaching of marriages only, which are absolutely within the Levitical degrees, leaving all others to spiritual jurisdiction, as before that act. Vaugh. 320.

2. A marriage with the grandfather's brother's wife by the mother's side is a lawful marriage by this act. Vaugh. 206, 207.

3. The marriage of the husband with the wife's sister, or the wife's sister's daughter, is prohibited. Vaugh. 322, 323. *Contra, Man's case*, Cro. Eliz. 228.

33 Hen. 8.

Cap. 6.

A dagger is within this statute, which prohibits the shooting or carrying, &c., of any hand-gun. *Gardner v. Saint John*, 5 Co. 71 b. Cro. El. 822.

Cap. 9.

1. This statute indicts a penalty of 40s. per day, for keeping a gaming-house. *Retz v. Dixon*, 10 Mod. 336.

2. The penalty may be recovered by indictment, though not one of the ways of proceeding directed by the statute. *Id. ibid.*

Cap. 16.

This act, respecting the buying of worsted yarn in N, not being a weaver, is made perpetual by 1 Edw. 6. c. 6.; an information thereupon *contra formam statuti*, held good, because the last act made no new addition or alteration; otherwise, if one act depends upon the other; but it was quashed, because not shown to be spun upon the rock. *Dingley v. Moor*, Cro. Eliz. 750.

Cap. 20.

1. Tenant in tail is attainted and dies; the land vests in the king, and does not descend to the heir till office found. Hob. 345, 346, 347.

2. The father is attainted, the grandfather dies seised in tail, the son shall inherit. Hob. 343.

3. This statute extends to all manner of treasons. *Dowie's case*, 3 Co. 9 b.

4. It is the first statute that ever gave leave to try a man in his absence. *Reg. v. Simpson*, 10 Mod. 341.

5. It is repealed by implication by statute 1 & 2 P. & M. c. 10. which leaves all trials

to the course of the common law. *Reg. v. Corporation of Buckingham*, 10 Mod. 341.

Cap. 23.

This statute, with respect to the trial of treasons in a foreign country, is repealed. 2 Dy. 131. pl. 75.

Cap. 39.

By the words of the act, "the said courts, &c., shall have full power and authority to accept, &c. and wholly and clearly to acquit and discharge all and every person, &c.," the Exchequer Chamber may well upon an English bill, (although the suit was by process at the common law, in the court of Exchequer before the barons,) make a decree in the case, for to this purpose they are but one court; the 33 Hen. 8. c. 39. s. 79. extends to all the king's debts, and process thereupon, as well at the common law as upon that act; although an obligation be made for performance of covenants; yet, after it was broken, it was a debt due to the king by obligation within the act. *Sir Thomas Cecil's case*, 7 Co. 18 b.

34 Hen. 8.

Cap. 5.

1. This act gave power to dispose of estates by will. *Arthur v. Bokenham*, 11 Mod. 149.

2. No other estate of inheritance is devisable within the act but an estate of inheritance. 1 Saund. 261. *See also Gaven v. Rainer*, Cro. El. 805.

3. It enables not a devise to corporations in mortmain. Hob. 136.

4. A devisee of a rent out of all lands in chief, is good for two parts. Hob. 80.

Cap. 90.

An estate tail cannot be barred where the reversion is in the crown. T. Raym. 358. *Wiseman's case*, 2 Co. 15 a.

Cap. 21.

This statute must be specially pleaded. 2 Dy. 129. pl. 65.

35 Hen. 8.

Cap. 2.

This statute, as to treasons committed beyond sea, is not repealed by 1 & 2 P. & M. c. 10. s. 7. 2 Dy. 131. pl. 75.; 298. pl. 29.

Cap. 16.

It reaches not to cities and corporations. T. Raym. 486.

37 Hen. 8.

Cap. 4.

It extends to none but superstitious hospitals. Hob. 122, 123.

Cap. 7.

A bachelor of law may be a commissary to grant administration by that act. *Pratt v. Stocks*, Cro. Eliz. 314, 315.

Cap. 12.

A house in London, part of the possessions of a priory that was discharged, yet by this act shall pay tithes. *Green v. Piper*, Cro. Eliz. 276.

Cap. 15.

This statute extends only to an union of

churches that are under the annual value of 8*l.*; otherwise the union is at the common law. *Austyn v. Thayne*, Cro. Eliz. 500, 501.

Cap. 16.

Lands lying out of the county palatine of Lancaster will pass under the duchy seal. T. Raym. 90.

[*1331 | Cap.* 17.

This statute, which enacts "that it shall not be lawful to any persons which have or shall have any wood therein, or any right to have any common, &c., to fell or cut down the same woods (except it be to his own use and occupation,) until such time as the fourth part of the said grounds or soil, &c., be divided and fenced and enclosed," restrains the owner of the wood from felling his own wood, on a penalty, but does not exclude the commoner of his common: the words in the act "except it be to his own proper use or occupation," exempt the owner from the penalty, and are to be intended of his necessary use, as to repair his house, or to burn in his house, &c. *Barrington's case*, 8 Co. 136 b.

38 Hen. 8.

Cap. 3.

Error lies in the King's Bench for an erroneous judgment given in Denbigh in an ejectment. *Griffith v. Apprice*, Cro. Eliz. 104.

1 Edw. 6.

Cap. 8.

This act cures only grants made by, and not to, the king. Hob. 232.

Cap. 14.

1. It extends to superstitious hospitals, though the word hospital be not in it. Hob. 122, 123.

2. But not to colleges in the university, nor to chapels of ease, erected as members of the parochial church. Hob. 123.

3. The statute is more favourable to churches than to colleges. Ibid.

4. The queen shall have no more by that statute but what is appointed for maintenance of the obit. *Hart v. Brewer*, Cro. Eliz. 449.

5. It extends not to a gift to pray for souls so long as the laws of the realm should permit. Hob. 123.

6. Nor to any superstition, unless it be direct and plain. Hob. 124.

7. Lessee for eighty years takes a second lease for ninety years, to begin after the first, and devises all his leases to J S, paying yearly 5*l.* to an abbot, &c., and 5*l.* to a priest to sing, &c., and that his son should have the letting of the lands; all continued until 1 Edw. 6.; the first lease ended 34 Eliz.; the second lease is not within 1 Edw. 6.; because not then begun, and nothing is given to the king but the two 5*l.* *Simons v. Wenlock*, Cro. Eliz. 799.

2 & 3 Edw. 6.

Cap. 13.

1. Debt lies at the common law for the treble value within this act. *Beadle v. Sherman*, Cro. Eliz. 608.

2. No remedy for the treble value of tithes in equity, but only at law. 3 Leon. 204.

3. If land be overflowed with water, and after gained by industry, tithes shall be paid thereof; and so if full of thorns and bushes, and grubbed up and made meadow or arable; but otherwise if merely barren, and improved by foldage or other industrious means. *Sherington v. Flewood*, Cro. Eliz. 475.

4. Not guilty, a good issue therein upon debt; but it lies only for the party grieved, and not for the king. *Johns v. Carne*, Cro. Eliz. 621. 766. S. P.

5. So *nil* is a good issue. Hob. 218.

6. In debt on the statute, it was held by the court, that a verbal agreement to pay money to the parson in discharge of tithes, though it is not such an agreement which may pass the right, yet it is a good agreement within this statute to bar the plaintiff of his action. T. Raym. 14.

Cap. 14.

1. An indictment lies not on this act before justices of peace. Hob. 405.

2. The indictment ought to show that the offence is within the statute. Holt, 405.

5 & 6 Edw. 6.

(Striking in a church or churchyard.)

Cap. 4.

1. Striking in Saint Paul's churchyard is within that act. Cro. Eliz. 214.

2. Drawing a dagger in the church of B against J S, but not with intent to strike him, is not within the act, nor finable at common law. Cro. Eliz. 531.

3. The offender is *ipso facto* excommunicated. *Reg. v. Whitehouse*, 10 Mod. 65.

Cap. 14.

Apples* are not within the [*1332] stat. 5 Ed. c. 14. of ingrossers; so also it seems a man cannot be a forestaller of such fruits, within the meaning of the statute, 5 Ed. 6. *Baron v. Boys*, 12 Co. 18.

Cap. 16.

1. This act does not extend to the sale of the office of secretary to the governor of Barbadoes. *Davis v. Vinder*, 2 Mod. 45. See also *Blankard v. Galdy*, 4 Mod. 222.

2. The office of a chancellor, or register, &c., in the ecclesiastical court is within the act. *Treavor's case*, 12 Co. 78. Cro. Jac. 269. S. C.

3. He that buys an office is for ever incapable of that office for which he contracted. Hob. 75.

4. The office of customer of London is within that act; and a bond to perform covenants, although some be good, yet if others are unlawful, is absolutely void by the act. Cro. Eliz. 539.

7 Edw. 6.

Cap. 1.

1. This statute was made in confirmation of a branch of the act of 33 Hen. 8. of erection of the court of surveyors. Plow. 203.

2. In the count hereupon the plaintiff ought to recite the branch of the act of 33 Hen. 8. upon which this statute is grounded. Plow. 206.

3. The place shall be specified where the extortion was committed. Plow. 200.

Cap. 5.

1. This statute does not restrain the king, but he may license any one to sell wine as he thinks fit. Vaugh. 355.

2. It only restrained the sellers to freemen of London, to the corporation of vintners, men bred up in that trade, and serving apprenticeships to it. Vaugh. 355.

8 Edw. 6.

Cap. 4.

An indictment upon it must be, that he drew a weapon to strike. 2. Leon. 188.

Philip and Mary.

Cap. 12.

Three distrained sheep, and impounded them in pounds in three several hundreds, there shall be but one 5*l.* against them all, and but one 40*s.* trebled, for it is but one offence in all. *Partridge v. Naylor*, Cro. Eliz. 480. See also *Gybbin's case*, Cro. Eliz. 646.

1 Eliz.

Cap. 1.

The construction of stat. 1 Eliz. c. 1. and of the letters patent of high commission in ecclesiastical causes, founded upon that act, belong to the judges of the common law. *Fuller's case*, 12 Co. 41.

Cap. 4.

1. The grant of a prochein avoidance by a bishop is void by that act against the successor. Cro. Eliz. 207.

2. An archdeacon having a parsonage appropriate, lets parcel for fifty years, the bishop, patron, and the dean and chapter confirmed it; it is not within the statute, being no parcel of the possession of the bishopric. *Denny v. Eakenstall*, Cro. Eliz. 430.

3. A grant of an advowson by a bishop for twenty-one years, and confirmed by the dean and chapter, is void against the queen and successor by that act, but good against the grantor himself. *Piper v. Wyden*, Cro. Eliz. 690, 691.

4. This is a disabling statute, and must be construed strictly. Orl. Bridg. 138.

5 Eliz.

Cap. 2.

An information upon the stat. 5 Eliz. c. 2. for converting arable lands into pasture, is not limited to any time for the queen. *Rutt v. Sir F. Bedolph*, Sav. 6.

Cap. 4.

1. At common law, any man might have

exercised any one or more trades without being an apprentice. Hob. 211. 1 Saund. 312.

2. Exercising a trade by others is within that statute. Salk. 610.

3. A man may use any trade privately. Hob. 211.

4. The restraints of this act do not extend* to persons carrying [*1333] on trades in country villages. *Turneth's case*, 1 Mod. 26.

5. An action lies on 5 Eliz. c. 4. against a merchant trading to Turkey, who never was apprentice to the cloth workers, but employs journeymen in his house who had served as apprentices, and pays them wages. *Hobbs, q. t. v. Young*, 1 Show. 241. See lb. 267.

6. A merchant may manufacture any commodity for his own use, but not for sale. S. C. 1 Show. 267, 268.

7. Serving five years out of England, and two in England, is enough to satisfy the statute. *Reg. v. Morgan*, 10 Mod. 70.

8. A wife that has concerned herself in trade may use it when a widow, if she lived with her husband seven years. *Hobbs, q. t. v. Young*, 1 Show. 242. 266. 10 Mod. 70.

9. Living seven years with one using a trade, though not qualified to do so, is sufficient. 10 Mod. 71.

10. Dying is part of the felt-maker's trade. *Hobbs q. t. v. Young*, 1 Show. 268.

11. A comb-maker cannot use the trade of a horner. Id. ibid.

12. One exercised a trade so as to fulfil the intent of a statute, yet not doing it according to the words or letter, this was adjudged an using of the trade contrary to the statute. *Reg. v. Briggs*, Skin. 428.

13. A merchant that works his own cloth is within the statute, and his employing journeymen is the same thing. *Hobbs q. t. v. Young*, 1 Show. 268.

14. The words of the statute are not confined to personal handicrafts, the words are "setting up," and that be by others, without working in it one's self. Id. ibid. 11 Mod. 120. n. 1 Show. 268.

15. A serge-maker may be indicted on this act for using the trade of a dyer, in dying his own serges, if he has not served as an apprentice to the trade. *Rex v. Prou*, 11 Mod. 189.

16. As to the businesses of milliner and barber-surgeon, see *Rex v. Standish*, 11 Mod. 110. *Anon.* 11 Mod. 64.

17. Many trades are within the act, though not mentioned in it. Salk. 611.

18. Trades mentioned in the act need not be averred to be used at that time; others must. *Rex v. Slaughter*, Salk. 611. n.

19. Where a trade is averred to be so at the time of making the act, the court will intend it within the act. *Rex v. Harper*, Salk. 611.

20. An information for using the trade of

a baker, without saying a common baker, held good. *Davison v. Barber*, Hob. 183.

21. The charters of the city of London were held to be no dispensation of the statute, although confirmed by act of parliament. *Rex v. Kilderby*, 1 Saund. 311.

22. The main penalty of the law is not given to cities or corporations by the word "forfeitures." *Davison v. Barber*, Hob. 183.

Cap. 9.

1. The 5 Eliz. (of perjury) lies only for the party grieved. 2 Leon. 12. 3 Leon. 68. 78.

2. If the perjury be in a matter not concerning the cause in question, it is not punishable. *Anon.* Cro. Eliz. 428.

3. A bill of debt lies for the party grieved upon that statute by the act of 18 Eliz. c. 5, and he is not forced to sue by information or original. Cro. Eliz. 434.

4. An action lies, though the defendant do not depose directly to the issue, but to increase damages. 2 Leon. 198.

5. If process be served upon a feme covert as a witness, and charges tendered, if she appear not, an action lies against her husband and her, for she is within the statute, and the tender must be made to her. *Hawthbury v. Harry*, Cro. Eliz. 130, 131.

6. No action lies for a false presentment in a leet. 3 Leon. 201. *Spencer v. Shory*, Cro. Eliz. 709.

7. An informer must sue by information or original. Cro. Eliz. 434.

8. In an indictment upon that statute, it must be directly alleged that he was sworn. Cro. Eliz. 105.

9. It ought to show in what matter he swore falsely, and in what action, and it must be in the same county where the oath was. *Stedman's case*, Cro. Eliz. 137.

Cap. 14.

An indictment thereupon cannot be at the sessions of the peace, but it must [*1334] be before the justices of oyer and terminer, and justices of assize. *Smith's case*, Cro. Eliz. 87.

Cap. 23.

This statute is to be intended not only of excommunication for criminal causes, but for legacies, probates of wills, tithes, or other cause there. *Garrett v. Fulwood*, Cro. Eliz. 144.

7 Eds.

This statute of hearing masses, extends to a feme covert. Hob. 97.

8 Eds.

Cap. 2.

An administrator plaintiff shall not pay costs within that statute, if nonsuited. Cro. Eliz. 61.

13 Eds.

Cap. 4.

1. This statute extends to land in the hands of a debtor, though the king release all rights and titles. Hob. 46.

2. It extends not to copyholds. 1 Leon. 98.

3. Nor to land purchased of a debtor, and after conveyed to the king, though he reconvey it to a purchaser. Hob. 45.

Cap. 5.

A feoffment fraudulent shall be avoided by not guilty, not by an issue *ne enfeoffa pas*. Hob. 72. 166.

Cap. 8.

1. This statute does not make a good contract void, but only such as are usurious; and if one contracts to have 20l. for 100l., and takes nothing, he is not punishable; otherwise, if he takes but a shilling, there he shall render for the whole contract. *Pelard v. Seely*, Cro. Eliz. 20.

2. Though the king pardon the usury, yet the bond is void. *Winchcombe v. Bishop of Winchester*. Hob. 166, 168.

3. One gave 566l. for an annuity of 120l. per annum; this was held no usury, although it was secured also by land of 100l. per annum. *Tenfield v. Finch*, Cro. Eliz. 27.

Cap. 10.

1. The statute of 13 Eliz. c. 10. restraining grants by any dean and chapter other than for the term of twenty-one years, or three lives, is a public act. *Chapter of Southwell v. Bishop of Lincoln*, 2 Mod. 66. Vaugh. 203.

2. It extends not to a lease made before, and confirmed after. *Spendlowes v. Burket*, Hob. 7.

3. It did not restrain leases in reversion. Hob. 269.

4. A lease of tithes and land out of which a rent may issue, and the accustomed rent may be reserved, is good within the intent of the statute. *Holden v. Smallbrooke*, Vaugh. 204.

Cap. 12.

1. Immediately upon not reading the articles, the incumbent is by this statute deprived *ipso facto*. *Shute v. Higden*, Vaugh. 132.

2. Upon such deprivation, the patron may present, and his clerk ought to be admitted and instituted, but if he do not, no lapse incurs until after six months after notice of such deprivation given to the patron. *Id.* *ibid.*

3. Where the incumbent subscribes the articles upon his admission and institution, that makes him perfect incumbent *pro tempore*. *Shute v. Higden*, Vaugh. 133.

4. If a minister read the articles according to that statute in this manner, viz. "I give my consent unto them so far forth as they agree with the word of God," that is not good, for it ought to be absolute. *Smith v. Clarke*, Cro. Eliz. 522.

5. The benefice is void to all intents, notwithstanding an appeal depending. *Baker v. Brent*, Cro. Eliz. 680.

6. If a man having one benefice be inducted into another, and read not the articles, the first is not avoided, because the second is as none. *Winchcombe v. Bishop of Winchester*, Hob. 168. Vaugh. 132, 133, 134.

Cap. 20.

1. By that statute the parson ought to be absent eighty days *et ultra*. *Reg. v. Blanches*, Cro. Eliz. 80.

2. He must absent himself for a month voluntarily, for if by restraint it is out of the statute. *Collins v. Vaughan*, Cro. Eliz. 100.

3. This statute and the 18 Eliz. are general laws. Cro. El. 816.

18 Eliz.

Cap. 2.

This act for confirmation of pa-
[*1335] tents, revives* not a void grant precedent. *Child v. Low*, Cro. Eliz. 808.

Cap. 4.

It aids no purchaser but such as comes in for valuable consideration, and not upon marriage or the like. *Upton v. Basset*, Cro. Eliz. 445.

Cap. 5.

This statute, which gives costs against an informer in popular actions, extends not to the party grieved if he sue. 2 Leon. 116.

Cap. 7.

1. See the reasons of making this statute, and what alterations it made, *Scarle v. Williams*, Hob. 291, 292, 293.

2. It discharges clerks in orders without burning, though the statute say after burning. S. C. Hob. 294.

3. It makes the party as capable to purchase goods as if he had made his purgation, or obtained his pardon. *Foxley's case*, 5 Co. 109 a.

Cap. 11.

This extends not to leases and covenants for them of houses in the city. *Crane v. Taylor*, Hob. 269.

Cap. 14.

1. This statute (of jeofails) extends not to variances between writ and declaration. *Cumberland v. Cumberland*, Hob. 38.

2. It aids the want of producing a deed in court. *Semb.* 2 Leon. 74.

3. It extends to a verdict in the disjunctive where the point in issue is good. *Keble v. Osbaston*, Hob. 49, 64.

4. It extends to process awarded to the sheriff after it has been granted to a coroner. *Semb.* — *v. Webb*, Hob. 64.

5. It extends to a ven. returned by three coroners, when there are four, but not to a return by one sheriff in London. *Lambe v. Wiseman*, in error, Hob. 70.

6. It does not remedy want of an original in some cases. 1 Leon. 30, 31.

7. It aids the want of fifteen days be-

tween the tests and return of the *venire facias*. 1 Leon. 329.

8. It aids where there is no writ, but not a bad one. Cro. Eliz. 722. *Anon.* 11 Mod. 2.

23 Eliz.

Cap. 1.

1. This statute extends to a feme covert. Hob. 97, 205.

2. If an action be brought on this statute three weeks after the year, yet if judgment be entered for the year only it is good. 11 Mod. 45.

3. It extends to all sorts of recusants; and though the party be indicted upon that statute in a wrong county, yet he shall have no advantage of it, or avoid the indictment for any cause but conformity. Skin. 99.

4. If lands be seised for the penalty of 20l. a month by this act, it bars the title which the university has to the presentation by the act of 3 Jac. 1. c. 5. Hob. 127.

Cap. 3.

1. This act (of fines) was designed only to regulate, not annul fines. *Lord Saye and Sele's case*, 10 Mod. 43.

2. It extends only to fines taken by *dedimus*. 10 Mod. 43.

3. The date of the concord is to be certified by the judge before whom the fine was levied. 10 Mod. 42.

27 Eliz.

Cap. 4.

This statute makes the fraudulent conveyance void against a purchaser, not against the party himself. *Winchcombe v. Bishop of Winchester*, Hob. 166.

Cap. 5.

1. See the commendations of this statute, *Heard v. Baskerville*, Hob. 232.

2. It is a favourable law, to be construed liberally; if the defendant plead *pleinment administer, et nulla bona, &c.*, *preterquam bona non attingentia* &c., without showing certainly what they did attain to, it is but want of form, and the plaintiff cannot demur generally. *Moon v. Andrewes*, Hob. 133.

3. It is not sufficient to allege the demurrer to be for form, but he must allege the special point that he requires. *Heard v. Baskerville*, Hob. 232, 233.

4. A demurrer not general, is now a confession of all matters, though uniformly pleaded; *secus*, of a demurrer at common law. S. C. Hob. 233.

5* If the defendant entitle [*1336] himself to a rent, and produce not the deed, the plaintiff may demur generally. S. C. Hob. 233, 301.

6. In assault, &c. *vi et armis*, the defendant pleads specially, but says nothing to the *vi et armis*; it is only matter of form. 1 Saund. 81, 82.

7. If an action be brought upon an obligation not laid in any place, or laid to be beyond sea, a general demurrer serves, so if

there be two affirmatives without a traverse. *Heard v. Baskerville*, Hob. 233. 301.

8. So, if after *nullum arbitrium* pleaded, the plaintiff reply, and set forth the award which makes a perfect issue, but assigns no breach, though the breach is not traversable. *Buckhead v. Archbishop of York*, Hob. 198. 233.

9. If a descent be pleaded to a cousin and heir, without showing how cousin, the demurrer must be special. *Heard v. Baskerville*, Hob. 232, 233.

10. So, if perpetual unity be pleaded in bar of tithe, without concluding *ratione inde*, &c. *Slade v. Drake*, Hob. 298.

11. The want of an inducement to a traverse is aided by a general demurrer. Hob. 236.

12. So, an informal conclusion of a plea or replication is aided. *Needler v. Bishop of Winchester*, Hob. 321.

13. It aids the not praying of damages. 1 Saund. 98.

Cap. 8.

An administrator may maintain a writ of error upon that statute, upon a judgment given in *scandalum magnatum*, although not named, and although execution were sued by *elegit*, because privy to the record, and the former execution may afterwards be avoided. *Scroggs v. Lord Mordant*, Cro. Eliz. 294.

Cap. 9.

Two hundredors only are necessary. Cro. Eliz. 850.

Cap. 13. (*See ante*, 13 *Edw.* 1. c. 1. p. 1319.)

1. The end of the statute of 27 Eliz. c. 13. of hue and cry, was to purge the party that he was not confederate with the robbers. 1 Show. 241.

2. This is a penal law. Hob. 140.

3. The day of the robbery shall be reckoned as part of the year. Ibid.

4. If the servant be robbed, he only ought to be sworn, and not the master. *Green's case*, Cro. Eliz. 142.

5. The master in such case may sue the hundred. Salk. 613, 614.

6. Charging one of the robbery present before a justice discharges the hundred. *Metuem v. Hundred of Thistleworth*, 3 Keb. 115. pl. 22.

7. One robbed and refusing to take the oath, cannot sue. Salk. 613.

8. If the party know that he has been robbed of the goods, he must, in order to obtain restitution (under the statute 21 H. 8.), first prosecute the felon. *Harris v. Shaw*, C. T. Hardw. 349.

9. The action on the statute must be by original against the inhabitants generally. *Stewart v. Hovey*, 3 Keb. 126. pl. 45.

10. The declaration need not set forth the oath to be taken before a justice of the same hundred. Salk. 614.

11. The declaration may be *omnes homines inhabitantes in dimidio hundredi*. Hob. 246.

29 Eliz.

Cap. 4.

1. The statute 29 Eliz. c. 4., for settling a sheriff's fees on serving an execution, was made at a session of parliament, began and held at Westminster on the 29th October, and adjourned from that time to the 15th February 29 Eliz., and then continued till it was dissolved; and therefore, if a declaration or other pleading, following the mistake of this fact in the printed editions of the statutes, recite this statute to have been made "at a session of parliament, by prorogation, held at Westminster, 15th February, 29 Eliz.," such misrecital will, on demurrer, be bad; but this error is cured by a verdict; especially as this is a particular statute, of which the judges are not bound to take notice unless pleaded; and the misrecital may also be taken advantage of by the plea of *nul tiel record*. *Spring v. Eve*, 2 Mod. 241.

2. Cities and corporations may, by the proviso in that act, take above twelvethe pence in the pound for serving executions upon judgments out of other courts, as well as from their own courts. *Sheriff of Gloucester's case*, Cro. Eliz. 263.

31^o Eliz.

[1337]

Cap. 3.

1. In a writ of dower of lands in one county, the summons may be made at the parish church porch in another county. *Register's case*, Cro. Eliz. 472.

2. Proclamation made at the most usual door of the church, though part of the land lie in another town in the same county, is sufficient, though the words of the statute be parishes or chapels. Hob. 133.

3. The sheriff must not proclaim the contents of the writ, but must proclaim that he hath made summons. Hob. 133.

4. If the defendant be not summoned at the church door, although the sheriff returns him summoned, thereby he loses by default. *Collet v. Marsh*, Cro. Eliz. 371.

Cap. 5.

1. Information upon the statute of unlawful games, &c. must be at quarter sessions or assizes, &c. Hob. 184. 429.

2. Recusancy against the statute of 23 Eliz. is no such offence, for which the informer ought to sue in the proper county by this statute, for it is but a *nonfeasance*. Hob. 251.

Cap. 6.

1. It is simony to contract for the next presentation, while the incumbent is sick and like to die. Hob. 165.

2. A simoniacal presentation is void. 10 Mod. 176, 177.

3. And though institution or even induction follow such presentation, yet the church may be presented to without bringing a *quare*

impedit, for the statute makes all void, in the same manner as if the incumbent was naturally dead. 10 Mod. 176, 177. 407.

4. To an action brought for tithes, a simoniacal contract is a good defence. *Thorby v. Fleetwood*, 10 Mod. 407.

5. He that is guilty of simony is for ever incapable of that benefice for which he contracted. *Rez v. Bishop of Norwich*, Hob. 75. 166.

6. Simony is properly triable in the spiritual court. *Risely v. Wentworth*, Cro. Eliz. 642.

7. Though the clerk presented by simony die, yet the king's turn is not satisfied. *Winchcombe v. Bishop of Winchester*, Hob. 165, 166, 167.

8. If the statute had only made the presentment void, and not given it to the king, it would have returned to the patron, as in case of institution by simony. S. C. Hob. 167.

Cap. 3.

Where an action is commenced by original writ out of Chancery, a writ of error does not lie in the Exchequer Chamber by this statute. 1 Saund. 346.

35 Eliz.

1. Y was committed by a secretary of state upon 35 Eliz. and the warrant was till he should be discharged by due course of law, where the statute is that he shall be committed, there to remain without bail or mainprise till he shall make a direct answer, if he be a Jesuit, &c.; and the commitment was adjudged to be irregular, for it is in the nature of a conviction, and the party is in execution till answer made. Skin. 369.

2. An indictment on 35 Eliz. c. 2. must state that the offence was committed after the offender had attained the age of sixteen years. *Rez v. Vicarier*, 2 Show. 401.

38 Eliz.

Held to be no offence against this statute, to erect a cottage, if nobody inhabited therein. 1 Vent. 107.

39 Eliz.

This statute takes away clergy from those who break a house, and steal above the value of 5s. *Rez v. Whistler*, 11 Mod. 26.

43 Eliz.

Cap. 2.

1. By this statute, that enables justices of peace to tax a neighbouring parish, the justices may tax any of the inhabitants, and the whole parish. 1 Vent. 350. *Rez v. Saint Giler's Parish*, 11 Mod. 239. and *Rez v. Farlow*, Ib. 403.

2. By the 7th section of this act "the father and grandfather, and the mother and grandmother, and the children of every poor, old, blind, lame, and impotent person, or other person not able to work, being of sufficient ability, shall maintain [*1338] every such poor person, according to the rate as shall be assessed

by the justices of the county at their general quarter sessions on pain of forfeiting twenty shillings a month." *Rez v. Davison*, 11 Mod. 268. n.

3. It is the sessions only that can tax the county, if the hundred is unable to afford relief. *Saint Benedict v. Saint Peter's, Norwich*, 11 Mod. 269.

Cap. 4.

1. The words "limited and appointed" will enable a devise to a college, though it be a corporation and mortmain. *Flood's case*, Hob. 136.

2. It helps a devise to feoffees of a house, to keep it in repair, and to bestow the rest of the profits upon reparation of the highways, yet the devise is void. *Collison's case*, Hob. 136.

3. The devise of an infant lunatic, or one that is not owner, is not aided. Id.

1. Jac. 1.

Cap. 4. (Papists.)

1. It disables persons brought up in popish seminaries abroad, in respect of themselves only, but not their heirs, from inheriting or enjoying any land, &c. during their non-conformity. *Thorby v. Fleetwood*, 10 Mod. 115.

2. It inflicts penalties upon the officers of the ports that suffer them to pass, and upon the master and mariners of the ship. S. C. 10 Mod. 124.

Cap. 7.

The statute 1 Jac. c. 7. for not delivering bills of fees under attorney's hand, may be given in evidence on *non assumpsit*. 1 Show. 338.

Cap. 8.

By this act "every person who shall stab any person that hath not then any weapon drawn, or hath not then first stricken the party which shall so stab, although not done with malice aforethought, shall be adjudged guilty of wilful murder;" but it is provided "that this shall not extend to any person who in keeping and preserving the peace, shall chance to commit manslaughter, so as the said manslaughter be not committed willingly, wilfully, and of purpose, under pretext and colour of keeping the peace." *Rez v. Tooley*, 11 Mod. 247.

Cap. 15.

1. This statute of bankrupts is explanatory of statute 13 Eliz. c. 7. See *Miles v. Williams*, 10 Mod. 164. 244.

2. A deed made in trust for the advantage of the bankrupt, with design to defraud creditors, amounts to an act of bankruptcy. *Cock v. Goodfellow*, 10 Mod. 493, 494.

Cap. 22.

This statute, concerning tanners, is a general law. Lutw. [590].

3 Jac. 1.

Cap. 5. (Of papists.)

1. This act was made upon the occasion

of the gunpowder treason. *Thornby v. Fleetwood*, 10 Mod. 118.

2. It was designed to lay papists under severer penalties than before. 10 Mod. 118. 122.

3. It restrains convicted recusants from the practice of law, physic, &c. 10 Mod. 118.

4. Provides against sending children abroad any where; whereas by 1 Jac. 1. they were only restrained from being sent to popish seminaries. 10 Mod. 123.

5. Gives a penalty to the informer. 10 Mod. 123.

6. Not said in 1 Jac. 1. who shall have the means profits of their estates, but here they are granted to the next of kin. 10 Mod. 123. 409.

7. This statute likewise disables popish recusants convict to present to any benefices, and vests the right of presenting to such benefices in the chancellor and scholars of the two universities respectively. 10 Hob. 207. See Hob. 73, 74. 126, 127.

Cap. 7.

This statute against attornies delaying their client's causes, or demanding more than their due, although it only says that the party grieved shall have his action against such attorney, and recover therein costs and treble damages, yet if he take more than his fees extorsively, a penal information will lie against him on the statutes of Westminster against extortion. *Troy's case*, 1 Mod. 5.

Cap. 8.

1. When a writ of error is [*1339] brought on* a judgment had upon a bond to pay money, special bail ought to be given. *Anon.* 11 Mod. 2.; and *Bull v. Clifton*, lb. 260. n.

2. Error is no *superedeas* till bail put in. *Pitt v. Coney*, 11 Mod. 357.

3. It extends to the counties palatine and great sessions in Wales. 1 Saund. 74.

4. But not to a writ of error brought upon a judgment given for the avowant for rent in a replevin. Hob. 265.

5. Special bail must be put in by plaintiff in error of a judgment upon debt, or contract for the payment of money. 10 Mod. 281.

6. It extends only to cases where the judgment does necessarily import a debt to be due; for otherwise, delay is not so prejudicial. 10 Mod. 283.

Cap. 13.

1. This statute (of killing conies) relates only to warrens inclosed. *Rex v. Weston*, 10 Mod. 279.

2. The summary way of proceeding by conviction before justices was not given by this statute. *Id.* *ibid.*

Cap. 15.

This act extends to rich as well as poor tradesmen. *Hickman v. Celly*, Andr. 379.

7 Jac. 1.

Cap. 5.

1. The question upon this act, and the 21 Jac. 1. c. 12. was whether an officer, or any in their assistance, that shall do any thing by colour of, but not concerning their office, and be therefore impleaded, shall have the benefit of these acts; or if they are impleaded for any thing done by pretence of their office, and which is not strictly done by reason of their office, but is a misfeasance, whether they may have the like benefit; without this act the action ought to be laid where the fact was done, and the act is but to compel the doing of that where an officer is concerned, that otherwise *feri debuit*. *Stiles v. Cox*, Vaugh. 114.

2. The statute intends like benefit to all the defendants (where the fact is not proved to be done where the action is laid), as if the plaintiff became nonsuit, or suffered a discontinuance, viz. that they should have double costs. *Stiles v. Cox*, Vaugh. 117.

Cap. 15.

The baron may assign a debt due to the feme before coverture. Hob. 253.

21 Jac. 1.

Cap. 3.

This act limited the time for which a grant may be made of a new invention to fourteen years. *Mitchel v. Reynolds*, 10 Mod. 131.

Cap. 4.

This act does not extend to statute of 12th Anne of usury, or to any subsequent statutes. *French q. t. v. Cockran*, Andr. 25. 1 Saund. 312 b. *French q. t. v. Coxon*, Stra. 1061.

Cap. 13.

1. This statute (of jeofails) extends to inferior courts. *Phyler v. Boson*, 1 Show. 320.

2. The error of making time and place parcel of the issue is aided by this statute. *Cumber v. Wade*, 11 Mod. 343.

3. None of the statutes of jeofails extend to criminal proceedings, but by express words excludes them. *Rex v. Atkins*, 3 Mod. 8.

4. The want of *contra pacem* in trespass is aided. *Musgrave's case*, W. Jo. 172.

Cap. 16.

1. An action of assault and battery is limited to four years by this statute. *Blackmore v. Tidderly*, 11 Mod. 38.

2. This statute extends to *indebitatus assumpsit*, for though trespass only is mentioned, yet, when the scope of a statute appears to be in a general sense, the law will extend it to particular cases within the same reason. *Crosier v. Tomkinson*, 2 Mod. 73.

3. It could not be taken advantage of formerly, unless it was pleaded, but now it is otherwise. *Stafford v. Forcer*, 10 Mod. 313.

4. A bare acknowledgment of a debt will not amount to a new promise sufficient to prevent the operation of this statute; but, "I deny that I owe you any thing, prove it and I will pay you," held sufficient. 10 Mod. 314.

5. If this statute be pleaded to an *assump-*

sit brought by an executor on a promise to the testator, no new promise to* [*1340] the executor can avoid the plea. 10 Mod. 313, 314.

6. Actions of assumpsit are not mentioned in the saving clause. *Aubrey v. Fortescue*, 10 Mod. 206.

7. The saving clause is not to be extended by equity. 10 Mod. 206.

8. Held that the shutting up of the courts *tempore guerra*, would not avoid the statute. 10 Mod. 206.

9. It extends to bills of exchange. 1 Show. 341.

10. Does not extend to suits in the admiralty, or to the spiritual court. *Anon.* 11 Mod. 6.

11. Debt for an escape upon the statute 1 Rich. 2. c. 12., and debt for the arrears of rent reserved by indenture, and actions upon the statute 2 Edw. 6. c. 13. of tithes, &c., are not within this statute. 1 Saund. 38.

12. It is not a good plea where the estate in law is in trustees. *Lowry v. Lowry*, 9 Mod. 33.

13. The statute concerning tender of amends, extends only to actions of trespass, and not of replevin. Lutw. [679].

Cap. 17.

The statute of 21 Jac. 1. does not give a new jurisdiction to the assizes or sessions. *Garland q. t. v. Burton*, Stra. 1103.

Cap. 19.

By this statute no purchaser for valuable consideration shall be impeached, unless the commission be sued out within five years. *Roper v. Ratcliffe*, 9 Mod. 202.

12 Car. 2.

Cap. 4.

See *Shepherd v. Gernold*, Vaugh. 165.

Cap. 12.

The twenty-first section of this act extends to all counties. Andr. 314.

Cap. 13.

1. A bond which was good when it was made, will not be made void by this statute, by an usurious contract, for delaying the day of payment after the making of it. 1 Saund. 295.

2. But for such usurious contract the obligee shall forfeit the treble value by the later clause of the statute. Ib.

Cap. 17.

The statute of 12 Car. 2. c. 17., for confirming and restoring ministers, is a beneficial act; it does not extend to livings without the cure of souls. *Pryn v. Heath*, 1 Mod. 12. 1 Vent. 15.

Cap. 24.

1. The intent of this statute gave the privilege to the father to appoint the guardian of his heir, and the time of his wardship under one and twenty. *Bedell v. Constable*, Vaugh. 179.

2. Such a special guardian cannot transfer the custody by deed or will to any other; he

has no different estate from a guardian in socage, but for the time of the wardship. Id. ibid.

3. The father either by deed or will may appoint. 9 Mod. 140.

4. If the father does not appoint for how long time under one and twenty years his son shall be in ward, it is void for uncertainty. *Bedell v. Constable*, Vaugh. 185.

5. A guardian so appointed is within the prevention and controlling power of the court of Chancery. 9 Mod. 143. *notis.*

6. The father cannot by this act give the custody to a papist. *Bedell v. Constable*, Vaugh. 180.

Cap. 25.

1. A merchant importer is within this act. *Hopewell q. t. v. Chalix*, Andr. 392.

2. Selling wine by one dozen quart bottles is within this act. S. C. Andr. 393.

13 Car. 2.

Cap. 2.

After issue joined, and any judgment had, there shall not need to be fifteen days between the tests and the return of the writ. *Silk v. Hill*, 10 Mod. 82.

Cap. 12.

1. Any person becoming chargeable may be removed to the last parish where he was legally settled. *Reg. v. Doughton*, 10 Mod. 81.

2. But not to an extra-parochial place where there are no officers to receive him, nor to the parish where he lived before removing to the extra-parochial place, because not his last settlement. Id. ibid. See 2 Lev. 103. 142.

3.* Any poor person coming to settle on a tenement under [*1341] the value of 10l. *per annum*, is removable by two justices, within forty days after such coming. *Rex v. Beauleer*, 10 Mod. 431.

4. A tenement of 10l. *per annum* will entitle to a settlement where the house is, though part of the lands should lie in a different parish. 10 Mod. 389. See *Sydenham v. Lamerton*, 10 Mod. 390. *Rex v. Beauleer*, 10 Mod. 431.

16 Car. 2.

Cap. 3.

Smiths' forges shall pay hearth-money; so will empty houses. *Goff v. Loyd*, 1 Vent. 191, 192. 312. Poll. 207.

16 & 17 Car. 2.

Cap. 5.

1. Trial in a wrong county after verdict is aided by this act. *Chew v. Briggs*, Mod. 7.

2. It does not aid the death of either party before the assizes. *Falmouth v. Stroude*, 11 Mod. 136, 137.

3. If the venue be from the county where the action is laid, although the issue arises in another county, yet it is aided by this statute, as well as if the venue were from a

wrong place in the proper county. *Craft v. Boite*, 1 Saund. 247, 248.

22 and 23 Car. 2.

Cap. 5.

This statute extends not to trespass of goods. T. Raym. 487, 488.

Cap. 9.

1. Gives full costs if the judge certify a trespass to be voluntary and malicious. *Buller v. Cozens*, 11 Mod. 198.

2. So where the freehold may come into question, there shall be full costs. *Anderson v. Buckton*, 11 Mod. 303.

3. The statute does not extend to trespasses commenced in an inferior court. *Roop v. Scritch*, 4 Mod. 379.

4. Nor to trespass for entering the plaintiff's close and impounding his cattle. *Barnes v. Edgard*, 3 Mod. 40. Skin. 100.

Cap. 10.

1. This statute makes the next of kin legatees. *Bp. of Canterbury v. Willea*, 11 Mod. 145.

2. The husband may release his wife's share of an intestate's estate; but if it be not released by him, it is so much the wife's that she shall have it by survivorship. 10 Mod. 64.

3. A rule has obtained in equity, that the residuum of a testator's estate not disposed of by his wife shall be divided according to this statute. *Ld. Lonsdown's case*, 10 Mod. 99. See *Brunker v. Cook*, 11 Mod. 136. n.

Cap. 17.

Assessments shall be as well on tenements, occupiers of houses, shops, &c. as upon the owners where there are no tenants. *Rex v. Dobbins*, 11 Mod. 308.

Car. 25.

The statute extends to all warrens inclosed or not inclosed; for the words "though not inclosed," are not restrictive. *Rex v. Weston*, 10 Mod. 280.

29 Car. 2.

Cap. 3. (Of frauds and perjuries.)

1. A lease for three years, to commence *in futuro*, by parol, is void by statute of frauds. *Anon.* 12 Mod. 610.

2. By this act, all declarations or creations of trusts or confidences of any lands or tenements, or hereditaments, shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect; and where any conveyance shall be made of any lands or tenements by which a trust or confidence shall or may arise or result by the implication or construction of law, or be transferred or extinguished by an act or operation of law, then such trust or confidence shall be of the like force and effect as the same would have

been if this statute had not been made. 9 Mod. 73. 88. See *Buskel v. Burland*, 11 Mod. 197. 11 Mod. 203.

3. The signing of three witnesses at three several times, in the presence of the testator, is a good execution of a will within this statute. *Cook v. Parsons*, 10 Mod. 15. 259.

4. The seventh section of this act extends only to strangers, and not to parties* to the fine. *Ld. Altham v. [1342] Anglesa*, 11 Mod. 214.

5. It is not necessary that trusts relating to personal estates should be in writing. 10 Mod. 405.

6. The fifteenth section of this statute declares, that judgments as against purchasers *bona fide* for valuable considerations of lands to be charged thereby, shall in judgment of law be judgments only from the signing; and the eighteenth section declares, that no recognizance shall bind any land, &c. in behalf of purchasers *bona fide*, and for valuable consideration, but from the time of the inrolment. *Roger v. Radcliffe*, 9 Mod. 202, 203.

7. The time when any judgment is given must be marked on the roll. *Taylor v. Mathews*, 10 Mod. 325.

8. And though the judgment, by being entered into without continuances, may have relation to a preceding term, yet it shall not bind land, but from the day so marked. 10 Mod. 325.

9. If this statute be not insisted on, Chancery will compel the performance of an agreement, though not in writing. *Nab v. Nab*, 10 Mod. 404.

10. Where a promise is made to answer for the debt of another, &c. there must be a sufficient consideration, otherwise the promise will not bind, though in writing. 1 Saund. 211 a.

11. A promise by letter is a sufficient promise in writing within this statute. 2 Vent. 361.

12. If the statute be once satisfied by writing, a verbal acknowledgment will take the case out of the statute of limitations. 1 Saund. 211 a.

13. In the declaration it need not be said that the promise was in writing, but in a plea it is otherwise. 1 Saund. 211 b. n. [i]. 276 c.

14. The statute extends to promises to answer for the *torious* default of another. 1 Saund. 211 b. n. [i].

15. Neither before nor since the statute is the executor personally liable, (by a. 4.) without a sufficient consideration stated and proved. 1 Saund. 211.

16. It need not appear in the declaration that the promise was in writing; *secus*, in a plea. 1 Saund. 211. 276 c.

17. The consideration for the promise, as well as the promise itself, must be in writing. 1 Saund. 211.

18. Promise of marriage is not within the statute. *Stra.* 4.

19. Held not to extend to verbal promises made before the statute, though the action was not brought till after the time limited by the statute. 2 *Lev.* 227. 1 *Vent.* 330.

20. The purchase of an interest is not within the statute. 1 *Saund.* 211 c. n. [i.]

21. The statute does not extend to trusts raised by operation of law. 2 *Vent.* 361.

22. The promise, if within the statute, must be declared on in a special *assumpsit*. 1 *Saund.* 211 b.

30 *Car.* 2.

Cap. 2.

Where a man commits a capital crime in Ireland, he may be sent hither to be tried thereupon, notwithstanding that by this act no subject of this realm shall be sent prisoner to foreign parts. 2 *Vent.* 314.

Cap. 7.

This act does not include an executor *de son tort* of an executor *de son tort*. *Andr.* 252.

31 *Car.* 2.

Cap. 2. (*Habes Corpus Act.*)

1. Persons committed by warrant for treason or felony are to be bailed, if not indicted the next term or sessions after their commitment, provided they enter their prayer the first week of the term, or first day of the sessions, to be brought to trial. *Rex v. Leonard*, 10 *Mod.* 429.

2. Such persons as stand committed by rule of court, are not entitled to claim the benefit of this act. 10 *Mod.* 429.

1 *Jac.* 2.

Cap. 17.

1. Notice in writing of coming to live in a parish is necessary to a settlement. *St. Mary v. St. Lawrence*, 10 *Mod.* 14.

2. But payment of taxes, or exercising offices upon the equity of the act, [*1343] judged equivalent* to notice in writing. *Id.* *ibid.*

1 *Will. and Mary.*

Cap. 4.

That statute (which saves time of limitation,) does not alter the form of pleading, but that shall be as it was before. 2 *Vent.* 185. 197.

Cap. 8.

Whether the statute 1 *W. & M.* c. 8., which requires the oath of allegiance to be taken within six months after promotion to an office or benefice, shall be construed to mean lunar or calendar months, see *Barton v. Woodward*, 4 *Mod.* 95.

Cap. 21.

See *Rex v. Lloyd*, and *Rex v. Evans*, 11 *Mod.* 80. n. *Ib.* 82. n.

Cap. 26.

1. The record of the default is a conviction of itself. *Vavasor v. Crofts*, 10 *Mod.* 209.

2. So that in pleading a conviction upon this statute, the special conclusion of *ideo convictus est* need not be used. *Id.* *ibid.*

2 *Will. and Mary, Seas.* 1.

Cap. 5.

1. Goods distrained for rent may be sold after notice left of the distress, with the cause thereof. *Potter v. Pinkney*, 10 *Mod.* 265, 266.

2. Notice to the lessee is sufficient, for the owner of the goods may not be known. 10 *Mod.* 266.

3. By this statute, distress is a satisfaction as to rent, but as to trespass it is only a gage. *Jasper v. Eadower*, 11 *Mod.* 22.

Cap. 8.

All open streets, lanes, &c., shall be repaired, &c., at the costs of the householders, inhabitants, in such streets, &c., and if occupied, by the owners and proprietors. *Rex v. Dibbins*, 11 *Mod.* 317.

3 & 4 *Will. and Mary.*

Cap. 10.

1. The conviction may be taken either by the justices of the county where the fact is committed, or of that where the party is apprehended. *Reg. v. Simpson*, 10 *Mod.* 342. See also *id.* 245.

2. No particular form of proceeding is prescribed, only that the conviction be by oath of one credible witness. *S. C.* 10 *Mod.* 249. 378.

3. The party should be summoned. 10 *Mod.* 250.

4. If the party do not appear upon summons, the justice may proceed to conviction in his absence; but a justice has no power to issue his warrant to compel the appearance of the party. 10 *Mod.* 345. 350. 381.

5. After conviction, the constable or other officer or prosecutor himself has power to detain the offender (in case he be present) for fear of escape. 10 *Mod.* 342.

6. The judgment of the justices is final. *Ibid.*

Cap. 11. (*Poor.*)

1. Of the design of the statute, see *St. Mary, Reading v. St. Lawrence*, 10 *Mod.* 14, 15.

2. A settlement is gained by executing any public annual office or by payment of taxes; but payment of a scavenger's rate adjudged no settlement, though executing the office of a scavenger would have been a settlement. 10 *Mod.* 11. 14, 15.

3. The warden of a borough is entitled to a settlement in the parish where he lives during the exercise of his office, though not chosen by the parish. 10 *Mod.* 13.

4. Hiring for a year, and service accord-

ingly, make a settlement; and though a person hired for a year should not serve out the whole time, yet if he has served as long before such hiring as to make up a year's service in the whole, it has been adjudged sufficient to satisfy the meaning as well as the words of the act. 10 Mod. 15. *South Sydenham v. Lamerton*, 10 Mod. 390.

5. A person not having a child or children, may gain a settlement by service without notice. *Rez v. Burclear*, 11 Mod. 292. Id. 35.

Cap. 14.

1. In debt upon bond, the heir may plead *riens per descent*; and if it be [*1344] found* for the plaintiff, the jury shall then enquire of the value of the lands descended. *Jefferey v. Barrow*, 10 Mod. 18.

2. The end designed by the act was to help the creditor in case of alienation. 10 Mod. 19.

3. And also the heir, by enabling him to plead *riens per descent*, without the risk of becoming liable to the payment of the whole debt, in case ever so little was found to descend. *Ibid*.

4 Will. and Mary.

Cap. 1.

Tenants shall pay the land-tax and deduct it out of their rent. *Hopwood v. Barefoot*, 11 Mod. 240.

5 & 6 Will. and Mary.

Cap. 11. (Certiorari.)

1. This act designed to discountenance the removing of suits by *certiorari*. *Reg. v. Muscott*, 10 Mod. 194.

2. If an indictment be removed by *certiorari* from the sessions into B. R., the prosecutor shall have costs upon the conviction of the defendant. 10 Mod. 193.

3. Notwithstanding which, the prosecutor shall be allowed to be an evidence, because otherwise the removing of suits would be encouraged, and the intention of the act defeated. 10 Mod. 194.

4. *Certioraries*, relating to the high-ways, are taken away by 5 & 6 W. & M., though to remove orders made on a subsequent law. *Rez v. Inhabitants of Eckershall*, Stra. 944.

Cap. 17.

Debt lies against a sheriff for the reward given by this act on conviction of clippers and coiners. *Bignot v. Rogers*, 12 Mod. 310. Holt, 644. S. C.

Cap. 22.

1. One may let coach-horses and coachman without license on 5 & 6 W. & M. c. 22. Salk. 612.

2. It is usual with the commissioners of hackney coaches to convict upon this act without appearance after a summons. *Reg. v. Simpson*, 10 Mod. 344.

7 Will. 3.

Cap. 3.

This act allows counsel in cases of high treason. *Rez v. Griffin*, 11 Mod. 168.

7 & 8 Will. 3.

Cap. 6.

No proceedings or judgment had by virtue of this act, shall be removed, &c., unless the title of the tithes come in question. *Rez v. Furness*, 11 Mod. 390.

Cap. 7.

The statute 7 & 8 W. 3. c. 7., giving an action for a false return of members of parliament, is a remedial act. *Myddleton v. Wynn*, bart (in error). Willes, 599.

8 & 9 Will. 3.

Cap. 11.

1. The judge is bound under this statute, to certify that a trespass was wilful and malicious, in order to entitle the plaintiff to his full costs. *Buller v. Cozens*, 11 Mod. 198.

2. A suggestion must be made on the roll of the death of one of the parties, to have advantage of this act. Andr. 58.

3. The statute respecting costs on a *scire facias* does not extend to executors or administrators. *Adams v. Savage*, 6 Mod. 137.

4. Nor to writs tested before. 1 Ld. Raym. 383.

Cap. 27.

1. This gives an action of escape against the marshal of the King's Bench or the warden of the Fleet, if they or their deputies refuse to produce a prisoner after a day's notice. *Parks v. Crawford*, 10 Mod. 394.

2. If no particular time of day be specified in the notice, the prisoner need not be produced till the close of the evening. S. C. 10 Mod. 396, 397.

3. Inferior officers of the prison are not comprehended under the word deputy. *Ibid*.

Cap. 32.

A contract to transfer stock upon request, is not within this statute. 1 Ld. Raym. 673.

9* & 10 Will. 3.

Cap. 11. (Poor.) [*1345]

1. See the reason of making the act, *Rez v. Beauclear*, 10 Mod. 430, 431.

2. A certificate person shall not by any act whatsoever gain a settlement, unless he takes a lease of a tenement worth 10l. per annum, or execute an annual office. *Rez v. Bureclear*, 11 Mod. 292. 10 Mod. 430. S. C.

3. Held, notwithstanding, that a certificate man was settled by the descent of a copyhold upon his wife, though but 20s. per annum. 10 Mod. 430.

Cap. 15. (Arbitration.)

1. Submission to arbitration may be made a rule of court, if the parties agree to have it so. *Clarke v. Elwick*, 10 Mod. 332.

2. An affidavit should be made by a witness to the arbitration bond, that such agreement was inserted in the condition of it. *Ibid*.

3. If a witness refuses to make the affidavit, the court will compel him to it, rather than the statute should be eluded. *Ibid*.

4. The party may at pleasure resort to this new remedy given by the statute, even

after judgment recovered upon the arbitration bond. *Id. ibid.*

Cap. 41.

It is not the having the stores in his custody, but their being found in his custody, that is the offence created by 9 & 10 Will. 3. c. 41. against embezzling stores. 2 *Ld. Raym.* 1105.

10 Will. 3.

Cap. 2.

1. Debt lies on this statute for making buttons of wood. *Salk.* 612.

2. Buttons made of wood (all but the shank,) are wooden buttons within the statute 10 & 11 Will. 3. c. 2. 2 *Ld. Raym.* 1276.

11 & 12 Will. 3.

Cap. 4. (*Papists.*)

1. This act disables papists (not conforming at eighteen,) to take lands either by descent or purchase. 10 *Mod.* 89, 90. 482.

2. Devise of lands to a papist, is a purchase within the meaning of this act. *Roper v. Radcliffe*, 9 *Mod.* 167. 10 *Mod.* 95. 234. 242. 483. 537.

3. The surplus of lands devised to be sold for payment of debts and legacies, is a real interest within this act, and so are all profits out of lands arising from sale, as well as continuing profits. *S. C.* 10 *Mod.* 93. 96. 483. 537.

4. So that papists are disabled by this act from charging their lands with portions for younger children of their own persuasion. *S. C.* 10 *Mod.* 91. 94.

5. A papist being tenant in tail suffered a common recovery, and declared the uses to himself and his heirs; this is not a purchase within this statute, for it is no new acquisition but a modification of the family estate. *Lord Derwentwater's case*, 9 *Mod.* 172.

13 Will. 3.

Cap. 10.

No member of the house of commons shall be capable of holding any office or employment in the customs. *Selwyn v. Honeywood*, 9 *Mod.* 422.

1 Anne.

Cap. 6.

If a prisoner escape from a commitment under an order of Chancery for hindering the execution of a decree, he cannot be retaken on an escape warrant under this statute. *Paine's case*, 11 *Mod.* 279.

Cap. 8.

1. Original writs not to abate upon the demise of the crown. *Reg. v. Aves*, 10 *Mod.* 258.

2. It extends to a *scire facias* brought for the repeal of a patent. *S. C.* 10 *Mod.* 355.

Sess. 1. Cap. 18.

1. Where it is doubtful who ought to repair, it is proper to be found by inquest. *Res v. Inhabitants of Middlesex*, *Andr.* 285.

2 It is necessary to be presented that a

bridge is out of repair, but not by whom to be repaired. *Id. ibid.*

2 Anne.

Cap. 16.

A prisoner discharged on this statute, and afterwards arrested for a debt of above* 100*l.* due before the dis- [*1346] charge, must find special bail. *Cragger v. Glover*, 11 *Mod.* 36.

3 & 4 Anne.

Cap. 9.

1. Promissory notes payable to A or order, are transferable by indorsement. *Jesselyn v. L'Acier*, 10 *Mod.* 316.

2. The indorsee may maintain an action as A might have done before indorsement. 10 *Mod.* 316. See also *Thorold v. Smith*, 11 *Mod.* 72.

4 Anne.

Cap. 16.

1. This act (for the amendment of the law) enables the defendant in debt upon bond to plead payment, or to bring the money into court, but not to plead tender, refusal, *et uncore prius*. *Player v. Bandy*, 10 *Mod.* 26.

2. Money paid after the day may be pleaded in bar as well as at the day, provided it was paid before the action brought. *Winchester's case*, 9 *Mod.* 471.

3. Such faults in form as would be cured by verdict, are helped upon a general demurrer. *Cole v. Hawkins*, 10 *Mod.* 252.

4. A plea in abatement for a misnomer in the place of residence in an indictment, must be verified according to this act; but the seventh section does not extend to the eleventh. *Res v. Grainger*, 11 *Mod.* 218. n.

5. The defendant in any action, with leave of court, may plead several pleas. *Haiton v. Jeffries*, 10 *Mod.* 280.

6. But the court may not give him leave to plead and demur. 10 *Mod.* 280, 281.

7. A writ of error shall not abate by the death of one of the plaintiffs in error. 10 *Mod.* 326.

8. Bail-bonds are made assignable under the hand and seal of the sheriff. *Kilton v. Fagg*, 10 *Mod.* 289.

9. All suits and actions in the court of Admiralty for seamen's wages, shall be commenced within six years, except in certain specified cases. 11 *Mod.* 44. n.

Cap. 17.

1. This act discharged bankrupts upon their conforming themselves to the statutes in that case provided, from all debts owing at the time of the bankruptcy. *Miles v. Williams*, 10 *Mod.* 160. See *ib.* 243.

2. Bankrupts obliged to make a discovery of their estates upon oath, under the pain of felony. 10 *Mod.* 164. 246.

5 Anne.

Cap. 14.

1. The offence in this statute is the keeping of dogs, engines, &c. 10 *Mod.* 27.

2. The bare having of these things is not

punishable unless used for killing game, but the party sued must prove he used them for other purposes. *Rex v. Gardiner*, Andr. 256, 257.

3. A person authorized by a lord of a manor to kill game for his use, is a qualification within this statute. *Reg. v. Mathews*, 10 Mod. 26.

4. A conviction "for unlawfully keeping a gun, being an engine for destroying game, contrary to the statute," without saying that it was used for that purpose, is ill. *Rex v. Gardiner*, Andr. 255.

5. So, where one is sued for keeping any of the things mentioned in the act, it must be averred to be for destroying game. *S. C. Andr.* 256.

6. But one 5l. can be forfeited in the same name. 10 Mod. 27.

7 Anne.

Cap. 12.

1. This act declared the proceedings against the Muscovite ambassador upon an arrest for debt null and void. 10 Mod. 5.

2. It settles the privileges of ambassadors in respect of debt. 10 Mod. 5.

8 Anne.

Cap. 14. (Rent.)

1. Where land is let for a year, and afterwards at will, for a less rent than before, and both rents are payable half yearly, and at the end of the first half year under the last demise an execution comes, the landlord is entitled only to the two last half years' rent. *Cook v. Cook*, Andr. 217.

2. Where land is let for a year, and then part thereof at will, and an execution comes, the landlord is not entitled to any part of the first year's rent. *Id. ibid.*

3.* If landlord does not show [*1347] a full case entitling himself to rent, he is not relievable by motion but by action only. *Id. ibid.*

Cap. 18. (Assise of bread.)

1. A conviction upon this statute was quashed for want of certainty in the charge. *Rex v. Bradley*, 10 Mod. 155.

2. Another conviction was also quashed, by reason the evidence was not otherwise set forth than that the witness was sworn *de veritate premissorum*. *Reg. v. Green*, 10 Mod. 213.

9 Anne.

Cap. 14.

Where money is lost by gaming, and no security given, an action lies for the money lost, and the same cannot be recovered back. *Turner v. Warren*, Andr. 70, 71.

Cap. 20.

1. This act speeds the proceedings upon mandamuses, but does not give any new mandamus in cases where none would lie before. *Reg. v. Healcote*, 10 Mod. 54.

2. The return to a mandamus is to be kept to the same strictness as before. *Reg. v. Mayor of Pomfret*, 10 Mod. 108.

11 & 12 Anne.

Cap. 9.

A purchaser of a ticket under this act who neglects to comply with its directions, cannot on his losing such ticket be relieved in equity against a *bona fide* holder of it, who as a *bona fide* holder complied with the directions of this act. *Devallar v. Herring*, 9 Mod. 45.

12 Anne.

Cap. 16. (Against usury.)

This act gives a moiety of the forfeiture to him who will sue "by action of debt, bill, plaint, or information," and therefore an indictment will not lie, because that mode of proceeding is not mentioned in the statute. *Rex v. Dye*, 11 Mod. 174. n.

Cap. 18.

1. Enacts, "that if any person whatsoever shall be an apprentice bound by indenture to any certificated person, and not afterwards having gained a legal settlement in the parish, such apprentice, by virtue of such apprenticeship, shall not gain or be adjudged to have any settlement in such parish by reason of such apprenticeship; but every such apprentice shall have his settlement in such parish as if he had not been bound apprentice to such person as aforesaid." 11 Mod. 205. n.

2. If the master be a certificate man, the servant can gain no settlement unless his master does. *Rex v. Bury-Pomroi*, 10 Mod. 279.

1 Geo. 1.

Cap. 48.

Cutting down trees held not punishable, unless done in the night. *Rex v. Pratt*, 11 Mod. 402.

Cap. 56.

Members of the house of commons are incapacitated from enjoying pensions from the crown. *Schwyn v. Honeywood*, 9 Mod. 422.

Cap. 57.

1. A coach let for hire for a day, though not used to ply in the streets, is within this act. Andr. 80.

2. This act extends to funeral coaches only. *Tedloe v. Dickenson*, Andr. 80.

5 Geo. 1.

Cap. 12.

A conviction on the evidence only of the person seizing is insufficient. *Rex v. Pierry*, Andr. 18.

Cap. 13.

Where an original is returnable the same time of which the placita are entered, this (if erroneous) is cured by this act. *Phillips v. Phillips*, Andr. 248.

Cap. 28.

Where a director is a lessee, his covenant for payment of rent is not discharged hereby. *Horaby v. Houlditch, Executrix of Houlditch*, Andr. 40.

9 Geo. 1.

Cap. 7.

No person whatever who shall be taxed to the scavenger's rate, and shall pay the same, shall be deemed to have a settlement by paying such rate. *Saint Mary v. Saint Lawrence, Reading*, 10 Mod. 15. *notis.*

[*1348]

11 Geo. 1.

Cap. 18.

By this act, a freeman of the city of London may give, devise, will, and dispose of his personal estate to such person, and to such use as he shall think fit, by custom or usage of or in the said city, or any bye-law or ordinance made or observed within the same, to the contrary notwithstanding; provided, nevertheless, he may agree by any writing under his hand, upon or in consideration of his marriage, or otherwise, that his personal estate shall be subject to or be distributed according to the custom; and if such freeman shall die intestate, the personal estate of such person so making such agreement, or so dying intestate, shall be subject to, or distributable according to the custom of the city. 9 Mod. 58, in *notis.*

2 Geo. 2.

Cap. 23.

1. Where a *laetitia* goes to the bishop of Durham for a mandate, and the *laetitia* is subscribed by an attorney of the K. B., it is sufficient within this act. *Chapman v. Mattison*, Andr. 196.

2. This act extends not to mandates. *Id. ibid.*

3. In the case of an executor of an attorney, the attorney's bills are not within this act. *Willis v. Nicholson*, Andr. 276.

Cap. 24.

This act extends not only to candidates, and persons employed by them, but to all others. *Phillips v. Phillips*, Andr. 248.

Cap. 28.

1. A general license is sufficient. *Rex v. Bryon*, Andr. 81.

2. Whether a person acting under a license not duly granted incurs the penalty of the act, see *Id. ibid.*

3 Geo. 2.

Cap. 25.

By requiring the sheriff to return the jury out of the county, it repeals the 4 & 5 Ann. c. 16. for a trial by the neighbourhood in penal actions, and in this case the *venire* must be *de comitatu*. *French v. Willshire*, Andr. 99.

Cap. 26.

Where A, a lighterman, gives a note to B, a master of a ship, employed in bringing coals to London, and B indorses it to C towards payment of goods bought of him, and afterwards (A proving insolvent without payment of the note) C brings an action against B for the goods, this is a case not within the act, which extends only to con-

tractors for coals, and to actions brought on notes. *Smith v. Wilson*, Andr. 187.

Cap. 23.

1. A justice of the peace may convict a person for selling gin without entry in a warehouse, and without license. *Rex v. Bryan*, Andr. 289.

2. And it is not necessary to show in the conviction that defendant is not exempted. *Id. ibid.*

Cap. 35.

This act must be taken advantage of, not by motion, but by pleading, or suggestion on record. Andr. 274.

10 Geo. 2.

Cap. 26.

Enacts "that no drama or other entertainment of the stage can be acted until a true copy thereof has, under a penalty of 50l, been previously sent to the Lord Chamberlain, who may prohibit the performance, and such penalty may be recovered in a summary way, &c." 11 Mod. 142.

11 Geo. 2.

Cap. 19.

1. Where any tenant for life shall happen to die before or on the day on which any rent was reserved or made payable upon any demise or lease of any lands, tenements, or hereditaments which determined on the death of such tenant for life, the executors or administrators of such tenant for life shall recover in an action on the case of and from such under-tenant or under-tenants of such lands, tenements, or hereditaments, if such tenant for life die on the day on which the same was made payable, the whole, or if before such day, then a proportion of such rent according to the time such tenant for life lived of the last year or quarter of a year, or other time in which the said* rent was growing due as afore- [*1349] said. 9 Mod. 22.

2. If tenant in tail make a lease, and die without issue before the rent becomes due, the rent in arrear at the time of his death shall be apportioned between the personal representative of the tenant in tail and the remainder man in fee. *Pagget v. Gee*, 9 Mod. 483.

14 Geo. 2.

Cap. 17.

If a plaintiff do not go to trial according to the practice of the court, the defendant may have judgment as in case of a nonsuit. *Rice v. Wilmer*, 11 Mod. 237.

17 Geo. 2.

Cap. 38.

By s. 4. any person aggrieved by any rate made for the relief of the poor, or who shall have any material objection to any person being put on or left out of such rate, or to the sum charged on any person, shall and may give reasonable notice of appeal to the next general or quarter sessions. 11 Mod. 259. n.

18 Geo. 2.

Cap. 15.

This act dissolved the company of barber surgeons, and made the two trades in London separate and distinct corporations. *Reg. v. Standish*, 11 Mod. 110. n.

19 Geo. 2.

Cap. 37.

By s. 7. "any person sued in an action of debt covenant or any other action on any police of insurance, may bring into court any sum or sums of money; and if the plaintiff shall refuse to accept it with costs taxed in full discharge, and the jury shall not assess above the sum, the plaintiff shall pay the costs." 11 Mod. 270.

20 Geo. 2.

Cap. 19.

1. This act empowers justices in certain cases to examine a servant upon oath, and to make an order thereon for the payment of wages. *Reg. v. Cecil*, 11 Mod. 267.

2. It extends the power of justices to examine servants on oath in certain cases to all servants in husbandry, though hired for less time than a year. *Id. ibid.*

22 Geo. 2.

Cap. 25.

By this act "no person shall ransom or enter into any contract or agreement for ransoming any ship or vessel, or any merchandize or goods on board the same, which shall be captured by the enemy; and all contracts and agreements entered into, and all bills, notes, and other securities given for such purposes, are void, and the offender liable to a penalty of 500*l.*" 11 Mod. 6. n.

31 Geo. 2.

Cap. 11.

By this act "no person who shall be bound apprentice by any deed, writing or contract not indented, being first legally stamped, shall be liable to be removed from the place in which he is so bound, and has been resident forty days, by reason of such deed, writing, or contract not being indented only." 11 Mod. 205. n.

34 Geo. 3.

Cap. 61.

It enacts that "no master baker, journeyman baker, or other person carrying on the business of a baker, in London, or within twelve miles of the said city, shall, on any pretence whatever make, bake, or expose to sale any bread or rolls of any sort or kind, or bake any meat, puddings, pies, or tarts, or in any other manner exercise the trade or calling of a baker on the Lord's day, or any part thereof, except the selling of bread or baking of meat, pudding, or pies only on the Lord's day, between the hours of nine in the forenoon and one in the afternoon." 11 Mod. 114. n.

STATUTE-MERCHANT,* [*1350 | &c.

I. OF THE NATURE OF A STATUTE-MERCHANT, STATUTE-STAPLE, AND RECOGNIZANCE IN THE NATURE OF A STATUTE-STAPLE, p. 1350.

II. WHEN DEBT LIES, p. 1350.

III. EXECUTION, p. 1350.

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V. RESTITUTION, p. 1351.

I. OF THE NATURE OF A STATUTE-MERCHANT, STATUTE-STAPLE, AND RECOGNIZANCE IN THE NATURE OF A STATUTE-STAPLE.

1. A statute-merchant must be sealed with two pieces; otherwise it is not good. *Byres v. Byron*, Cro. Eliz. 472.

2. A statute-merchant is void for not expressing therein the day of payment. *Matthew v. Davies*, W. Jo. 1. 52, 53.

3. But it seems if no day of payment is expressed, it is payable immediately. *J. Bridg*. 20.

4. A statute without a defeasance is good if money can be proved to be paid. *Middleton v. Shelly*, 1 Lev. 197.

5. By statute 27 Eliz., the whole tenor and contents must be entered within six months in the office of the clerk of the recognizances. 2 Saund. 70.

6. A statute-staple is confined to those of the staple by statute 23 H. 6. *Ibid.*

7. A recognizance taken before the chief justice of the Common Pleas in the nature of a statute-staple arose out of statute 23 H. 6. 2 Saund. 70. Vaugh. 102.

8. It may be used by all persons. 2 Saund. 70.

9. It is not within the statute 27 Eliz., but by statute 8 G. 1. shall be entered with the clerk of the recognizance. 2 Saund. 70 a.

II. WHEN DEBT LIES.

1. Though the statute be void for want of form, yet if it have the seal of the consor, the conseree may sue on it as a bond. 2 Saund. 69 b. *Fulham v. Asens*, Cro. El. 319.

2. Upon a statute-merchant which wants the smaller seal, debt cannot be brought, unless the delivery of it as his deed can be proved. Mo. 405.

3. In debt upon a statute-staple, it must be averred that one of the parties was a merchant at the time of the debt contracted. 2 Ld. Raym. 819.

III. EXECUTION.

1. Execution under stat. 2 & 13 Ed. 1. may be taken out any time, either by consor or his executor, without a *sci. fa.* 2 Saund. 70 b.

2. A rent-charge is extendible, though the statute speak only of lands and goods. Mo. 32.

3. A reversion after an estate for life is extendible. Mo. 36.

4. If the conusor release a rent which he has, yet the conusee may extend it. *Winchcombe v. Pulleton*, Hob. 165.

5. Execution of it may be sued against body, lands, and goods, all at once by one writ, or severally one after another. *Foster v. Jackson*, Hob. 60. 2 Saund. 70 b.

6. If conusor be taken, and sheriff suffer him to escape, either goods or lands are liable. 1 And. 266.

7. But if the conusor's body be taken, and let at large by the assent of the conusee, the land is thereby discharged. *Linacer's case*, 1 Leon. 230, 231.

8. The conusee can have no advantage of the 32 H. 3. c. 5., but where he is put without remedy to obtain any part of his debt; and if he has remedy either in *presenti* for part, or in *future* for all or part, the act does not extend to it. *Fulwood's case*, 4 Co. 64 b.

9. Lands descended to an infant are not extendible *durante minori etate*. Mo. 37.

10. But though a statute is not extendible against an infant, yet equity may therein relieve against him. *Middleton v. Shelly*, 1 Lev. 198.

11. If a conusee has execution of four houses, and the execution would endure for thirteen years, and afterwards two of the said houses are evicted by *elegit* for fifteen years, such conusee may assign over his interest in the two houses so evicted; and if the conusee is* ousted by wrong [*1351] by the conusor, or any other who has the immediate estate, the conusee shall hold over. *Fulwood's case*, 4 Co. 64 b.

12. If a man marry an inheritrix and have issue, and then acknowledge a statute, and they sell the land by fine, the land shall not be charged, for the conusee is in by the fine. *The Serjeant's case*, 3 Leon. 254.

13. The extent of the statute changes not the possession till *liberate* executed. *Grobham v. Thornborough*, Hob. 82. 2 Saund. 70 b.

14. Under this writ, the sheriff gives only legal possession; the conusee must get actual possession by an ejectment. 2 Saund. 70 b.

15. Though the *liberate* be not returned, yet the execution is well made; but when inquisition is to be taken, there the writ ought to be returned. *Fulwood's case*, 4 Co. 64 b.

16. An extent upon a *puise* statute, where extended after a prior statute, is in the nature of a reversional interest. *Dighton v. Greenoil*, 2 Vent. 328. See Cro. Jac. 424.

17. If the conusee purchase part, all the other lands in the hands of the other feoffees are discharged. *Sir W. Fleetwood's case*, Hob. 46.

18. When a former statute is determined, whether it be by release of the debt, by pur-

chase of part of the lands, by being barred by non-claim upon a fine, satisfaction acknowledged, or any other means, this lets in the *puise* statute. *Dighton v. Greenoil*, 2 Vent. 332.

19. An extent begins by record, but it may end without record; for a lease by the conusee after extent determines it, and he that has a *puise* statute may enter. S. C. 2 Vent. 336.

20. Upon an extent of the lands of the conusor of a statute-merchant, they shall be delivered to the extenders if they extend them too high. Plow. 82.

21. The conusee may waive the execution given on the recognizance by 27 Ed. 3., and treat it as a bond. 2 Saund. 70 a.

IV. INCIDENTS.

1. A statute cannot at law be assigned before extent. *Anon.* 2 Vent. 362.

2. The conusee of a statute can release it, notwithstanding an assignment. 2 Ro. 399.

3. Release to conusor of a statute of all right in the land is no bar. *Milton v. By*, J. Bridg. 124.

4. A was bound in a statute of 20l. to B, B sued execution, and the land of A was delivered to B in execution until he had levied the 20l., and afterwards B made a defeasance to A by indenture that if, &c., the statute should be void; and held that the defeasance is sufficient to defeat the statute, and the execution upon it. *Case of Pardons*, 6 Co. 13 a.

5. An estate by statute-merchant or staple cannot be barred by a recovery. 2 Saund. 42 d.

6. A tenant by statute-merchant or staple is not liable for waste. 2 Saund. 252. n. [a].

7. If the conusor sow the land, the conusee shall reap. *Bardens and Withington's case*, 2 Leon. 54.

V. RESTITUTION.

1. When the execution upon a statute-staple by *liberate* is satisfied by effluxion of time, the conusor cannot enter without a *scire facias*; otherwise in *elegit*. *Fulwood's case*, 4 Co. 64 b.

2. No ejectment lies though conusee has levied his debt. 2 Saund. 72 m.

STEALING.

I. WHAT STEALING IS FELONY, p. 1351.

II. INDICTMENT FOR STEALING, p. 1352.

III. REMEDY TO RECOVER GOODS STOLEN, p. 1353.

I. WHAT STEALING IS FELONY.

1. If goods are delivered to a porter or carrier, and stolen by him, it is felony. J. Kely. 35. 82, 83.

2. So, though taken by colour of law, yet it is felony. *Rez v. Gardiner*, J. Kely. 47.

3. Goods taken by a lodger that hires them, is at common law neither [*1352] felony nor trespass. J. Kely. 24. Vide Ib. 81 to 85, *contra*.

II. INDICTMENT FOR STEALING.

1. An indictment *quod cepit quosdam pisces* of JS, called carp fishes, is good, though without any mark of value. 1 Lev. 203.

2. Goods of the employer may be laid to be the goods of the carrier. *Rex v. Trollop*, J. Kely. 39.

3. An indictment lies for stealing the goods of a person unknown. 8 Mod. 248. See also *Anon.* 8 Mod. 165.

4. An indictment *eo quod L et L felonice duas centenas casei cepit et asportaverunt*, was quashed, because *centenas* is uncertain, and because *cepit* was in the singular number. Cro. Eliz. 754.

5. On not guilty pleaded to an indictment, a property must be proved in somebody. *Anon.* 8 Mod. 248.

III. REMEDY TO RECOVER GOODS STOLEN.

1. The property is not altered by the completion in market-overt of a contract made out of it, with election of after refusal in the vendee. 1 Dy. 99. pl. 66.

2. By stat. 21 H. 8, stolen goods, though sold in market-overt, are to be restored to the owner prosecuting to conviction. 2 Saund. 47 c.

3. The statute is confined to felonies, and therefore the purchaser of goods obtained by false pretences may bring trover against the owner for them after conviction. 2 Saund. 47 c. n. [i].

4. The owner of goods stolen cannot recover before conviction. 2 Saund. 47 c.

5. A ferryman, or common innkeeper, or carrier, is liable, though the goods be stolen; otherwise, of a factor. *Southcote's case*, 4 Co. 84.

STEWARD.

1. A steward having a reputed authority, may do things of necessity, as admittances or presentments of nuisances; but not acts voluntary, as grants, or if he diminish the ancient rents. Cro. Eliz. 699.

2. The steward of a court leet (except a steward by patent) cannot hold a court without directions from the lord. Comb. 265.

3. The steward of a court leet cannot impose a fine on a person who is not in court, but may have him amerced. *Fletcher v. Ingram*, 5 Mod. 130.

4. Steward of a manor cannot make a deputy without special words in his patent so to do. 3 Salk. 124.

5. The stewardship of a manor may be granted in reversion. 3 Salk. 125.

6. A steward of the king's manor appointed by the auditor or surveyor is not good,

for they have no such authority. Cro. Eliz. 699.

7. An attachment lies against the steward of an inferior court for discharging a jury before they have given a verdict. *Wright v. Crump*, 7 Mod. 2.

STRIKING.

1. Striking in Westminster Hall *sedentibus curiis*, is punishable with loss of right hand, perpetual imprisonment, and forfeiture of lands and goods. 2 Dy. 188. pl. 10. *Oldfield v. Gerling*, 12 Co. 71.

2. For striking in a court-leet *sedente curia*, the steward may impose a fine. 2 Dy. 233. pl. 14.

3. An indictment without conviction or outlawry, is not sufficient to subject one who strikes in a churchyard to the corporeal punishment directed by 5 & 6 Edw. 6. c. 4; and whether without sentence he stand *ipso facto* excommunicated, *quære*. 3 Dy. 275. pl. 48.

STOCK.

1. Stock in the public funds is not goods and chattels, but a *chose in action*. 1 Saund. 210 a. n. [a].

2. If a person has 1800*l.* stock in the funds, and devises 1000*l.* of it, and afterwards sells 1600*l.*, and then buys 1400*l.*, and between the making of the will and the testator's death the legislature changes that kind of stock into annuities,* these circumstances make no alteration [*1353] in the legacy. *Partridge v. Partridge*, 9 Mod. 269.

3. A having purchased stock for 750*l.*, entrusts B, her broker, with the orders and minutes; B gets another to personate A, and sells the stock to C for 994*l.*, and having transferred it, leaves the kingdom; A hearing of the fraud, forbids C to part with the stock; but C, notwithstanding, sells it to D, for 1090*l.*, and D sells it to E for 1100*l.*, A brought trover against C and recovered 750*l.* damages. *Monk v. Graham*, 8 Mod. 9.

4. Stock must be transferred, or tendered to be transferred, before the other party is obliged to part with his money. *Lock v. Wright*, 8 Mod. 42.

5. In *assumpsit* for not transferring stock, the declaration must be special. 1 Saund. 269 b. n. [c].

6. In a contract for stock, it must appear by the register itself to whose use the contract was made. *Rogers v. Wilson*, Com. 365.

7. *Nil debet* is not pleadable to debt on articles for not paying for stock. *Stra.* 778.

SUBJECT.

A bastard born of English parents, though

beyond sea, if under the dominion of the crown, is a liege subject of England. *Anon.* 2 Dy. 224. pl. 29.

SUBSIDIES.

[See post, tit. TAXES.]

SUMMONS.

1. The sessions cannot exercise their authority between masters and servants, unless the party complained of be summoned to appear. *Watkins v. Edwards*, 1 Mod. 287.

2. If the defendant be not summoned, it is a misbehaviour in the justices, for which an information lies. *Rex v. Venables*, 8 Mod. 378.

3. A summons must be issued before granting a warrant of apprehension for non-payment of money. 1 Saund. 262 c.

4. In debt for an amercement in a court leet, it must be shown that the party was summoned to the court at such a day and place. *Brooks v. Hustler*, 11 Mod. 76.

5. An order of bastardy was quashed, for not setting forth that the putative father was summoned. *Rex v. Clegg*, 8 Mod. 4.

6. Though a summons is necessary, it need not be stated in the conviction. 1 Saund. 262 c.

7. A summons is not necessary to a member of a corporation not resident in the town. *Rex v. Truebody*, 11 Mod. 75. n.

8. It is ordinarily sufficient, if a summons be left at the usual place of the party's abode. *Reg. v. Simpson*, 10 Mod. 345.

9. A summons is the first process of an inferior court, and must issue before a *capias* can be awarded. 1 Mod. 173.

10. In an action of debt, a summons is the first process in the superior courts, and if the party appear upon it, common bail only is required; but if he do not, a *capias* issues to hold to special bail, upon a supposition that he has contemned the process of law. *Hall v. Booth*, 1 Mod. 236.

11. In real actions there ought to be real summoners, and two of them; and if there be not such, though the sheriff give notice to the party, the court will set aside the judgment on motion. 2 Show. 282.

12. But a summons in real actions is now never actually made. 2 Saund. 45 c.

13. The omission of supreme head of the church, in the king's style, does not vitiate his writ of summons to parliament. 1 Dy. 98. pl. 50.

SUMMONS AND SEVERANCE.

1. Summons and severance takes place in no personal actions, only in the case of executors. *Carter*, 191.

2. In debt brought by two executors, one was summoned and severed, and afterwards,

he who was served died, and the defendant pleaded it in abatement of the writ; held the writ shall not* [*1354] abate. *Read v. Redman*, 10 Co. 134 a.

3. Summons and severance are always before appearance, and nonsuit after, where the severance is without process, &c. *Id. ibid.*

SUNDAY.

1. The ecclesiastical courts may proceed on the statute 1 Eliz. c. 2. s. 14. against a man for not going to his parish church on a Sunday. *Britten v. Standish*, 6 Mod. 188.

2. A citation may be served (by fixing it on the church-door) on a Sunday. *Allen v. Brookbank*, Salk. 625. 5 Mod. 450. Carth. 504. *Brookbank v. Allenson*, 12 Mod. 275.

3. Held to be no ground of error, that information was alleged to be exhibited on a Sunday. *Bedoe v. Alpe*, W. Jo. 156.

4. An arrest on a Sunday might be made in any case at common law: no judicial acts can be done on a Sunday, but ministerial may. *Mackalley's case*, 9 Co. 66 b.

5. Selling meat on a Sunday is no offence at common law. *Stra*, 702.

6. The holding a fair on every twenty-ninth of August, without excepting Sunday, may be good; for the sale then is not void. *Cro. Eliz.* 485.

7. A declaration cannot be delivered on a Sunday. *Taylor's case*, 12 Mod. 667. *Waldegrave's case*, 12 Mod. 606, 607. *Contra*, *Fort*. 375.

8. Sundays and holidays are computed for acts done out of court. *Asmole v. Goodwin*, 2 Salk. 624.

9. Though Sunday is included in notices for trials, &c., yet it is not included in the four days' rule to plead, or to move in arrest of judgment, &c. *Lord Coningsby's case*, 8 Mod. 46. *Hales v. Owen*, Salk. 625. *Sed vide* *Stra*. 86.

10. One may be taken on an escape warrant on a Sunday. *Parker v. Moor*, 2 Ld. Raym. 1028. S. C. Salk. 626.

11. But an attachment for non-payment of costs, or non-performance of an award, (being now considered as a civil execution,) cannot be executed upon a Sunday. 2 Ridgw. 309. note. 1 T. R. 266. *Cowp*. 136. *Cecil's case*, 12 Mod. 348.

12. A fine is erroneous, if any of the proclamations are on a Sunday. *Fish v. Brochet*, 6 Mod. 196.

13. A *scire facias* made returnable on a Sunday is void. *Prime v. Mason*, 11 Mod. 120.

14. If a writ of inquiry be made returnable *tres Trinitatis*, and the return-day happen to be Sunday, it is bad, and cannot be executed on the Monday. *Harvey v. Broad*, 6 Mod. 148. 159. 196. Salk. 626. S. C. *Davy v.*

Salter, 6 Mod. 251. *Stra.* 387. *Fort.* 373. S. P.

15. The court is bound to look into the almanack, and to take notice of it, though not specially assigned for error. *Stra.* 387. *Fort.* 373.

SUPERSEDEAS.

1. Writs that issue out of B. R. erroneously are frequently superseded before the return. *Rex v. Theed*, 10 Mod. 352.

2. A writ cannot be superseded after it is returnable. *Andr.* 195.

3. In a writ of dower, if the return of the summons be contrary to 31 Eliz. c. 3, the court will grant a supersedeas to the grand cape. *Furnis v. Waterhouse*, 1 Mod. 197.

4. If a privileged person as an attorney, &c., or his menial servant, is sued in any jurisdiction foreign to his privilege, he may have a supersedeas. *Vaugh.* 155.

5. A supersedeas does not lie on a *mandamus post mortem*, or on a *diem clausit extremum*, but the party grieved must traverse the office. 2 Dy. 170. pl. 2.

6. Where judgment is had against a prisoner, and he is not charged in execution within two terms, he shall have a supersedeas, and be discharged upon common bail. *Cart.* 469.

7. A writ of second deliverance is a supersedeas to a *retorno habendo*, though sued out after, if returnable before it; but not to a writ of inquiry upon a recovery in replevin. *Palm.* 403. 1 Dy. 41. pl. 4.

8. The delivery of a *habeas corpus* [*1355] is a supersedeas, although the writ be not returnable till after the term. *Hayley's case*, 1 Mod. 195.

9. A writ of error is a supersedeas, and no *ca. sa.* can issue even to charge bail. *Prac. Ca. K. B.* 215.

10. The sealing of a writ of error is a supersedeas to the execution, even though the writ varies from the record. *Hughes v. Underwood*, 1 Mod. 28.

11. Upon the delivery of a writ of error to the clerk of the errors, it becomes a supersedeas to a *scire facias* upon the judgment; but if bail be not put in by the plaintiff in error, within four days after the allowance of the writ of error, it ceases to be a supersedeas. *Say.* 52. *Prac. Ca. K. B.* 216.

12. A writ of error is a supersedeas, although only bail and not recognizance be put in. 2 Show. 304.

13. A writ of error *coram vobis* is not a supersedeas in itself, but execution cannot be sued out upon the judgment, while the writ of error is depending, without the leave of the court. *Say.* 166. *Hearne v. Bushel*, 7 Mod. 165.

14. If judgment in debt on bond be affirmed on error, and another writ of error brought, it is no supersedeas, unless the

plaintiff in error puts in bail. *Anon.* 7 Mod. 120.

15. In a writ of error returnable in parliament, if no certain day be mentioned, it shall not be a supersedeas. *Sedgwick v. Gofton*, 1 Mod. 106. 185.

16. The delivery of a *certiorari* is a supersedeas, and if the court afterward proceed, an attachment shall issue. *Smith's case*, 1 Mod. 44.

17. A *certiorari* delivered to justices of the peace after restitution awarded, and before it be executed by the sheriff, is not a supersedeas to the sheriff, unless the justices make a supersedeas upon it; which, if they neglect to do, they are finable for the contempt. *Mo.* 677.

18. An *audita querela* is not immediately a supersedeas as a writ of error is. *Holt.* 664.

19. If a sheriff takes a person before he has notice of a supersedeas to the writ, it is good. *Prac. Ca. K. B.* 215.

20. A sheriff makes his warrant to the bailiff to take the body upon a *copias ad sat.*, and before the warrant executed, the sheriff receives a supersedeas, the bailiff not having notice *proceda*, still the arrest is not lawful, though the bailiff is excusable in trespass. *Mo.* 677.

21. If a sheriff by *feri facias*, take goods, and before sale there comes a writ of supersedeas, he can still sell them and not deliver them to the party; otherwise, if the writ had come before the taking of the goods. *Mo.* 542.

22. A supersedeas delivered to the sheriff prevents his distraining the jury, or returning the *habeas corpora*. *Yelv.* 57.

23. If a supersedeas be delivered to the sheriff to a writ of *nisi prius*, and a trial is afterwards had, it is error. *Prac. Ca. K. B.* 215.

24. The escheator being commanded by the writ *quod superdeat*, when it should be *superseadat*, held that it could not be amended. *Lord Powis's case*, 2 Dy. 170. pl. 4.

25. A supersedeas is a writ which a sheriff, on going out of office, is bound to deliver over to his successor. *Calthrop v. Phillips*, 1 Mod. 222. 2 Mod. 217.

SUPERSTITIOUS USES.

1. If a devise be made to any of the devisor's kindred, on condition of procuring the performance of superstitious uses within the stat. 1 Edw. 6. c. 14., although the devisor has limited certain sums of money to those uses, yet the lands are given to the king by the said statute; and no other consideration is to be supposed, but that the intention of the devisor was to advance such uses, unless some other consideration was declared, *Adams v. Lambert*, 4 Co. 104 b. *Moore*, 648. S. C.

2. Lands given in tail, or for life, for superstitious uses, are within the statute, as well as estates in fee, or for years, which alone are mentioned. *Id. ibid.*

3. Whether the person be of the blood or not, single or corporate, or politic, to whom the land is devised, makes no difference. *Id. ibid.*

[*1356] SURETY*.

1. A justice may make a warrant to bring a party before himself to find sureties of the peace. *Forster v. Smith*, 5 Co. 59 a.

2. An action of *assumpsit* lies by one surety against his co-sureties, or the party for whom he is surety, on an implied request, if he has paid the whole debt. 1 Saund. 264 a. n. [c].

SURGEON.

A surgeon may maintain an action for his trouble, though subject to a penalty under 2 H. 8. 1 Saund. 309 a. n [b].

SURPLUSAGE.

I. WHAT WORDS IN PLEADING MAY BE REJECTED AS SURPLUSAGE, p. 1356.

II. WHAT CANNOT BE REJECTED AS SURPLUSAGE, p. 1357.

III. EFFECT OF SURPLUSAGE, p. 1357.

I. WHAT WORDS IN PLEADING MAY BE REJECTED AS SURPLUSAGE.

1. If a thing be alleged in pleading which it was not necessary to allege, it may be rejected as surplusage. *Wyndham v. Bowen*, Say. 143.

2. What is immaterial shall be rejected as surplusage. *Rex v. Bp. of Chester*, 5 Mod. 303.

3. If what is contained under a *scilicet* be contrary to a positive allegation in the pleadings, it may be rejected as surplusage. Say. 221.

4. In *assumpsit* for money had and received by the defendant for the plaintiff, to the use of the defendant, the latter words may be rejected as surplusage. *Nesworthy v. Wyldeman*, 1 Mod. 42.

5. A wife, as administratrix of her husband, brought debt for arrears of rent granted to the husband and wife; the naming herself administratrix was held to be surplusage. Mo. 887.

6. Plea *quod solvit 14 Julii*; replication, *quod non solvit predicto 14 die Augusti*; "*Augusti*" is surplusage, and the issue is good. Palm. 74.

7. In replevin, if a demurrer to a repleader to a plea in bar conclude "wherefore, as before, he prays judgment, and that the declaration may be quashed," these last words may be rejected as surplusage. *Crosse v. Bilton*, 6 Mod. 102.

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8. In trespass for throwing down rails and entering a wharf, if the defendant plead that A was possessed of the wharf under a lease then unexpired, and had a way from thence over the *locus in quo*, and underlet the same to the defendant, with all ways, &c., necessary to the enjoying of the same, and that he the defendant had no other way to the *terminus ad quem*, the allegation "that the defendant had no other way, &c.," is surplusage. *Staple v. Heydon*, 6 Mod. 1.

9. A trespass was alleged *continuando in depasturatione conculatione et consumptione herbar.*, where it could not be in *depasturatione*, it was held to be surplusage, and no ground of error. Mo. 684.

10. In the caption of an indictment, if the year of the king be stated, and the year of our Lord be in figures instead of letters, it may be rejected as surplusage. *Anon.* 1 Mod. 78.

11. An insensible word, if surplusage, shall not vitiate an indictment, &c. *Rex v. Harris*, 8 Mod. 327.

12. In an indictment for entering a field and "cutting down trees there growing, the goods and chattels, &c." "goods and chattels" may be rejected as surplusage. *Rex v. Harris*, 11 Mod. 121.

13. A writ of appeal, concluding *et habes ibi tunc hoc breve*, is good; for *habes ibi hoc breve* being sufficient, the word *tunc* shall be rejected as surplusage. *Bennet v. Preston*, 4 Mod. 159.

14. So in an *audita querela*, where the party was taken upon a *ca. sa.*, and it was recited that *captus fuit virtute brevis nostri judicialis*, the writ was held good, and the word *judicialis* rejected* as surplusage. *Arundell v. Morris*, [*1357] cited 4 Mod. 159.

15. Where an action lies at common law, the words *contra formam statuti* shall be rejected as surplusage. *Bennet v. Thalbois*, Com. 26.

16. To a plea of deprivation, replication that plaintiff had appealed to the "archbishop of C. in his prerogative court of the arches;" on a general demurrer, because the statute gives the appeal to the archbishop of the provinces generally, without limiting any court in particular, C. B. rejected the words "in his prerogative court of the arches" as surplusage. *Heath v. Atworth*, 2 Dy. 240. pl. 46.

17. Although the 23 Hen. 6. c. 9. ordains, that if sheriffs take any obligation in other form than the statute prescribes, such obligation shall be void, yet a bond making the condition void is good, for these words may be rejected as surplusage. *Maleverrer v. Redshaw*, 1 Mod. 35.

II. WHAT CANNOT BE REJECTED AS SURPLUSAGE.

If a judgment be given at Westminster, which makes *bona notabilia* in Middlesex,

and the administrators of the plaintiff declare in a *scire facias* on the judgment, upon letters of administration granted "by the archdeacon of Dorset, these words cannot be rejected as surplusage, although without them the declaration would be good. *Adams v. Savage*, 6 Mod. 135.

III. EFFECT OF SURPLUSAGE.

1. Surplusage will not abate a writ. *Crocker v. Dormer*, Poph. 24.
2. Though it vary from the register. Hob. 51, 52.
3. Surplusage hurts not in a count. Hob. 23.
4. Surplusage shall not vitiate a judgment. *Turner v. Moese*, 8 Mod. 377.
5. If surplusage is rejected, it is as if the objectionable matter had not been stated. *Whitney v. Mulcaster*, Fort. 334.

SURRENDER.

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- II. OF SURRENDER BY A TENANT FOR LIFE, p. 1358.
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I. BY AND TO WHOM A SURRENDER MAY BE MADE.

1. A dean and chapter may surrender to the king without the consent of the bishop, and the corporation will be dissolved thereby. 3 Dy. 282. pl. 28.
2. A surrender by one *non compos mentis* is void *ab initio*. 3 Mod. 303.
3. One tenant for years cannot surrender to another tenant for years. *Pory v. Allen*, 1 Leon. 303.
4. Surrender does not hold place betwixt joint-merchants. 3 Leon. 264.
5. The husband and wife can neither in deed or in law surrender the wife's estate for life, so as to bind her if she survives. Hob. 203, 204.
6. A surrender to the use of a will is good. 1 Ro. 253.
7. Lessee for years of a seignory can take a surrender. 2 Ro. 181.
8. No man can take it but he who has the immediate reversion. 3 Mod. 299.
9. A surrender to an infant in ventre *sa mere* is void. 1 Ro. 254.

10.* A man cannot authorize a stranger to surrender his lease [*1358] for years, so as to make it a good surrender. Cro. Eliz. 488.

II. OF SURRENDER BY A TENANT FOR LIFE.

1. Alienation by tenant for life to him in remainder for life is a surrender. *Gardiner v. Bredon*, 1 Co. 76 a.
2. The reversioner enfeoffs the tenant for life; it enures as a surrender of the life estate, and makes a good feoffment. 3 Dy. 358. pl. 48.
3. Tenant for life levies a fine to the reversioner in fee to certain uses; it is no surrender, but it may be to an use. Cro. Eliz. 688.
4. The surrender of tenant for life to him in reversion is good before his agreement thereto. 1 Show. 296. 308. *Contra*, Carth. 211, 212. 250.
5. Tenant for life in remainder cannot surrender his estate without deed; otherwise, where tenant for life in possession and he in remainder for life join in the surrender. 2 Ro. 20. *Sed vide*, Poph. 137, 138. *contra*. See also 1 Co. 77 a.
6. A parol agreement without livery by tenant for life that the reversioner shall have his interest, rendering rent, is not a surrender. 2 Dy. 251. pl. 93.

III. RELATIVE TO THE SURRENDER OF A LEASE.

1. The acceptance of a new lease makes a surrender of the first, and thereby determines it. Hutt. 104. Poph. 9.
2. If he who is possessed of a term for years, takes a new lease of the same tenements to commence presently, this is a surrender of the first lease. Plow. 106, 107.
3. If lessee for sixty years takes a new lease, to begin ten years after, it is a surrender immediately. Cro. Jac. 84. *See v. Sammes*, 5 Co. 11 a. Cro. Eliz. 521, 522. 2 And. 51, 52. Mo. 636.
4. The lessee of a messuage under the crown, accepting by letters patent the office of the custody thereof, with a fee annexed, is a surrender of his lease. 2 Dy. 200. pl. 62.
5. Queen Elizabeth by letters patent demised the rectory of S to the corporation of the churchwardens of S for twenty-one years; afterwards, the queen by other letters patent, reciting the former letters patent, and that the churchwardens lately having and now possessing the said letters patent, and all the estate, interest, &c., had surrendered them to be cancelled, demised to the said corporation the said rectory for fifty years, in consideration of the said surrender, &c., and also of a fine of 20*l.* paid by the said corporation: the corporation at the time of making the lease for fifty years delivered up the first letters patent, to be cancelled, and then paid the officers of the court the fees due for cancelling and

entering a *vocat.*, but no *vassal*. was made of the enrolment; held, an actual surrender was not necessary. *Case of Churchwardens of St. Saviour*, 10 Co. 66 b.

6. A lease by prior is made to a woman for years, who marries, and dies; the lessor grants the reversion to the plaintiff for years, to commence from the end of the expiring of the first term of years; the husband marries again, devises his term to his wife, and dies in possession; she also marries again, and with her husband accepts a lease for life of the patentee in fee of the king, to whom the prior had granted the reversion; by this acceptance, the first term is surrendered and merged, and the plaintiff may, by virtue of his lease, enter immediately, as well as if the years had been gone by the efflux of time. 2 Dy. 177. pl. 35.

7. If lessee for years take a second lease from guardian in socage (made in his name,) it is a surrender of the first lease. 4 Leon. 7.

8. A lessee's acceptance of a second lease is a surrender of his former, though he had not at the time possession of the land. 3 Dy. 280. pl. 13.

9. Feoffment by tenant for years, and by the lessor, shall enure as the feoffment of the lessor, and as the surrender of the tenant for years. Plow. 140.

10. A man makes a lease by deed, and afterwards enfeoffs, and takes back an estate to himself and his wife in tail, and then the lessee takes a new lease by* [*1359] parol; this is a surrender of the former, though the wife may avoid it after the death of her husband. 2 Dy. 140. pl. 43.

11. If lessee for life accept of a lease for years, this shall be a surrender of his estate for life. Aleyn, 59.

12. Lease for life to commence after the end and expiration of a former term; the first term surrenders; the second lease shall commence as well as if the first term had been ended by effluxion of time. *Wrotesley v. Adams*, Plow. 198.

13. A lease for life *habendum a die datus* is void, and a livery after will not help it; yet it is a surrender of a former lease, and so is the acceptance of a rent-charge to begin presently. *Mellows v. May*, Cro. Eliz. 874.

14. If a lessee for years re-demise his whole term to the lessor, though with a reservation of rent, yet it operates as a surrender of the original lease. *Lloyd v. Langford*, 2 Mod. 174. 2 Lev. 80.

15. But if any part of the term remain in the lessee, it is a reversion and not a surrender, though it be for a day only. 1 Ro. 387. 388.

16. Lessee covenants and grants to his tenant that he shall hold the land to him and his wife during the life of the lessor; this is

neither a surrender nor a confirmation, but a covenant only. 3 Dy. 273. pl. 34.

17. A lease cannot be surrendered before it commences in possession. 1 And. 32. 3 Leon. 95.

18. A *cestuy que use* made a lease for twenty years, to commence at Midsummer; his feoffees, by his request, the day after, made another lease of the same lands to the same lessee for thirty-four years, to commence at the same Midsummer; this is no surrender in the lessee of the first lease, but a confirmation of it, and enures as a new one for fourteen years more. 1 Dy. 57, pl. 2.

19. Lessee for years may surrender to a reversioner for years, who has a shorter term. 1 Ld. Raym. 402.

20. A surrender by operation of law is confined to taking a new lease. 1 Saund. 236 a.; but see n. [k.] and 236 c. n. [m.]

21. If lessee for years say he is content, the lessor shall have his land again, it is a good surrender. Cro. Eliz. 488.

22. Lessee for years of a house accepts a grant of the custody of the same house; it is a surrender. Cro, Jac. 177.

23. A grant, release, or discharge by lessee to lessor amounts to a surrender, and must be pleaded as such. 1 Saund. 235 b. 236.

24. So an assignment by lessee or lessor, though an annual sum is reserved to the lessee over and above the rent. 1 Saund. 236. n. [h.]

25. If lessor make a feoffment and letter of attorney to the lessee to make livery, it is no surrender. Cro, Jac. 177.

26. The surrender must be in writing and stamped, even of a parol lease. 1 Saund. 236 a. 236 c. n. [m.]

27. Where a statute provides "that the old lease be surrendered within one year, &c.," a conditional surrender is not within the act. *Elmer v. Gale*, 5 Co. 2 a. Moore, 253. S. C.

28. A conditional surrender of a prebendary's lease is good to warrant a renewal. *Wilson v. Carter*, 2 Stra. 1901.

29. If a lessee for years surrender his whole term to the original lessor upon condition, he may, upon non-performance of the condition, re-enter and revive the term. *Lloyd v. Langford*, 2 Mod. 176.

30. Marriage of lessee in remainder with lessee in possession is no surrender. 1 And. 32.

IV. RELATIVE TO THE SURRENDER OF A COPYHOLD.

1. The surrender of an infant copyholder is void. Poph. 39.

2. A surrender of a copyhold estate by a disseisor (as if a copyholder in reversion enter upon the tenant for life) is void. *Krew v. Kirby*, 2 Mod. 32.

3. The surrender of a copyhold to the

use of a will is unnecessary by statute 55 G. 3. 1 Saund. 276 d. n. [d.]

4. Lessee of a manor cannot surrender the courts. Hob. 108.

5. The surrender of a copyhold for life to a lord who is a disseisor of the manor, *ut inde faciat volutatem suam*, is [*1360] void,* and does not extinguish the copy hold, but a surrender to the use of a stranger, though a disseisor, and admittance thereon, is good. *Moor v. Pit*, 2 Mod. 287. 2 Show. 153.

6. By a surrender into the hands of two tenants, nothing passes till it be presented in court. *Cro. Jac.* 403.

7. If a copyhold be surrendered, and a fine assessed, but no admittance, the heir of the surrenderee has no title. *Brown v. Dyer*, 11 Mod. 73.

8. Surrender of a copyhold before admittance, is good by the heir. *Cro. Eliz.* 602.

9. Tenant for life, remainder in fee of a copyhold; he in the remainder may surrender in the life of the tenant for life, if there be no custom to the contrary. 3 Leon. 259.

10. If the custom of the manor be that the lord may grant copyhold estates "to three persons, *habendum* to them successively as they shall be named, and not otherwise," a surrender to A for his own life and the lives of B and C is warranted by the custom. *Smartle v. Penhallow*, 6 Mod. 63.

11. On the surrender of a copyhold, a remainder may be made. 1 Saund. 147 a. n. (3.)

12. Land in fee can be surrendered by the custom of a manor. 1 Ro. 411.

13. A surrender of a copyhold "to the use of the surrenderor for life, and after his decease to the use of A and his wife their heirs and assigns for life, and for default of such issue to the use of the right heirs of the surrenderor for ever," conveys an estate in fee to the husband and wife; but by such a devise they would have only taken an estate-tail. *Idle v. Cook*, 11 Mod. 57.

14. If a copyholder having an estate *per autre vie*, surrender all his estate in possession, remainder, or expectancy, to the use of his will, and afterwards take the fee by descent, and then dispose of the fee by will, the fee will not pass, for he had not the fee at the time of the surrender. 11 Mod. 130. n.

15. A copyholder may surrender his copyhold by the name of a reversion, though the lease in being were made by license, not by surrender. Hob. 177.

16. The surrender in court of a copyhold by husband and wife to a tenant in possession by a wrongful title, she being examined by the steward, binds the wife, although there is no custom to support it. 2 Show. 83.

17. A surrender of a copyhold, *habendum* after his death, is void; a surrender of a

copyhold cannot commence at a day to come. 5 Mod. 267. *Cro. Jac.* 372. 1 Saund. 152.

18. Where there are joint-stewards, and a surrender is taken by one of them, it is good. *Parker v. Keck*, Com. 84.

19. A surrender out of court into the hands of the steward is good. *Cro. Jac.* 526, *Sed vide Cro. El.* 443.

20. The surrender of a copyhold is good, though not agreeing with the covenant to surrender. 3 Salk. 100.

21. A steward having authority *ad exequendum per se vel sufficientem deputatum suum*, makes A his deputy to take surrender absolute, *et ulterius ad faciendum et exequendum quantum in se est*, and he takes it upon condition, it is good by the last words. *Cro. Eliz.* 48.

22. A copyhold estate surrendered on a condition to be void on payment of a sum of money, will, on non-performance of the condition, defeat the wife of the surrenderor of her free-bench. *Benson v. Scott*, 4 Mod. 251.

23. If copyhold lands are given by will to younger children, equity will compel the heir at law to surrender to them. *Cock v. Goodfellows*, 10 Mod. 497.

24. The surrenderee may compel the lord to admit by mandamus. 11 Mod. 73. n.

V. SURRENDER OF A RIGHT.

A surrender cannot be of a right. 1 Saund. 236 c, d.

VI. SURRENDER OF AN INTERESSE TERMINI.

An interesse termini cannot be expressly surrendered, but the acceptance of a new lease is a surrender in law of it. *Case of Churchwardens of Saint Saviour*, 10 Co. 66 b. *Lampet's case*, 10 Co. 45 b. 2 Brownl. 172.

VII. HOW THE SURRENDER SHOULD [*1361] BE.

1. A surrender of things which lie in grant must be by deed. 1 Saund. 236. 236 a.

2. A surrender cannot be by cancelling. 1 Saund. 236 a.

3. The formal word surrender need not be used in the conveyance. 1 Saund. 235 b.

4. A surrender of a patent is void for want of enrolment. Salk. 191.

5. It is no surrender, if upon a feoffment of land lessee makes livery of land by letter of attorney. 1 And. 247. Mo. 11.

6. If the tenant who takes a surrender or the surrenderor be dead, the surrender is void, and cannot be made good. 1 Ro. 415. *Contra, Bunting's case*, 4 Co. 4.

VIII. RELATIVE TO THE CONSTRUCTION AND EFFECT OF A SURRENDER.

1. A surrender is to be construed as a conveyance at common law. Salk. 621.

2. The surrender of a copyhold is to have the same favourable construction as a will. *Fisher v. Wigg*, Com. 91.

3. A void surrender may sometimes ope-

rate as a covenant to stand seized. 1 Saund. 236 d. 2 Saund. 97 b. n. [c].

4. But it must be pleaded as such. 1 Saund. 236 a.

5. A surrender to a use is a conveyance. 1 Ro. 253.

6. A surrender vests in A and wife, though an estate for their lives is expressed. Salk. 620.

7. A surrender of the husband of the land of the wife is no discontinuance. Poph. 38, 39.

8. When a surrender is made to the use of another in tail, it is not a fee-tail within the statute *de donis*, but a fee conditional. 1 Ro. 239.

9. A surrender divests the estate immediately before notice or express assent of the surrenderee. 2 Vent. 199. 203. 208. 2 Salk. 618.

10. The consent of the surrenderee is presumed till the contrary appear. 1 Saund. 236 b.

11. A lessee for twenty years accepts a lease *in futuro*, whereby he surrenders the former lease; the lessor may enter immediately. Cro. Eliz. 522. 605.

IX. HOW IT SHOULD BE PLEADED.

1. A surrender must be pleaded by the words "*resum reddidit*." 1 Saund. 235 b.

2. Where a surrender is pleaded, the agreement of the surrenderee thereto must be averred. 2 Dy. 110. pl. 39.

3. If pleaded without an acceptance, it is aided after verdict. 3 Mod. 301.

4. It need not be averred that surrenderee entered, for it shall be intended. 2 Saund. 305 a.

5. Where the king, in consideration of the surrender of a lease, grants, it is sufficient to aver the surrender made, without saying that there was a lease, for the surrender is the consideration. Case of *Alton Wood*, 1 Co. 40 b.

X. RELATIVE TO ACTIONS BY SURRENDEREE.

1. The surrenderee of a reversion of copyhold lands may have an action against the lessee upon an express covenant to repair. Carth. 205.

2. If a copyholder in fee make a lease for years warranted by the custom, in which the lessee covenants to repair during the term, a surrenderee of the assignee of the reversion may maintain covenant for non-repair against the original lessee, although he had assigned the term before the reversion was surrendered. *Glover v. Cope*, 4 Mod. 81.

3. A surrenderee of a copyholder in fee is an assignee within the equity of the statute 32 Hen. 8. c. 34., and must take advantage of a condition broken. *Beal v. Brasier*, cited 4 Mod. 83.

SURVIVORSHIP.

1. There is no survivorship amongst joint merchants. Carth. 171.

2. The survivor of two joint obligors shall be charged alone. 2 Saund. 51.

3. But if the lands are charged with the debt, the charge shall not lie wholly on the survivor. *Id. ibid.*

4. A bond made to two, and one survives, he may bring the action in his own name; so if a charge survive; otherwise,* where nothing survives, as [*1362] in feoffment. Aleyn, 42.

5. If the condition of a bond be that if the obligee shall pay yearly a sum of money to two strangers during their two lives, that then, &c., the payment shall cease on the death of either of them. 1 Mod. 187.

SUSPENSION.

1. A suspension of rent is when either the rent of land are so conveyed, not absolutely and finally, but for a certain time, after which the rent will be again revived. Vaugh. 199.

2. A rent may be suspended by unity for a time, and afterwards restored. Vaugh. 39.

3. Disturbance of common will not suspend the rent. Palm. 392.

4. A lease is made of a messuage for fifteen years, the lessee dies, his executor assigns his interest in a back garden, part of the messuage, to K for five years; K assigns it to the lessor; the rent is not suspended. *Hodgkins v. Thornborough*, Poll. 141.

5. If the lessor commits a trespass merely, it does not suspend the rent, unless he oust the lessee. Palm. 150.

6. A lease is made for sixteen years rendering £20 rent; lessee for ten years leases for ten years without rendering any rent; lessee for ten years assigns his term to the first lessor; this is no suspension or extinguishment of the rent; but the first lessor shall have the whole £20 rent against the first lessee, and he nothing against the second lessee; and this is according to their several contracts. *Hodgeon v. Thornborough*, 2 Lev. 143. 3 Keb. 500. S. C.

7. Suspension of a personal action does not extinguish it. Hob. 10.

SUSPICION.

One may justify imprisonment for suspicion of felony without showing any cause of suspicion. Plow. 46.

SWAN.

Cygnets belong equally to the owner of the cock and the owner of the hen, and shall be divided betwixt them. 7 Co. 15 b.

SWEARING.

In a conviction, the particular oaths must be set forth, and the degree of the defendant, if the higher penalty is inflicted. Stra. 497. 686.

TAIL.

[See post, tit. TENANT, div. III. p. 1364.]

TALES.

1. A tales may be awarded where one juror only appeared. *Cro. Jac.* 476.
2. On the trial of indictments and informations, neither the defendant nor the prosecutor can pray a tales, without a warrant from the attorney-general. *Rex v. Banks*, 6 Mod. 246. 3 Salk. 339. 1 Lev. 223.
3. But he can in an information *qui tam* without such warrant. 1 Lev. 223.
4. Where a jury is summoned to try a particular issue, there may be a tales; but in commission of gaol-delivery, the course is to send a written precept to the sheriff to return a jury generally. 3 Salk. 338, 389.
5. A trial by more of the tales than there ought, there being sufficient of the principal panel, is erroneous. *Michel v. Woodruff*, *Cro. Eliz.* 850.
6. In dower, a tales is not grantable at the return of the *venire facias*, if one of the principal panel appears. *Mo.* 528.
7. A tales to the new sheriff, where the *venire facias* was to the coroner, is error. *Cro. Eliz.* 894.
8. The return of a tales is good though the name of the sheriff be not indorsed. *Mo.* 846.
9. A tales returned by the sheriff [*1363] being party is bad. *Stanton v. Sulistard*. *Cro. Eliz.* 654.
10. A tales is not grantable till there is a default of the principal panel. 2 Ro. 76. 394. [See ante, tit. JURY, div. IX. Vol. II. p. 855; and post, tit. TRIAL, div. I.]

TAXES.

1. By taxes is meant in general parliamentary. Salk. 615.
2. A covenant to pay an annuity clear of all taxes, includes parliamentary taxes. *Brewster v. Kidgell*, *Carth.* 438. *Arran v. Crisp*, 12 Mod. 54.
3. Though the taxes are imposed by a subsequent act of parliament; and the grantee may have an action against the grantor and his heirs, by reason of assets descended, but not against the assignee, for it is not a real but personal covenant, but the assignee will be made liable in a court of equity. *Brewster v. Kidgil*, 5 Mod. 373, 374. 12 Mod. 166, 167. S. C.
4. The tenant shall not deduct land-tax to the improved value in account with his landlord. *Yeo v. Liman*, 2 Stra. 1191.
5. On a lease in which rent was reserved to be paid "without any deduction or abatement whatsoever," it was resolved that as the land-tax act enables the tenant to deduct his tax out of his rent, he has in all cases a right to stop it unless there is an express

agreement to the contrary. *Crenshaw v. Clerk*, 11 Mod. 242. n.

6. But where there is an express agreement "to pay all taxes, land-tax only excepted," the lessor is only bound to allow at the rate and in the proportion to the rent at the time of the demise, and not for any increase on account of the improvement of the estate. 11 Mod. 240.
7. Rates to church and poor are not to be esteemed taxes on land. *Theed v. Starkey*, 8 Mod. 314.
8. The king has an inheritance in taxes to be granted. *Brewster v. Kitchen*, 1 Ld. Raym. 320.
9. Prisaige (an ancient duty in specie on goods imported) may be granted away by the crown; but the grantee is chargeable with duties charged on the said goods while in the grantee's hand. *Paul v. Shaw*, Salk. 617.
10. One may be assessed by the land-tax either where he dwells or carries on his employment. *Trowell v. Ellford*, Salk. 616.
11. A farmer is to be taxed for common appendant in the parish where the farm lies. *Rex v. Fox*, 1 Salk 169.
12. An exciseman employed in different parishes is to be taxed in the division where he lives. *Barret v. Weeks*, Stra. 417. 2 Salk. 616. n. (a). S. C.
13. The parson must be assessed for the poor's rate on his tithes as the occupier thereof, although he has agreed with the tenant that he shall retain them. *Lambeth Poor's case*. 11 Mod. 375.
14. A mandamus lies to commissioners of the land-tax to tax estates equally. *Butler v. Cobbel*, 11 Mod. 254.
15. In an order made by two justices to tax parishes in aid, it must appear that the parishes taxed are within the hundred; and therefore, if it only state them to be within the county, it is bad; for by the 43 Eliz. c 2, it is the session only that can tax the county, if the hundred is unable to afford relief. *Saint Benedict v. Saint Porter's, Norwich*, 11 Mod. 269.
16. The collectors of the window duty are only answerable for what they respectively receive, but not for the deficiency of each other. *Park*. 167.
17. When the defendant justifies as collector of the poor-tax, and it is so certified upon the *postea*, he shall have treble costs. *Carth.* 183.

TEMPLE.

The Temple is not a privileged place, nor can any exemption be good without setting up a jurisdiction to do justice; but bailiffs should not come to execute process there; if they do, the way is to submit to the process, and the judges will lay them by the heels. *Brown v. Borlace*, 12 Mod. 155, 156. [See ante, tit. RESTITUTION, pl. 20. Vol. II. p. 1211.]

[*1364] TENANT.*

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1. OF TENANT IN CAPITE, OR BY KNIGHT'S SERVICE.

1. When the king grants lands without reservation of any tenure, &c., the land shall be held of the king in capite by knight's service, according to the rate and proportion of land which belongs to a knight's fee. *Anthony Lowe's case*, 9 Co. 122 b. See also *Holt's case*, 9 Co. 131 b. *Mene's case*, 9 Co. 133 a.

2. If a man be seized of three acres of land of an equal yearly value, one of them being held of the king by knight's service in capite, and having issue two sons, gives the acre so held and one of the other acres to his younger son in tail, and afterwards purchase other three acres of equal annual value held in socage; he can demise but two parts of the land newly purchased. *Lovie's case*, 10 Co. 78 a.

3. Where a man was seised of a reversion in fee held in capite expectant on an estate tail, which he had made to R, his son, and covenanted to stand seized of the said reversion to the use of his niece, and afterwards R died without issue, it was held the king should not have primer seisin. *Curson's case*, 6 Co. 75 b. S. C. Cro. Jac. 157.

4. When land passes from the king by his grant, and in his grant no tenure is reserved, &c., the law will create a tenure best for the king; but when the land passes from a subject, and of necessity the tenure changes, the law will create a tenure as near the freedom of the first tenure as may be. *Anthony Lowe's case*, 9 Co. 122.

5. The king's tenant conveys half his land

for the jointure of his wife, the other half for the payment of his debts; held, the king's third shall be taken equally out of the whole. *Parker's case*, 8 Co. 173 b. See also *Harper's case*, 11 Co. 23 a. *Drury's case*, 6 Co. 73 a. Cro. Jac. 156.

II. OF TENANT IN FEE.

1. Fees are absolute, base, restrained, or conditional. *Idle v. Coke*, Salk. 621.

2. A tenant in fee cannot convey his land *habendum* after his death. *Sympton v. Southern*, Cro. Jac. 376.

III. OF TENANT IN TAIL;—

(a) What words make a tenancy in tail, and relative to the nature of the estate.

1. Estates tail had no existence at common law, but were created by the statute *de donis*. 2 Mod. 134.

2. An estate tail results from an operation of law, and is created on purpose to uphold and preserve the intention of the testator, which would otherwise be often defeated. *Woodright v. Wright*, 10 Mod. 377.

3. Before the statute *de donis*, there was no reversion of an estate tail, but the whole was a fee simple conditional. Plow. 553.

4. If lands be given to one and his heirs,* *viz.* the heirs of his [*1365] body, it is an estate tail. Hob. 172.

5. An estate tail cannot be raised without the word "heirs." 1 Saund. 186 b.

6. In a gift in tail, it must appear of what body the issue are to come. *Idle v. Coke*, Salk. 621.

7. If a settlement on marriage be made to the husband and wife for life, then to the issue male, and for want of such issue to all the issue female, and to the heirs of the bodies of such issue female, and they have afterwards two daughters, they are joint tenants for life with several inheritances, being both born before the estate for life determined; for, if not, the remainder had vested in the elder. *Matthew v. Thompson*, 5 Mod. 385.

8. A gift to one and the heirs of his body, to the use of him and his heirs, is an estate tail and fee expectant; but a gift to one and his heirs, to the use of him and the heirs of his body, is only an estate tail. 1 Ro. 384.

9. An estate to B, and the heirs male of the said B lawfully begotten, and for default &c., over, is a tail. Salk. 621.

10. So if a feoffment be made to the feoffor for life, then to his son and his heirs, and for default of issue of his body, then to his right heirs males. *Leigh v. Brace*, 5 Mod. 266.

11. Feoffment to the use of W R for life, remainder to the son of the feoffor and his heirs, and for want of issue of him, to the right heirs of the feoffor; the son has an estate tail. 3 Salk. 337.

12. Feoffment by deed to one and to his heirs, and if it happen that the feoffee dies without heir of his body, the land to revert; this is a fee tail. Plow. 541.

13. A feoffment to E & D, and their heirs,

habendum to them and the heirs of their bodies, gives an estate tail only with a fee expectant. 2 Ro. 19. 23.

14. A feme may have an estate tail as a jointress, which though it descend, yet by reason of statute 11 H. 7., cannot be aliened. *Duncombe v. Wingfield*, Hob. 258.

15. A feoffment to the use of A and his issues male of his body, is no estate tail in A. T. Raym. 317.

16. A gift of land to a man that has a wife, and to a woman that has a husband, and to the heirs of their two bodies begotten, is a fee tail presently for the possibility that they may intermarry, but the tail is in abeyance until the possibility happens. Plow. 35.

17. A feoffment to the use of baron and feme for their lives, remainder to the first son in tail, remainder to baron and feme, and the heirs of their two bodies, they having no issue male, they are tenants in tail executed. *Purefoy v. Rogers*. 2 Saund. 383.

18. When they have a son born, then they become tenants for life, remainder to the son in tail, remainder over to them in tail. S. C. 2 Saund. 383. 387.

19. Feoffment is made to the use of A the the Baron, and B the feme, *et diutius viventis, et post discescam A et B, tunc ad usum hered. de corpore predict.* A, *procreand. super corpus predict.* B; the estate tail vests only in A, as if it had been *hereditibus A, de corpore suo super corpus etc.* Hob. 84.

20. If lands are given to J S, and the heirs males of the body, a daughter's son is not inheritable, because the title must be conveyed through all males. *Thornby v. Fleetwood*, 10 Mod. 415.

21. If a father give an estate in tail to his daughter, provided she marry with the consent of the trustees, the estate-tail is not determined by her marrying without such consent, although she had notice of the condition on which the estate was given. *Malborne v. Fitzgerud*, 2 Show. 316.

22. An estate-tail upon failure of issue reverts to the donor and his heirs. *Thornby v. Fleetwood*, 10 Mod. 411.

23. A remainder can never take place, but upon the cesser of the estate-tail. 10 Mod. 120. 366. 414. 415.

24. A fee-simple in possession, and a fee-tail in possession, cannot stand together in one and the same person, alone, and the same time. Plow. 230.

25. The estate of tenant in tail after possibility ought to be a remnant or residue of an estate-tail, and cannot be by the limitation of the party; a tenancy in tail after possibility will not merge a prior estate for life. *Bowler's case*, 11 Co. 79 b.

26. A use cannot be limited [*1366] upon an estate-tail,* for tenant in tail cannot be seised to an use. Jenk. 195. Plow. 555.

27. But a use in tail is an estate tail, by the

equity of the statute *de donis*. *Basset v. Mansel*, Plow. [2].

28. A sum of money or annuity cannot be entailed. 2 Vent. 349. Plow. [3].

29. Though a term in gross cannot be entailed, yet where a man has a term in point of interest, and at the same time the trust of the inheritance, he may entail the trust of the term to wait upon the inheritance. *Sir R. Boye's case*, 1 Vent. 194.

30. An office may be entailed by the equity of the statute. *Basset v. Mansel*, Plow. [2].

31. So also copyholds. Ib. ibid.

(b) *Respecting his power to alien or charge the estate.*

1. At common law, after issue, tenant in tail to three purposes had a fee-simple. *Paine's case*, 8 Co. 35 b.

2. Tenant in tail cannot be restrained from alienating by recovery, either by condition, limitation or by devise. *Sunday's case*, 9 Co. 127 b.

3. Tenant in tail cannot convey an estate which is not to take effect till after his death. *Chotmley's case*, 2 Co. 50 a.

4. The inheritance shall be intended to continue in the tenant in tail, and he in the inheritance, till the contrary is shown. 1 Saund. 225 a.

5. The issue in tail is restrained by the statute *de donis, etc.*, from alienating as well as the first donee. Plow. 13. Vide 244.

6. An innocent conveyance by a tenant in tail to another and his heirs passes a base fee-simple. 1 Saund. 260. 260 a.

7. A tortious alienation by tenant for life does not defeat derivative estates or charges. *Baldwin v. Smith*, 1 Co. 66 b.

8. Tenant in tail of a trust may bind his heir by articles in equity. *Lady Coventry v. Lord Coventry*, Stra. 602.

9. If tenant in tail and his son join in a grant of the next avoidance, yet it is void against the son. *Wivel's case*, Hob. 45.

10. The possession of a feoffee of tenant in tail, so long as the feoffment remains in force, is not subject to the charge of the remainderman. *Hunt v. Gateley*, 1 Co. 61 b.

11. If a tenant in tail bargains and sells or makes a lease and release to another in fee, the bargainee or releasee has a base fee not determined nor determinable until the entry of the issue. *Macbell v. Clerk*, Com. 120.

12. Tenant, lord, and meane, the tenant makes a gift in tail, remainder to the king in fee, the donee shall hold of nobody. *Bingham's case*, 2 Co. 91 a.

13. The issue in tail shall avoid all charges by his ancestor, except such as are for his benefit. *Shelby's case*, 1 Co. 93 b.

14. A warranty is entailed by the equity of the statute *de donis*. Plow. [2].

15. The lineal warranty of tenant in tail shall not bind the right of the estate-tail by the statute *de donis*, either with or without assets descending. Vaughn. 365.

16. Tenant in tail *post prolem suscitatum*, is dishonourable for waste. 2 Leon. 68.

17. Tenant in tail after possibility of issue extinct, shall not be punished for waste; he shall not be compelled to attorn, nor can he have aid; on alienation, no *consimili casus* lies; after death, there can be no intrusion; such tenant may join the issue on the mere right; he shall not name himself, nor be named tenant for life; such tenant has but an estate for life, and a feoffment in fee is a forfeiture; an exchange between him and tenant is good. *Bowles's case*, 11 Co. 79 b.

18. If the issue in tail be once barred in a formodon by warranty and assets, he is barred for ever, though he afterwards alien the assets. *Cowper v. Andrews*, Hob. 40.

19. An estate tail is not assets in the hands of the heir. 2 Saund. 8 f.

20. If tenant in tail sells the trees to another, they are a chattel in the vendee; but if tenant in tail dies before actual severance, as to the issue in tail, they are parcel of the inheritance, and the vendee cannot take them. *Liford's case*, 11 Co. 46 b. Plow. 259. 437.

21. The grants of tenants in tail are voidable only. 1 Saund. 235.

[*1367] (c)* *Of docking the entail.*

1. Tails were not docked till the 12 of E. 4., and then by common recovery, with vouchers, which was not enacted but adjudged a bar to the issue. *Earl of Derby's case*, T. Jones, 240.

2. The tail cannot be docked either by fine or recovery, where the lands are of the gift of the king, and the reversion in the crown. Id. *ibid.* *Murray v. Eyton*, T. Raym. 369.

3. But if such reversion be granted out of the crown, it may be destroyed by fine and recovery. S. C. T. Raym. 368. 358.

(d) *Effect of a bargain and sale.*

1. If tenant in tail of a reversion bargains and sells it to the bargainee and his heirs, nothing passes but an estate descendable for the life of tenant in tail. *Took v. Glascock*, 1 Saund. 260, 261. *Mackil v. Clark*, Salk. 619.

2. Tenant in tail bargains to B, who re-bargains to him, he is tenant in tail as before. *Freshwater v. Rois*, Yelv. 51.

(e) *Covenant to stand seised.*

1. Tenant in tail covenants to stand seised to his own use for life, remainder to his son; this does not make any alteration of the use except for his own life. Mo. 32. 683.

2. He remains tenant in tail as before. *Ibid.*

3. Covenant to stand seised to the use of himself for life, remainder to his first, second, third, and fourth sons successively, according to the minority of birth, and so to all and every the heirs male of the body of the covenantor; adjudged he had an estate tail in him by virtue of the last words. *Lisle v. Gray*, 2 Lev. 223.

4. A covenant by tenant in tail to stand seised to the use of himself for life, remainder to A in tail, is void, because the remainder is to take effect after his death. *Macbell v. Clerk*, Com. 121. Salk. 619. S. C.

5. If tenant in tail covenants to stand seised to the use of A and his heirs, or of A for life, with remainders, it divests the estate tail, and passes a base fee to the *cestuy que use*. S. C. Salk. 620. Com. 121.

6. Otherwise, if the new use be to take effect after his death. Salk. 620.

(f) *Feoffment.*

1. If tenant entail, the reversion in the king, makes a feoffment, this does not discontinue nor divest the reversion out of the king. Plow. 552, 553.

2. When tenant in tail makes a feoffment, no right of the ancient entail remains, as to the tenant in tail: for at common law, there was no estate-tail, but a fee-simple conditional. 2 Ro. 416. 322. 334. Hob. 335.

3. And this right of entail he may bar, and the tail is not in abeyance. *Sheffield v. Ratcliffe*, Hob. 335, 336. &c.

4. None can discontinue an estate-tail, unless he discontinue the reversion, and therefore, if tenant in tail insoff the donor, it is no discontinuance of the entail. *Murray v. Eyton*, T. Raym. 344.

(g) *Lease.*

1. A feme sole tenant in tail made a lease not grantable by the stat. 32 H. 8., and took husband, and had issue, and died; the husband cannot avoid the lease, but the issue can, if the father die or surrender. Mo. 8.

2. A lease by tenant in tail will be good against him to whom the issue in tail levied a fine in the life of the ancestor. 1 Sid. 62.

3. If tenant in tail makes a lease for years, and dies, it is only voidable. *Macbell v. Clerk*, Com. 120.

4. Though no rent be reserved. *Opey v. Thomasius*, T. Raym. 132, 133. 1 Sid. 261.

5. And if he conveys his estate over by fine, the lease cannot be avoided. 1 Sid. 261.

6. If tenant in tail makes a lease to commence after his death, it is void. *Macbell v. Clerk*, Com. 121. *Symonds v. Cudmore*, Carth. 258.

7. If tenant in tail, having also the reversion in fee, makes a lease to commence in futuro, if the issue in tail levy a fine, it is an extinguishment of the tail, and the cognizee of the fine shall never avoid this lease, because it arises out of both the estates, viz. out of the estate-tail and reversion in fee. *Symonds v. Cudmore*, 4 Mod. 3.

8. A being seised of certain houses in tail, and of certain lands in fee, held* *in capite*, by deed indented, made [*1368] leases of the said houses, whereof he was seised in tail, rendering rent, and which leases were not warranted by statute 32 Hen. 8., and died; the reversion descended to the heirs general of

A, being two females; and it appeared, that the leases were to have continuance after the said heirs general should be out of ward; and by office, after the death of A, it was found that A died seised of the said estate-tail of the said houses, and that they descended to the said heirs general, by force whereof the said houses were seised into the queen's hands: resolved, 1st, That the king, in privity and right of the heirs in tail, should avoid the said leases during the time that they should be in ward: 2, That although the king, in the right of the heir, had avoided it for his time, yet it does not avoid the leases so absolutely, that the heirs in tail, after the king's interest determined, cannot make them good by acceptance of rent. *Earl of Bedford's case*, 7 Co. 7 b.

9. Lease by tenant in tail shall bind the issue, but not the remainder. *Noy*, 6.

10. Baron and feme tenants in special tail of the provision of the husband have issue, the baron dies, the issue levies a fine to a stranger, the feme leases for sixty years, and dies; hold that lease was good against the conusee. *Bellison v. Elways*, Skin. 31. 36.

11. Lessee of tenant in tail shall hold his lease free from a statute acknowledged by the lessor before the lease. 3 Leon. 156.

(h) *Fine*.

1. Husband and wife tenants in special tail; the husband alone levies a fine and dies; the wife enters and dies; the issue is barred. *Mo*. 28.

2. The issue is for ever barred by a fine with proclamations, though the discontinuance, who is disseised by the father of the issue, make claim during the proclamations; and there can be no *remitter* after a fine with proclamations. *Mo*. 114.

3. Tenant in tail is barred by a fine with proclamations levied by the father, in the life of the grandfather, the tenant in tail, although the grandfather survive the father. *Mo*. 146.

4. A wife tenant for life, remainder in tail to the husband; they levy a fine with proclamations; this is not a discontinuance, but still it is a bar to the issue. *Mo*. 634.

5. Tenant in tail of a reversion bargains and sells it to the bargainee and his heirs, and afterwards levies a fine to a stranger; the estate-tail is barred and extinguished. *Took v. Glascock*, 1 Saund. 261.

6. If tenant in tail levies a fine to the bargainee, the issue cannot avoid it. *Macbell v. Clerk*, Com. 120.

7. Tenant in tail covenants to stand seised to the use of himself for ninety-nine years, if he so long lives, remainder to his first son in tail, remainder over, and then levies a fine; it was doubted if the fine should make good the limitations on the condition, for how it should work; and a difference was taken if the covenant had been to himself for life, for then no limitation could have

been; but here a remainder for the life of tenant in tail may vest in the son. *Whaley v. Greenfield*, 2 Lev. 84.

8. If husband and wife be tenants in special tail, and the husband only levies a fine, and dies, and the wife enters, she becomes tenant in tail again; though the entail cannot descend, because the issue is barred by the father's fine. *Thornby v. Fleetwood*, 10 Mod. 412, 413.

9. The issue of tenant in tail is barred by a fine, though the reversion be in the king. 3 Leon. 57.

10. If tenant in tail, where the reversion is in the crown, be disseised, and the disseised levy a fine, and five years pass, his issue shall be bound. *Murray v. Eytton*, T. Raym. 273.

11. So, if a man purchase an estate-tail from the crown, a fine will bar his issue, notwithstanding the statute of 34 Hen. 8. S. C. T. Raym. 274.

12. The issue in tail was barred by a fine, by virtue of the statute of 4 H. 7. c. 24., before the statute of 32 Hen. 8. c. 36. S. C. T. Raym. 359.

13. The issue of tenant in tail shall have five years after tenant in tail to make his claim. *Noy*, 46.

(i) *Recovery*.

1. An estate-tail may be barred by a common recovery. *Plow*. [2.]

2. Tenant in tail suffers a recovery with* vouchers, and dies [*1369] before execution; the recoverer can sue execution against the issue. *Mo*. 137.

3. If tenant in tail suffer a recovery as vouchee, or levy a fine, he bars his issue of a writ of error upon any precedent judgment or fine. *Mo*. 365.

4. If land is given in tail, and then a reversion upon condition, if the tenant in tail suffer a common recovery, it will bar the reversion and condition also. 2 Ro. 219.

5. Husband and wife, tenants in tail, levy a fine with proclamations, to the use of themselves in special tail, remainder to the husband in tail, remainder over; in the *præcipe* against the conusee he vouches the husband, who as vouchee comes in, and a common recovery is passed; this does not bar the reversioner in fee. 2 Ro. 447.

6. By the common law, a common recovery against the king's tenant in tail could not divest the reversion out of the king, although the issue in tail was bound. *Plow*. 553.

7. *Cestui que use* cannot bar an estate-tail in use by a common recovery. *Plow*. [3].

8. But it will bar the entail in equity. *Cartwright v. Cartwright*, 10 Mod. 514.

9. Tenant in tail, after common recovery suffered, may alien. *Sir W. Pelham's case*, 2 Leon. 66, 67.

IV. OF TENANT FOR LIFE.

1. Baron and feme, tenants in tail executed,

become, after a son born, but a tenant for life. *Purefoy v. Rogers*, 2 Saund. 383. 387.

2. A grant by tenant for life, for a longer period than his own life, is absolutely void. 1 Saund. 235 a.

3. If tenant for life makes a feoffment, the lessor may enter for a forfeiture. *Willion v. Berkley*, Plow. 241.

4. Tenant for life forfeits his estate by acceptance and agreement to a fine. *Smith v. Abel*, T. Jones, 65.

5. Upon an erroneous recovery against tenant for life, a writ of error lies. *Willion v. Berkley*, Plow. 241.

6. Lessee for life or donee in tail shall not have *ne jure vexes* against the donor. *Forster's case*, 8 Co. 66 b. 1 Brownl. 169.

7. A *quod ei de forceat* may be brought under the statute of Ruthland. 2 Saund. 38.

8. If tenant for life or years fells timber, or pulls down the house, the lessor shall have the timber. *Bowles's case*, 11 Co. 79 b. 1 Ro. 177. S. C.

9. If a house falls down *per vim venti*, the particular tenants have a special property in the timber to rebuild the house. *Id. ibid.*

10. Tenant for life without impeachment of waste has as great power to do waste, and to convert it at his own pleasure, as tenant in tail has; the privilege is annexed to the privy of estate; if one who has a particular estate without impeachment of waste changes his estate, he loses his advantage. *Id. ibid.*

11. When timber trees are severed from the inheritance, either by act of the party or of the law, and become chattels, the whole property of them is in the tenant for life without impeachment of waste. *Id. ibid.*

V. OF TENANT BY THE CURTESY;—

(a) *Who shall be such tenant.*

1. In every case where a man takes a wife seised of such an estate and tenement as that the issue which he has by his wife might by possibility inherit the same tenement of such estate as the wife has, as heir to the wife, after the death of the wife, he shall have the same lands by the curtesy of England, otherwise not. *Paine's case*, 8 Co. 34 b.

2. A man shall be tenant by the curtesy of England if the issue be born alive, though it have never been heard to cry. 1 Dy. 25. pl. 150. 8 Co. 35 a. 1 And. 35. S. P.

3. The crying is but evidence of the fact. *Paine's case*, 8 Co. 35 a.

4. The true reason of dower, and the reason of the case, viz. the possibility of the issue to inherit, are all one, and the right to entry of an estate-tail is not defeated, although the estate-tail be determined. *Paine's case*, 8 Co. 36 a.

5. Where a woman mortgagor marries, and not having redeemed, dies, her husband is entitled to be tenant by curtesy of the mortgaged premises. *Casburne v. Inglis*, C. a. T. Hardw. 399.

6.* A husband shall be tenant by the curtesy of the equitable [*1370] estate of the wife, and the heir at law may oblige him, like any other tenant for life, to keep down interest. *Id. ibid.*

7. A man shall be tenant by the curtesy of a rent or advowson, although the wife dies before the day occurs, or the presentment falls. *Finch's case*, 6 Co. 68 a.

8. The king's ward being married, and having issue, after she attained her age, tendered livery, but before it fully passed, died; her husband shall be tenant by the curtesy. 1 Dy. 95. pl. 35.

9. So, of a trust estate. 2 Saund. 46. n. [g].
10. So, of a use, since the 27 Hen. 8., but not before. *Lord Cromwell v. Andros*, 2 And. 75.

11. So, by custom within manor. *Ewer v. Astwicke*, 1 And. 192.

12. Land in *capite* by knight service descends to a feme covert, who dies without suing livery; her husband shall be tenant by the curtesy, and sue it. 2 Dy. 229. pl. 49.

13. So, of a seisin defeasible by condition. *Paine v. Samms*, 1 And. 184.

14. If a man with his wife alien her land after issue, and she die, the issue cannot enter during the life of the husband. 3 Dy. 263. pl. 26.

(b) *Who not.*

1. To entitle to curtesy, the issue must be such as might have inherited. *Paine's case*, 8 Co. 35 b.

2. The husband shall not be so, unless there be an actual seisin by him or his wife. 2 Saund. 45 n. n. (5).

3. A seisin in law in not sufficient. *Paine's case*, 8 Co. 36 a.

4. Devise to the wife for life, remainder to the issue male of her body, and to the heirs male of such issue, remainder over; she had issue a son who died in her life, and then she dies; but being heir at law to the testator the reversion in fee descended on her, and yet decreed her husband should not be tenant by curtesy. *Boothby v. Vernon*, 9 Mod. 148.

5. If the child be ripped out of the belly of the wife deceased, the husband is not entitled to curtesy; but if the issue be dead at the time of the descent, it is immaterial. *Paine's case*, 8 Co. 35 a. and 35 b.

6. Nor by the curtesy of Scotland, without the child has actually been heard to cry. 1 Dy. 25. pl. 159.

(c) *Incidents.*

If tenant by the curtesy grants his estate with warranty, and comes in as vouchee, yet he shall have aid of him in the reversion. *Roll v. Osborn*, Hob. 21.

VI. OF TENANTS FROM YEAR TO YEAR, AT WILL, OR BY SUFFERANCE.

1. *Cestuy que trust* by deed is tenant at will to the trustees. *Rex v. Lenthall*, 3 Mod. 149.

2. If *cestuy que use* for life, remainder over

in tail, make a feoffment *pur auter vie* and die, the tenant is only by sufferance. 1 Dy. 57, pl. 1.

3. If the lord admits a stranger, he is but tenant at will of the copyhold. 3 Leon. 210.

4. If bargainor after bargain and sale continues possession, he is tenant at sufferance; if by agreement, he is tenant at will. Palm. 202.

5. After entry on the lessee at will he continues possession; whether the lessor accepting future rent waives the disseisin, and he shall be still tenant by sufferance. See 2 Dy. 173, pl. 15.

6. Tenant at will makes a lease, and the lessee enters; the lessee is only disseisor: otherwise of a feoffment. *Ponsoley v. Blackman*, J. Bridg. 14.

7. If tenant at will be ousted by a stranger, and he re-enters, he is tenant at will to his lessor. Cro. Jac. 660.

8. An estate at will cannot be made by way of remainder. *Geary v. Bearcroft*, Carter, 67.

9. There can be no tenant at sufferance to the king. 2 Leon. 141. 143.

10. If A lease to B at will, B is not tenant at will till entry; if A lease to B for twenty-one years, to begin presently, B is not lessee for years until he enter. *Geary v. Bearcroft*, Orl. Bridg. 499. Ca. Prac. 66, 67. S. C.

11. Agreement that one shall receive the profits does make him tenant at will. *Geary v. Bearcroft*, Carter, 64.

12. If a termor, after surrendering, continue possession and pay rent, it [*1371] is optional* in the lessor to consider him as tenant by disseisin or at sufferance. 1 Dy. 62, pl. 34.

13. A tenant at will in former times is now considered tenant from year to year; as, where lessee for years holds over his term and pays his rent as before, he formerly became tenant at will; but he is now looked upon as tenant from year to year, by such holding over by consent. *Bowe's case*, Aleyn, 4. 1 Saund. 276 a. n. [a.]

14. So, by holding under a parol lease for more than three years. 1 Saund. 276 a. n. [a.]

15. But an exception still exists in the case of a mortgagor in possession. 1 Saund. 276. n. [a.]

16. If tenant in fee make a lease for one hundred years in trust to attend the inheritance, and continue still in possession, he is tenant at will to the lessee for one hundred years; and if he make any lease, and levy a fine *sur consueance*, &c., the first lease is displaced and turned to a right, and the fine bars it. *Smith v. Pierce*, 3 Mod. 196.

17. If one be tenant at will *de anno in unum quamdiu ambabus partibus placuerit*, after the beginning of the year, he cannot determine his will to the prejudice of the

lessor for his rent. *Timberley v. How*, T. Jones, 5.

18. If there be two lessees at will, whether the death of one of them determines the will. See 3 Dy. 269, pl. 20.

19. The king having granted an estate for life, if it shall so long please us, granted the reversion to another in fee; the reversioner cannot determine the estate at will, but the king's successor may. 1 Dy. 94, pl. 29.

20. Lessor leases the land to another, but it was agreed that the second lessee should not enter till after another rent-day; yet this has determined the will. *Disdale v. Ilex*, 2 Lev. 88. T. Raym. 224.

21. Tenant at will is not punishable for premissive waste. 1 Saund. 323 b.

22. Tenant at will shall have aid, and a release to him is good; *secus*, of a tenant at sufferance. 2 Leon. 47. 3 Leon. 152, 153.

23. Tenant at will, or other particular tenants, cannot bind him who has the inheritance. *Rooke's case*, 5 Co. 99 b.

24. A tenant at sufferance is not within the statute of forcible entries. *Rex v. Depuke*, 11 Mod. 273.

25. Tenant at will cannot justify a forcible entry until he has been three years in possession. *Anon.* 11 Mod. 43.

VII. OF UNDER-TENANTS.

A holds of B, who holds of C; A is sub-tenant to C. *Burman v. Aston*, 1 Lev. 144.

VIII. OF TENANTS TO THE PRECISE.

1. Tenant to a *precipe pedente placito* before judgment is sufficient. *Samborne v. Belke*, 1 Show. 347.

2. A tenant has been made frequently after the return of the *precipe* and a voucher. *Id.* *ibid.*

3. Tenant in tail and remainder may join in making a tenant to the *precipe*, who vouches them jointly, and they vouch over the common vouches. *Page v. Haywood*, 11 Mod. 61.

[See ante, tit. RECOVERY, div. I. Vol. II. p. 1143.]

TENDER.

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I. IN WHAT ACTION A TENDER MAY BE MADE.

1. A tender is good in an action of covenant for the payment of rent. 1 Saund. 33 d. n. [A].

2. Tender and refusal is no plea on covenant to pay a sum to a stranger at a place and time certain. *Anon.* 12 Mod. 441.

3. The statute of 21 Jac. 1. c. 16. concerning tender of amends, extends not to replevin, but only to actions of trespass. *Lutw.* [679].

4. It was formerly held that a tender was not good in any case but where there was a penalty; therefore not in *assumpsit*. *Browne v. Pine*, Comb. 334. S. C.

5. Tender may be pleaded to a *quantum meruit*. *Johnson v. Lancaster*, 1 Stra. 576. 1 Saund. 33 d. *Contra* *Giles v. Harris*, 1 Ld. Raym. 255.

[See post, tit. TRESPASS, div. V. (e) 2.]

II. RELATIVE TO THE MODE OF MAKING A TENDER;—

(a) *With respect to the person*.

1. Tender to an agent is good. 1 Saund. 33 c. n. [e].

2. But a tender of amends for a trespass to a bailiff is not good. 1 Ro. 258.

3. The obligor can plead a tender to one whom the obligee has appointed to receive the money, and refusal of it; but not where he is bound to pay the money to a stranger. *Mo.* 37.

4. Two provisions in two indentures of conveyance of two several manors to A and B, "that if the feoffor pay or tender 20s. to A and B, or the heir of A, they shall be void;" A dies; tender to B is ill, but to the heir of A good; yet it must be of two twenty shillings: *secus* of a collateral act. 3 Dy. 372. pl. 9.

(b) *With respect to the time*.

1. If a thing is to be delivered at or before a certain day, the tender must be at the

last convenient time of the day; a tender any time before will not do. *Hammond v. Ouden*, 12 Mod. 421.

2. The tender of stock must be at the last part of the day that it can be accepted. *Duke of Rutland v. Hodgson*, 2 Stra. 777.

3. Upon rent reserved by the king, payable on demand at a place certain, on pain of forfeiture if not paid within one month, a tender after it is due, but within the month, suffices without another on the last instant. 1 Dy. 87. pl. 104.

4. On a distress for damage feasant, &c., amends may be tendered till the cattle are impounded, but after impounding the tender comes too late; tender of amends to the bailiff is not good. *Pilkington v. Hastings and others*, 5 Co. 76 a. Cro. Eliz. 813. S. C. *Alcoyes v. Browne*, Lutw. [527]. 1262.

5. Tender after the day fixed in the condition of a bond is a bad plea. 2 Saund. 48. n. [f].

6. Where a man has refused to pay money due, he cannot plead a tender made afterwards. *Giles v. Harris*, 1 Ld. Raym. 254.

7. And although it is before the action brought, yet if it is after two requests, it avails not. *Johnson v. Mapletoft*, Lutw. [79].

(c) *With respect to the amount of the sum to be tendered*.

1. A tender of more than is due is good.* *Wade's case*, 5 [*1373] Co. 114 a. *Astley v. Reynolds*, 2 Stra. 916.

2. But a tender of a larger sum, demanding change, is not good. 1 Saund. 33 c. n. [e].

3. If a tender be to J S in full of all demands, it will be so, though he take it in part. *Turner v. Goodwin*, Fort. 150.

4. In trespass, tender must be of sufficient amends, at the peril of the party tendering; but in the case of an estray, if the party say, "tell me what is due, and I will pay you," it is sufficient. *Anon.* 11 Mod. 71. 2 Salk. 686.

5. Tender that the plaintiff was ready to pay what was due for the copy of a poll, till the officer demands a something certain, held a good tender. *Phillip v. Smith*, Com. 279.

(d) *With respect to the manner of tendering*.

1. Tender may be made of stock without an actual transfer. *Lancashire v. Killingsworth*, 1 Ld. Raym. 686. *Thales v. Seignoret*, 1 Ld. Raym. 441. S. P.

2. A tender of money in bags is good, without showing or counting it, if in truth the proper sum was there. *Wade's case*, 5 Co. 114 a.

3. If at the time appointed for payment a base money be current in lieu of sterling, tender at the time and place of that base money is good, and the creditor can recover no other. 1 Dy. 82. pl. 69.

4. A tender in bank notes is not a legal tender, but it is good if not objected to. 1 Saund. 33 c. n. [e].

5. After acceptance of the money, the party cannot object to any part of it. *Wade's case*, 5 Co. 114 a.

6. Whatever is given in satisfaction must be accepted in satisfaction, else it is not good. *Young v. Rud*, 12 Mod. 85.

7. The manner of the tender and of the payment shall be directed by him who makes them, not by him who accepts. *Pinnel's case*, 5 Co. 117 a. Mo. 677.

8. Demanding a receipt in full makes the tender bad. 1 Saund. 33 c. n. [e].

9. The defendant upon an award was to pay to the plaintiff 8*l.*, or 3*l.* and costs of suit expended in an action of trespass betwixt the plaintiff and defendant, as should appear by a note under the attorney's hand of the plaintiff, &c.; the plaintiff is not tied to cause his attorney to tender the note to the defendant, but the defendant ought to seek the attorney, and request it of him. March, 108. pl. 186. and 156. pl. 225.

10. In debt on bond conditioned that the defendant shall seal and execute a release to the plaintiff, the defendant is bound to seal and execute without the deed being tendered by the plaintiff. *Baker v. Bulstrode*, 1 Mod. 104.

(e) *When notice is necessary.*

If money is to be paid or tendered at a place certain, but no time limited, the party must give notice of the time when he will make the tender. 3 Dy. 354. pl. 32.

(f) *When the party has an option.*

Where a condition is to pay 20*l.*, or to deliver cows, at the choice of the obligee, the obligor must tender both. *Fordley's case*, 1 Leon. 68.

III. EFFECT OF A TENDER.

1. A tender and refusal is equivalent to payment. 1 Vent. 167.

2. If one is obliged to release on payment of money, he is bound to release on tender and refusal, as if actually paid. *Simon v. Gavi*, Salk. 75. 2 Ld. Raym. 961. S. C.

3. Where a man has to pay money upon an act being performed, and there is a tender of performing the act, and a refusal, it is equivalent to its having been done. *Lancashire v. Kellingsworth*, Com. 116.

4. If there be a tender of the money after the day, and refusal, upon an after debasement of the coin, the debtor shall bear the loss. 1 Dy. 82. pl. 70.

5. A sum awarded to be paid is lost for ever by tender and refusal. *Genne v. Tinker*, 3 Lev. 24.

IV. WHEN A TENDER SHOULD BE ALLEGED IN A DECLARATION.

On a covenant to do an act, the other party paying so much money, a tender of

the money need not be alleged. *Merril v. Rane*, 1 Stra. 458.

V. RELATIVE TO THE PLEA OF [*1374] TENDER.

(a) *Nature of the plea.*

1. The plea of tender is no longer considered a dilatory plea. 1 Saund. 33 c. n. (2).

2. It cannot be joined with *non assumpt* to the whole, nor with alien enemy, nor with *non est factum*. 1 Saund. 33 d. Ib. n. [i].

(b) *With respect to its form.*

1. Where the time and place are certain, it must be set forth when he came and made the tender, and how long he stayed. *Lancashire v. Killingworth*, 3 Salk. 342. 2 Salk. 624.

2. If the other party be not ready at the time and place, the party tendering must be there at the latest convenient time of the day, and it must be so alleged. S. C. 12 Mod. 530, 531. Com. 117. Holt. 177.

3. Unless by usage it is to be at a particular hour, which must be averred. S. C. 12 Mod. 533. 2 Salk. 624. S. C.

4. A plea of tender of rent on the land demised is not good, if it be not shown that it was made in a convenient time before sun-set; but it is aided by a tender afterwards to the lessor himself. *Keating v. Irish*, Lutw. [229].

5. In tender of stock, the usual hours of transferring must be set forth. *Bowles v. Bridges*, 2 Stra. 832.

6. The time of a tender at the transfer office should be shown. *Lancashire v. Killingworth*, 1 Ld. Raym. 588.

7. In a plea of tender of amends, the tender must appear to be immediately after the trespass and before the *latitat* issued. *Watts v. Baker*, Prac. Ca. K. B. 172. Cro. Car. 164.

8. Plea, that he was ready to deliver an obligation, &c., is ill, without saying he tendered or offered it. *Cole v. Walton*, 3 Lev. 103. 12 Mod. 353. *Anon.* 3 Salk. 342. 2 Lev. 209. *Horn v. Lewins*, Fort. 235. 1 Saund. 33 c. *Contra*, *Giles v. Hart*, Carth. 413.

9. When both parties meet at the time and place, he that pleads tender must also plead refusal. *Lancashire v. Killingworth*, Salk. 623. 12 Mod. 530. Com. 117. 2 Vent. 109. 8 Mod. 106. 219. 292. 1 Ld. Raym. 687. Cro. Eliz. 869.

10. Otherwise, where the action is brought on a bond given in defeasance of a former bond. 10 Mod. 282.

11. If the party be not present, that must be shown. *Blackwell v. Nash*, 8 Mod. 106. 2 Vent. 109.

12. And it ought to be shown that notice was given to him. *Semb. Lancashire v. Killingworth*, Com. 117.

13. In case of absence, it must be shown that he was there at the time ready. S. C. Salk. 623.

14. And also when he came, and how long he stayed. *S. C. Salk. 624.*

15. A tender pleaded, and that the party was not there to receive it, is good, without saying nor any one else for him. *S. C. Com. 117. 12 Mod. 531. S. C.*

16. Plea of tender and refusal is in general not sufficient, unless he pleads "always ready." *Turner v. Goodwin, Fort. 150. 1 Dy. 24. pl. 154. 1 Saund. 33 c.*

17. Ready from the time of the tender is not sufficient. *Haldenby v. Tuke, Willes, 632.*

18. In debt on bond conditioned to pay 500*l.* to the administrator of the obligee within two months after his death, a plea, that he was ready to pay it but that no administrator was appointed, without saying *encore prius*, is bad. *Lee v. Garret, 2 Show. 144.*

19. If *tout temps prius* be pleaded by an administrator, he must aver that his intestate was at all times, from the time of making the promise to the time of his death, ready to pay; and that he has at all times since the death of his testator been ready to pay. *Say. 18.*

20. Where money is to be paid in discharge of a debt, *tout temps prius* must be pleaded, notwithstanding a tender. *Hammond v. Webb, 10 Mod. 282.*

21. The owner of an estray may seize it, tendering satisfaction; and in pleading, he need not show the sum tendered. *Henly v. Walsh, 2 Salk. 686.*

22. Tender and refusal may be pleaded in satisfaction of payment. *Ledingham v. Porphyry, 1 Mod. 77, 78.*

23. A tender in covenant for rent may be pleaded to the whole declaration. *1 Saund. 33 d.*

24. In *assumpsit*, satisfaction pleaded, and issue upon the acceptance, held good. *Young v. Ruddle, Salk. 627.*

25.* To a general *assumpsit*, or [*1375] debt on simple contract, tender, &c. must be pleaded with a *tout temps prius*, which it was formerly held could not be after imparlance. *Sweetland v. Squire, 2 Salk. 622. Lutw. [86]. Giles v. Hart, 12 Mod. 152. Wigmore v. Veal, 12 Mod. 84.*

26. But it may be pleaded after an order for time. *Giles v. Hart, Salk. 622. note.*

27. And now a tender may be pleaded after a general imparlance. *1 Saund. 33 c. 2 Saund. 20. Comb. 50.*

28. A tender at the day might always be pleaded after imparlance. *Giles v. Harrie, 1 Ld. Raym. 254.*

29. So, to debt on bond, a tender at the time and place, but that no one was there to receive, and *encore prius*, held a good plea without *tout temps prius*, and pleadable after imparlance. *3 Dy. 300. pl. 37.*

30. But in debt on bond to pay a certain sum on a certain day, there a tender on the

day, and *semper paratus*, is a good plea, but not in *assumpsit*, without *tout temps prius*. *Giles v. Hart, 3 Salk. 343. 1 Ld. Raym. 254. Carth. 413.*

31. So, in pleading a tender of a sum of money according to a defeasance which is in a different instrument from the original deed, it is not necessary either to plead that the party has always been and still is ready to pay, or to bring the money into court. *Trevel v. Aggas, Willes, 110. 2 Saund. 48.*

32. *Aliter*, if the defeasance be in the same deed. *Willes, 110.*

33. On covenant to pay money, damages being only to be recovered, tender and refusal is a good plea without *encore prius*. *Carter v. Downish, 1 Show. 130.*

34. A tender in debt is to be pleaded in bar of damages. *2 Salk. 623. 1 Saund 33. c. 12 Mod. 84. Giles v. Harrie, 1 Ld. Raym. 254.*

35. In *assumpsit*, it is pleaded in bar of further damages. *1 Saund. 33 c. Sweetland v. Squire, Salk. 623.*

36. A tender can be pleaded to an avowry only in excuse of damages. *Horne v. Lewin, 1 Ld. Raym. 644. Osborn v. Beversham, 1 Vent. 322.*

VI. RESPECTING THE PAYMENT OF MONEY INTO COURT;—

(a) *When it is necessary that the money tendered should be brought into court, and so averred in the plea.*

1. A tender of rent must be pleaded with *proferet in curia*. *1 Ld. Raym. 83. Brownlow v. Henley, Lutw. [129].*

2. So, on a plea of tender at A, to a bond for payment of money there, with *encore prius*, the money must be brought into court. *Panel v. Nevel, 2 Dy. 150. pl. 84.*

3. If the defendant pleads a composition by the other creditors, he ought to tender the composition money in court. *Buxton v. Nelson, Lutw. [243].*

4. On a tender pleaded to an avowry, the money need not be paid into court. *Horn v. Lewin, 1 Ld. Raym. 643.*

(b) *In what cases money is allowed to be brought in.*

1. In trover for money, leave was given to bring it into court. *Anon. 1 Stra. 142.*

2. Money may be brought into court at the suit of an executor. *Crutchfield v. Scott, 2 Stra. 796.*

3. The penalty of a penal statute may be brought into court. *Webb v. Punter, 2 Stra. 1217.*

4. Debt on bond was stayed on bringing into court the instalments in arrear. *Budges v. Williamson, 2 Stra. 814.*

5. Money due by the first instalment may be brought in, but not to stay the plaintiff from signing his judgment. *Darby v. Wilkins, 2 Stra. 957.*

6. Principal and interest, &c., brought into court upon ejectment on a mortgage. *Anon.* 1 Stra. 413.

7. Proceedings in ejectment stayed on bringing arrears of rent into court. *Goodtitle v. Holdfast*, 2 Stra. 900.

8. Proceedings on a mortgage may be stayed without payment of a bond. *Archer v. Snatt*, 2 Stra. 1107.

(c) *When not.*

1. In debt upon bond conditioned for payment of money by instalments, the payments due cannot be brought into court upon the statute 4 Ann. c. 16. *Sand v. Harris*, 1 Stra. 515.

2. In an action for dilapidations, [*1376] money* cannot be paid into court. *Squire v. Archer*, 2 Stra. 906.

3. Bringing money into court was refused in debt. *Leaspidge v. Pongillionne*, 2 Stra. 890.

4. No bringing goods into court in trover. *Bowington v. Willas*, 2 Stra. 822. 1191.

5. In an action for immoderate riding, the defendant cannot bring money into court. *White v. Woodhouse*, 2 Stra. 787.

(d) *Consequence of omitting to bring the money into the court.*

1. A plea of tender without bringing the money into court when necessary is a nullity. *Bray v. Booth*, 1 Barnes, 181.

2. And the plaintiff shall take judgment. *Pether v. Shelton*, 1 Stra. 638.

(e) *Respecting the taking of the money out of court.*

1. An admission of the tender is not necessary to enable plaintiff to take the money out of court. 1 Saund. 33 c. *Contra*, 2 Ld. Raym. 774.

2. Money brought in on pleading a tender, cannot be taken out by the defendant though he has a verdict. *Cox v. Robinson*, 2 Stra. 1027.

3. Held, that plaintiff could not proceed for damages where money was paid generally on the whole declaration in *assumpsit*, after taking the money tendered out of court. *Burton v. Souter*, 2 Ld. Raym. 774.

4. On a tender to one of two counts, plaintiff may proceed on the other, though he take the money out of court. 1 Saund. 33 c. n. [f].

VII. REPLICATION.

The plaintiff cannot reply instructions to his attorney for a writ. *Briggs v. Calverly*, 8 T. R. 629. *Moffat v. Parsons*, 5 Taunt. 307. March, 55, S. C. Cited, 1 Saund. 33 b. n. [c].

VIII. REJOINDER.

To a plea of tender, the plaintiff replied a demand and refusal before suing out the writ; rejoinder, that before the suing out the writ, the defendant tendered, &c.; traversing, that at any time after the tender, and before suing out the writ, the plaintiff requested him to pay, &c.; the rejoinder is bad. *Willes*, 602.

IX. EVIDENCE.

1. An actual tender must be proved, or a dispensation of it. 1 Saund. 33 c. n. [e].

2. To a plea of tender, a replication alleging a previous demand is not supported by proof of a demand of a larger sum. *Rivers v. Griffiths*, 5 B. & A. 630. Cited, 1 Saund. 33 b. n. [d].

3. A replication of a subsequent demand is not proved by bringing the action in covenant for rent. 1 Saund. 33 d. n. [h]. Cites *Johnson v. Clay*, 7 Taunt. 486. 1 B. Moore, 200. S. C.

X. COSTS.

If the costs are not paid on bringing money into court, the plaintiff must go on, and cannot have an attachment. *Hand v. Lady Dineely*, 2 Stra. 1220.

TENEMENT.

1. The word "tenement" extends not only to that which may be holden by some service, but comprehends all that a man may be seized of *ut de libero tenemento*. *Powell v. Bull*, Com. 267.

2. The word "tenement" mentioned in the statute 9 & 10 Will. 3 for the workhouse corporation of Colchester, extends to a rectory. S. C. Com. 265.

3. Tenement being of an uncertain signification, the words "messuage or tenement" is not a sufficient description of the premises in an ejectment. *Ellis's case*, Cro. Jac. 633.

TENURE.

1. All tenures in chief are in gross. *Spathurst's case*, Hob. 90.

2. A tenure *de domino ut de uno grosso, per vigesimam partem unius feodi militaris*, is a tenure by knight's service in chief, and the words "*ut de uno grosso*" are void. *Id. ibid.*

3. A tenure of any ancient honour is,* by usage and allowance [*1377] in all ages, taken to have the effect of a tenure in *capite*, viz. to have all the lands in ward. *Estwick's case*, 12 Co. 135.

4. The king having an honour, part by descent or purchase, part by attainder, tenure as of that honour should not be in *capite*. 1 Dy. 58. pl. 6.

5. Where a man holds of the king by reason of another thing, as of a manor, this is not a tenure in *capite*. Plow. 240, 241.

6. A man having jointured his wife from his socage lands, and devised two parts of after-purchased lands holden in *capite*; the king shall not have any part of the socage lands to supply the third part of the whole, unless covin be averred. 2 Dy. 158. pl. 33.

7. Lands holden of an honour or manor shall never be holden of the king in *capite*, though the honour or manor be escheat for treason. 1 Dy. 44. pl. 28.

8. Where the first offence found upon the

diem clausit, and the second found upon the *melius*, shall be joined together to make that a tenure by knight's service which would else be a tenure in *capite*. *Cowper v. Andrews*, Hob. 40.

9. If tenant by knight service make a gift in tail, reserving rent, the donee shall hold by knight service and the rent. 1 Dy. 52. pl. 3.

10. Office found that J S died seised of a manor holden of the king by knight service generally, the heir within age, it shall be intended land in *capite*; and it being also found in another county that he died seised of another manor holden of A B by knight service, A B may traverse the first manor's being holden in *capite*. 2 Dy. 161. pl. 47.

11. A fine levied upon a writ of customs and services, where it recited that there was a dispute about castle guard and murage, and that now the lord granted that the connise should be quit of the aforesaid services, saving all other services, this discharge of murage and castle guard, which it may be were not of right due, is no discharge of the tenure in chivalry. 2 Dy. 179. pl. 46.

12. The lord by chivalry releases to his tenant, rendering a hawk; this new reservation is void, and tenure by fealty continues. 2 Dy. 230. pl. 57.

13. If a man hold a manor of the king by the service of being constable of England, it is a good tenure in grand serjeantry. 3 Dy. 285. pl. 39. note.

14. The feoffee of tenant in *capite* before the statute of *quia emptores*, making a feoffment over to hold of his feoffor by a rent for all services, clearly makes no tenure in *capite*, and the first mestalty is holden only by knight service. 3 Dy. 299. pl. 33.

15. Land holden of the king by the service of finding two men with two oars to row over and beyond sea whenever it shall please the king in person to pass beyond sea, is not grand serjeantry. *Ibid*.

16. By service to find a man for the war, if it be of a manor, is by chivalry; if of any other, is grand serjeantry. 2 And. 189.

17. If on a *melius inquirendum* after 2 Edw. 6., tenure be found of the king as of a manor, *sed per quas servitias, juratores ignorant*, it shall be taken for knight service. 3 Dy. 306. pl. 64.

18. He who holds by the moiety of a knight's fee, shall be intended to hold by knight service, unless found otherwise. *Ibid*.

19. Tenure of the queen by the service of going to the wars at free charge, is no tenure in *capite*, though found so by office. 3 Dy. 345. pl. 3.

20. The tenant of a manor on socage obtaining a release of his lord, who holds over in *capite*, shall himself now hold in *capite*. 3 Dy. 359. pl. 1.

21. The tenant levies a fine to the king;

who grants the land to be held of the king; the seignory is extinct. Mo. 237.

22. Tenant by priority and posteriority makes a feoffment of all his lands to his sole use; the tenure by priority remains as before. *Role v. Osborn*, Hob. 27.

23. If the king's tenant make a gift in tail, the king has election to take the donor or the donee for his tenant; but if he accepts the services of the one, whether by this acceptance he is estopped from taking the other for his tenant afterwards, see Plow. 241. 249.

24. The construction of law is stricter where* the tenure is [*1378] charged upon a warranty real, than where upon a chattel. *Sir H. Roll v. Sir R. Osborn*, Hob. 25.

TERM.

I. OF THE LEGAL DIVISION OF THE YEAR INTO TERMS AND VACATIONS.

(a) *Relative to the commencement of the terms*, p. 1378.

(b) *Of the relation of the term*, p. 1378.

(c) *Practice respecting the terms*, p. 1378.

(d) *Relative to the adjournment of a term*, p. 1378.

(e) *Of the vacation*, p. 1379.

II. RESPECTING TERMS OF YEARS, p. 1379.

1. OF THE LEGAL DIVISION OF THE YEAR INTO TERMS AND VACATIONS;—

(a) *Relative to the commencement of the terms*.

1. If midsummer day be the next after *corpus Christi*, it is a hall day by the statute of Hen. 8., and the first day of Trinity term. 1 Ro. 29.

2. Trinity term may begin on Midsummer day, but cannot end on it. 7 Mod. 17.

3. In legal construction, the term commences on the essoign day; but in common construction, on the day of appearance. 1 And. 240.

4. For the purpose of delivering declarations, it does not begin till the sitting of the court. 2 Saund. 1 d. n. (1.)

(b) *Of the relation of the term*.

1. The whole term is but one day in law. *Reeves v. Trindle*, Com. 258. Cro. Jac. 284.

2. A declaration of such a term refers to the first day, unless there be a special memorandum of the time of filing the bill or of putting in bail. 12 Mod. 647.

3. The whole term has relation to the first day, if there be not a memorandum to the contrary. *Banbury's case*, Holt, 397.

4. In the King's Bench, a declaration or judgment shall not refer to the first day of the term, but to the time of filing the bill. *Kerbude v. Dyke*, 2 Lev. 180.

(c) *Practice respecting the terms*.

1. The courts are bound *ex officio* to take judicial notice of the beginning and end of

terms. 1 Saund. 300 d. n. (7.) Jenk. 331. 12 Mod. 647. Salk. 626, 627. *Estwick v. Cooke*, 2 Ld. Raym. 1557.

2. But the court will not take notice of the day of the return of the writs, as to the day of the month, in moveable terms. *Courtney v. Philips*, 1 Lev. 196.

3. The replication, rejoinder, rebutter, &c., are supposed to be in the same term with the preceding pleading. 2 Saund. 2. n. (2.)

4. Judgments ought to be entered of the same term they are given in. *Anon*, Holt, 400.

5. An entry of *curia advisari vult* from Hilary term to Trinity term, omitting mention of Easter term, held bad. 2 Ro. 422.

6. The term in which bail is put in is reckoned one of the two terms in which plaintiff must declare. 1 Stra. 631.

7. No matters of law are to be heard on the last day of term. Salk. 624.

8. But a trial at bar may be the last paper day, where the king is party. *Bellamont's case*, Salk. 625.

(d) *Relative to the adjournment of a term.*

1. Any of the terms may be adjourned by proclamation. 7 Mod. 1.

2. The term was adjourned to Oxford after the plague in London. 1 And. 279. W. Jo. 84, 85.

3. A term was adjourned to Reading. Cro. Car. 13.

4. The first return of a term may be cut off by proclamation, and the term adjourned to the second return. 7 Mod. 1.

5. An adjournment may be to another day or term, and it may be directed* [*1379] what sort of proceedings shall be first heard. Cro. Car. 11.

6. After the proclamation, the chancellor must issue his writ. 1 And. 279. 1 Keb. 942. pl. 1.

7. Where the term was adjourned to Oxford and back to Westminster, how the bill of Middlesex should be tested and executed, see *Memorandum*, 1 Lev. 176.

8. The sheriff takes a bond for appearances at Westminster, the term was adjourned to Saint Albans; the appearance ought to be at Saint Albans and not at Westminster. Mo. 430.

9. If the term be adjourned, the memorandum shall apply to the day of the adjournment. *Brook v. Bishop*, 7 Mod. 152.

10. The statute 1 Mary, c. 2. c. 7., by equity extends to cases where part only of a term is adjourned. 2 Dy. 186. pl. 68.

(e) *Of the vacation.*

1. The vacation begins the last day of the term as soon as the court rises. Salk. 544.

2. A bill could not formerly be filed against a privileged person in the vacation. Ibid.

3. Judgments in the vacation are as of the term before, except as against purchasers. *Duke of Norfolk's case*, Holt, 400, 402.

II. RESPECTING TERMS OF YEARS.

1. A term may be extended or sold on an *elegit*. 2 Saund. 68.

2. A term cannot be entailed. *Child v. Bailye*, 2 Ro. 129.

3. If one termor grant over his term, it will not be only for life, but absolutely. 1 Ro. 249. 280.

4. If the lessor takes the lessee to wife, the term is not extinguished, because the husband has the reversion in his own right, and the term in *auter droit*. *Lichden v. Winsmore*, 2 Ro. 472.

[See ante, tit. ESTATE, div. VII. Vol. I. p. 619., and tit. LEASE, Vol. II. p. 874.]

TERRE-TENANT.

1. After an annuity or rent determined, the person of the terre-tenant shall be charged in debt for the arrears. *Lillingston's case*, 7 Co. 39 b.

2. It is a good plea in *scire facias* against terre-tenants, that JS (who holds other lands of, &c.) *non fuit præmonitus nec return. tenens*. *Collop v. Brandlin*, T. Jones, 122.

3. A plea that there other tenants cannot be after a plea in bar, and must be verified by affidavit. 2 Saund. 9 a. n. (10.) 210 d. *Vide Hall v. Woodcock*, 2 Keny. 19. 1 Bart. 359. S. C.

[See ante, tit. SCIRE FACIAS, Vol. II. p. 1228.]

TIMBER.

1. If the house falls by a tempest or other act of God, the lessee for life or years has a special interest to take the timber to build the house again; but if the lessee pulls down the house, the lessor may take the timber. *Herlakenden's case*, 4 Co. 62 a.

2. The lessee for life may maintain trover for the timber of a house. 2 Saund. 47 b.

[See post, tit. TREES.]

TIME.

I. RELATIVE TO THE COMPUTATION OF TIME, p. 1379.

II. RELATIVE TO THE STATING OF TIME IN PLEADINGS, p. 1380.

I. RELATIVE TO THE COMPUTATION OF TIME.

1. If an act be to be performed on a certain day, and no particular time appointed for the doing it, the law intends the last hour of the day to be the time of performance. *Parks v. Crawford*, 10 Mod. 396.

2. Where a bill of exchange is payable ten days after sight, the day of showing the bill shall be taken for one of the ten days. Lutw. [672, 673].

3.* If a submission to an award is, *ita quod* it be made six days af- [*1380] ter the submission, the day of the

award is to be taken inclusive, so that if the award be made the day of submission, it is good. *Bellaryse v. Hester*, 2 Lutw. [177.] 1593, 1594. Sty. 382.

4. The day of the date of a protection was never counted any part of the year. *Norris v. Hundred of Gawtry*, Hob. 139.

5. The day of the date of a bargain and sale shall not be counted any part of the six months. S. C. Hob. 139.

6. The day of a robbery shall be counted parcel of the year. S. C. Hob. 139, 140.

7. When a computation of days is made from an act done, the day is included. *Anon.* 1 Ld. Raym. 481.

8. A lease a *confeccion* takes effect the same day, whether dated or no. S. C. Hob. 140.

9. If a bargain and sale have no date, the six months shall be counted from the delivery. S. C. Hob. 140.

10. A person is of age the day before his birth-day. *Anon.* 1 Ld. Raym. 480. *Fitzhugh v. Dinnington*, 2 Ld. Raym. 1096.

11. A policy to insure a life for a year is broken by the man's dying on that day twelvemonth. *Anon.* 1 Ld. Raym. 480.

12. Generally a month in law is accounted a lunar month. *Sharp v. Hubbard*, 2 Mod. 58. *notis. Rex v. Peckham*, Comb. 439.

13. Thus, in a condition of re-entry for non-payment of rent for the space of a month, the month shall be computed according to twenty-eight days to the month. Lutw. [461].

14. So, in contracts for stock, the computation must be by lunar months. 1 Stra. 445.

15. But the six months in which by the statute 2 & 3 Edw. 6. c. 13. s. 14. the suggestion for a prohibition is to be proved, must be reckoned according to the calendar. *Sharp v. Hubbard*, 2 Mod. 58. *Copley v. Collins*, Hob. 179.

16. So, when a statute speaks of six months in a matter which concerns ecclesiastical affairs, as in *quare impedit* in the case of lapses, the time shall be computed according to the calendar, because that is the mode of computation in such case in the ecclesiastical courts. *Sharp v. Hubbard*, 2 Mod. 58. *notis. Galesby's case*, 6 Co. 61 b. Cro. Jac. 141. 160. Jenk. 282. Yelv. 100. S. C. *Sed vide Woodward v. Hawersly*, Skin. 313.

17. In many cases concerning time, the common law gives a year and a day for a convenient time. *Constable's case*, 5 Co. 106 a.

18. The time for appeals was a year and a day after the murder. J. Kely. 25.

19. Time immemorial, is only presumptive evidence, and no absolute bar. 2 Saund. 175 b.

20. The law rejects fractions of days for the uncertainty; the whole day is commonly given to him that has the fraction, unless a third person will be thereby prejudiced. *Hemmings v. Brebason*, Orl. Bridg. 8.

II. RELATIVE TO THE STATING OF TIME IN PLEADINGS.

1. In ejectment by original, the demise &c., was laid upon the essoin-day, and held well. *Rogers v. Reresby*, 2 Ld. Raym. 870. 3 Salk. 8. S. C.

2. If a time to come be laid in an action of trespass, yet the plaintiff shall have his damages after a verdict. *Blackwell v. Eales*, 5 Mod. 287.

3. The time in trespass being laid before the plaintiff's title, held bad. *Pawlet v. Lawrence*, 1 Leon. 104.

4. In trespass in C. P., the omission of the day of the month in the declaration was held to be ground of error, and not amendable by the statute 18 Eliz. *Bicroft's case*, 2 Ro. 153.

5. Outlawry assigned as a breach of covenant, must show in what reign. *Fox v. Wilbraham*, 1 Ld. Raym. 668.

6. In real and mixed actions the time is never inserted. *Duppa v. Mayo*, 1 Saund. 286.

7. The court will not take notice *ex officio* that a certain hour was part of the night, without the words *nocte ejusdem diei*, or *noctanter*. *Mackalley's case*, 9 Co. 65 b.

8. A plea of entry by the defendant is not good without showing the time. 1 Ld. Raym. 432.

9. The time of the fact is not material in indictments of treason. J. Kely. 16.

10. Where the time is not material, yet,* if it be laid after the [*1381] action brought, the judgment shall be arrested; *secus*, of a time impossible, as 30th of February, &c. Comb. 442, 443.

11. An impossible time is no time. 3 Salk. 8.

12. When the year of the king is well expressed, the *Anno Domini* is surplusage. *Rex v. Everard*, 1 Ld. Raym. 639. Salk. 195. Holt, 175. S. C.

13. In covenant, the plaintiff alleges that after the descent to him, *scilicet* such a day, *et per decem annos tunc ultimo elapsos*, the defendant permitted the tenements to be out of repair; the *et per decem annos* was rejected as repugnant. *Crowther v. Oldfield*, 2 Ld. Raym. 1126.

14. Where a thing is to be done at such a time to be named by plaintiff, and the plaintiff sets forth that he appointed such a day, it is sufficient. *Scott v. Hegson*, 3 Salk. 346.

15. An issue of which time is made parcel is bad. *Brown v. Johnston*, 2 Mod. 145. 3 Salk. 208, 209.

16. Therefore in *quare impedit*, if to a plea of collation, the plaintiff reply a presentation on such a day, a rejoinder traversing the presentation on the day mentioned is bad, for it is making time parcel of the issue. *Stroud v. Horner*, 2 Mod. 185.

17. If a plea vary from the time laid in the declaration, and make such time mate-

rial, it must be traversed. *Beverly v. Pim*, 7 Mod. 16.

18. In covenant by a master against his apprentice, for leaving his service on such a day, if the apprentice plead a license for his absence on that day, the time is material, and therefore the master cannot give in evidence an absence on another day. *Anon.* 6 Mod. 70.

TITHES.

- I. OF THE NATURE OF TITHES IN GENERAL, p. 1381.
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- III. OF WHAT THINGS TITHES ARE PAYABLE, p. 1382.
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- XVII. PROCEEDINGS IN THE SPIRITUAL COURT RELATIVE TO TITHES, p. 1391.
- XVIII. PROCEEDINGS IN THE EXCHEQUER, p. 1392.
- XIX. EVIDENCE, p. 1392.

I. OF THE NATURE OF TITHES IN GENERAL.

1. Tithe naturally is but the tenth of a man's revenue, not of his labour and industry. *Hob.* 250.
2. Tithes have every property of an inheritance in land, except that they lie in grant and not in livery. 2 Saund. 305.
3. There can be no primary and immediate occupancy of tithes. *Holden v. Smallbroke*, *Vaugh.* 191. 194.
4. By statute 32 Hen. 8., in the hands of lay impropriators, they are as it were turned into lands and tenements. 2 Saund. 305.
5. The tithes of rectories impropriate are by 31 Hen. 8. c. 13., and 32 Hen. [*1382] 8. c. 7., converted into lay fees. 1 Mod. 269.

II. INCIDENTS.

1. An impropriate rectory is not chargeable for the repairs of the chancel by the se-

questration of the tithes by the bishop. *Walwyn v. Auberry*, 2 Mod. 254.

2. The tithes of a parson are subject to assessment for the poor's rate. *Parish of Lambeth's case*, 11 Mod. 375.

3. A woman is dowable of tithes. 2 Saund. 46.

4. An *assumpsit* lies on a promise to pay so much in consideration of tithes. *Eaton v. Sherwin*, 2 Show. 307.

5. An ejectment lies for them. 2 Saund. 304 a.

III. OF WHAT THINGS TITHES ARE PAYABLE.

1. Fenny fodder is liable to pay tithe. *Cro. Jac.* 47.

2. If a man agists cattle, and takes the cattle of other men to eat up his pasture, tithes are payable for the grass. 2 Ro. 191. *Guilbert v. Eversly*, *Hard.* 35.

3. Tithes of agistment of barren cattle are due of common right. *Hicks v. Woodson*, 2 Salk. 655. 1 *Ld. Raym.* 137. *Carth.* 392. S. C. *Jenk.* 281.

4. Tithes are due of after-math and rakings. *Mo.* 910.

5. Tithe is payable for acorns. 1 Ro. 100.

6. Milk used in the owner's house in another parish shall pay tithe; so of cattle for the plough. *Scoles v. Lowther*, 1 *Ld. Raym.* 129.

7. Tithes may be due of a warren by custom; so of doves and fishes. 1 *Vent.* 5 *Palm.* 527. *Mo.* 909.

8. Bucks and pheasants, although they are *feræ natura*, may be titheable. *Sharpe v. Sharpe*, *Noy.* 148.

9. Corn standing bought of the proprietor of a rectory, without special words to discharge it, must pay tithes. *Cro. Jac.* 262.

10. The tithe of corn ground in a horse-malt-mill shall pay only personal tithe, viz. a tenth part of the clear profits arising from the corn ground in the mill, over and above all incident charges. *Chamberlain v. Newot*, 4 *Mod.* 48 *notis.*

11. Tithes are payable for firewood, or wood for fences, unless there be a special custom to discharge them. *Cro. Car.* 113.

12. Tithe of wood (though not fuel,) is payable, unless shown to be burned in a house used for the maintenance of husbandry. *Anon.* 1 *Vent.* 75.

13. Wood that is not timber ought to pay tithes, though above twenty years' growth, if considered in the place as underwood. *Palm.* 38. 1 *Sid.* 300.

14. Tithes shall be paid of birch, but not of oaks. *Mo.* 908.

15. Also of willows growing in the soil of a manor when felled, though it be waste to fell them. *Gaffy v. Purdue*, *Hob.* 219.

16. By 2 & 3 *Edw.* 6. c. 13. s. 5., all barren heath or waste ground not titheable, shall, after it has been seven years improved, and converted into arable ground or

meadow, pay tithes. *Thomas v. Gifford*, 2 Show. 92.

17. Barren land to be exempt from tithes must be so *suapte natura*. *Anon.* 2 Ld. Raym. 991.

18. Tithe is payable for broom. 1 Ro. 39.

19. By 11 & 12 Will. 3. c. 16., 5s. an acre shall be paid for the tithe of hemp and flax. 4 Mod. 185 *notis*.

20. Land, though uncultivated, yet if it yield a profit, as in wood, slate, &c. is titheable. *Horner v. Bennet*, 6 Mod. 96.

21. Fenny land drained shall pay tithes notwithstanding the statute of barren land. Mo. 430.

22. Tithes ought to be paid for fulling mills. *Grimley v. Faulkingham*, 4 Mod. 45.

23. A corn-mill shall pay a personal tithe only. *Carlton v. Brightwell*, 4 Mod. 46 *notis*.

24. A *modus* was paid for one mill, and the party added two new mill-stones; it was held that the parson was entitled to have of the miller the tenth toll dish as a predial tithe. *Grimley v. Falkington*, 1 Show. 281. 282.

25. If a parson lease his glebe, he shall have his tithes notwithstanding. *Wetton v. Weston*. J. Bridg. 33.

IV. OF WHAT NOT.

1. Wood is not titheable of common right,* because not of annual increase. [1383] *Hicks v. Woodson*, 1 Ld. Raym. 137. Comb. 404. S. C. 6 Mod. 223.

2. No tithes of beeches above twenty years' growth, and decayed oaks. Mo. 541.

3. If one cut wood for fencing his own corn, he shall not pay tithes for it. *Croucher v. Collins*, 1 Saund. 142.

4. If leases cuts wood to make hedges, no tithes of the overplus. *East v. Harding*, Cro. Eliz. 499.

5. Trees once discharged shall yield no tithes of their wood being after *arides et mortuas*. *Rein v. Patenson*, Cro. Eliz. 477.

6. Tithe shall not be paid of willows within a county where they are used as timber. Hob. 219.

7. The loppings of trees privileged are discharged of tithes. *Rein v. Patenson*, Cro. Eliz. 477. Mo. 762.

8. A man shall not pay tithes of roots of a coppice rooted up, nor of quarries of stone. March, 58. pl. 89. & 64. pl. 100.

9. Germs of oak which was not cut till after twenty years, not titheable; *aliter*, if before. *For v. Thexton*, 12 Mod. 524.

10. No tithes are payable for beech. 1 Ro. 355.

11. No tithes of broom. Mo. 909.

12. Trees above twenty years' growth are not titheable. *Anon.* 3 Salk. 347.

13. Apples or other fruit in an orchard shall not pay tithes, if there be a *modus* to

pay a groat for every hogshead of cider, or 2s. a year in lieu thereof. 2 Show. 461.

14. Tithe is not payable of wood, &c. spent in the house. 1 Sid. 447. 1 Ro. 38. Cro. Eliz. 471. 609.

15. Predial tithes are not payable when the land lies fresh, but personal tithes for the cattle feeding upon it. *Attorney-General v. Futter*, Sav. 62.

16. Sheep fed in stubble fields solely for the purpose of manuring the land, are not titheable. 1 Mod. 216.

17. No tithe lamb is due if there be not ten, because they are entire things. *Selby v. Bank*, 12 Mod. 498. 1 Ld. Raym. 677. S. C.

18. On a bill for small tithes by a vicar against a parishioner for milk, it was held he should pay every tenth meal only. *Dodd v. Ingleton*, T. Raym. 277.

19. Milk is exempted from tithes by a custom, that the parson shall for so many weeks have the sole milking and milk of all the milch cows in the parish. *Hill v. Harris*, 2. Show. 461.

20. Tithes are not payable for tame turkeys, pheasants, or partridges, nor for their eggs. Mo. 599.

21. Pigeons shall not pay tithes, unless by special custom. *Stouffil's case*, 2 Mod. 77.

22. No tithes are payable for dry or barren cattle. Cro. Jac. 576. 1 Ro. 38.

23. Due for no fish taken in the sea, except by prescription. *Sheppard v. Penrose*, 1 Lev. 179.

24. No tithe is due for fish of comm. right. *Anon.* 6 Mod. 223. March, 17. pl. 41.

25. Cattle shall not pay tithes for agistment in the parish where the owner resides. *Harris's case*, 7 Mod. 114.

26. A man shall not pay tithes for cattle which are for plough and pail only, nor for conies, except by custom; and if the tenant does not plough and manure his land, yet the parson may sue him for tithes. March, 56. pl. 87. Cro. Eliz. 471.

27. Tithes are not due for the yearly rent or value of houses. Hob. 11.

28. Tithes are not due to a vicar out of the parson's glebe, by the words "*in minutis decimis totius parochie*;" otherwise of an endowment by express words. *Blincoe v. Barnsdale*, Cro. Eliz. 578. 579.

29. No tithes of quarries. Mo. 908.

30. Turf, gravel, and chalk, are not titheable, for they are part of the freehold. *Amiles v. Chambers*, 1 Mod. 35.

31. Tithes are not payable for bricks or clay, because part of the soil. *Stouffil's case*, 2 Mod. 77. March, 58. 64.

32. No person is liable as occupier of a corn-mill to the payment of a predial tithe. Say. 43.

33. Tithes are not payable of after-math *de jure*. *Norton v. Brigs*, 1 Ld. Raym. 243.

34. Tithes shall not be paid for rakings

unless covin be averred. Cro. Eliz. 660. 1 Mod. 121.

25.* Where there is a *modus decimandi*, if a deer die, the owner is not bound to replenish it. *Cowper v. Andrews*, Hob. 40.

V. WHAT ARE GREAT TITHES.

It is the nature and not the quantity that makes the tithe great or small. 3 Lev. 365. *notis*.

VI. WHAT ARE SMALL.

1. Small tithes must be estimated from the nature of the thing titheable and not from the quantity of it sowed, or the place where sowed. *Wallis v. Pain*, Com. 639. *Wharton v. Lisle*, Skin. 356. *Sed vide* 12 Mod. 41.

2. Acorns are small tithes. *Wallis v. Pain*, Com. 640.

3. It is necessary that the acorns be gathered and sold; for if they drop of themselves from the trees in the season, and the owner's cattle eat them, in that case no tithe shall be paid of them. S. C. Com. 640. *note* 2.

4. Clover seed is a small tithe, and as such due to the vicar. S. C. Com. 633.

5. If a man sow his land with clover, and make his profit by the seed, this being a grain, the parson shall have tithe of it; but if he convert it into hay only, and make his profit of the hay, the vicar being endowed of tithes of hay, shall have it as a small tithe. *Wharton v. Lisle*, Skin. 341.

6. Flax is a small tithe wherever sown; by three judges against Holt, who held, the place where sown must determine whether great or small. *Wharton v. Lisle*, 12 Mod. 41.

7. Upon a special verdict, it was found, that twenty-six acres only in a parish which consists of twelve hundred were sown by several persons with flax; and adjudged that this was a small tithe and belonged to the vicar, who was endowed *de minutis decimis*. S. C. Skin. 341. 356. 12 Mod. 41. S. C. 3 Salk. 349.

8. Lambs are small tithes. Palm. 220.

9. Potatoes are only small tithes, in whatever quantities they may be sown. *Smith v. Wyatt*, 9 Mod. 336. *Wallis v. Pain*, Com. 639. *note*.

10. Saffron is a small tithe. Mo. 909.

11. Wood is a small tithe, and by custom may be payable to the parson instead of the vicar. *Tiddell v. Walters*, 1 Mod. 50.

VII. RELATIVE TO THE SETTING OUT AND PAYMENT OF TITHES.

1. Tithes of corn are payable in the sheaf. 1 Sid. 283.

2. Tithes of hay ought to be paid in grass cocks. *Smithson v. Dodson*, 9 Mod. 117, 118.

3. A mill for grinding corn by horses shall pay tithe in the nature of personal tithes only, that is to say, not the value of the tenth toll-dish, but a tenth part of the clear profits arising from the corn ground in the mill,

over and above all incident charges. *Grimley v. Falkingham*, 1 Show. 282 *notis*.

4. If two men are entitled to tithes by moieties in a parish, it is sufficient if the parishoner sets out an entire tenth without dividing it. Lat. 24.

5. Tender of tithe cheese at the house of the parishoner, is a good tender. *Dodd v. Ingleton*, T. Raym. 278.

6. Tithe milk ought to be carried by the parishoners and delivered at the vicarage or parsonage house, unless it has usually been delivered at the church porch, &c. Id. *ibid*. *Scoles v. Louther*, 1 Ld. Raym. 129.

7. It is not necessary by the common law to give notice of the setting of them out. *Gale v. Ewer*, Com. 23. 12 Mod. 117, 118. S. C. Noy, 19. S. P. *Contra*, *Shotton v. Friend*, Carth. 143.

8. But by the civil law it is. *Spencer's case*, Noy. 19.

9. And a custom to give notice is good. *Gale v. Ewer*, Com. 23.

10. A custom to pay tithes truly, without view of the parson, held bad, for no man can be his own judge or divider. *Wilson v. Bishop of Carlisle*, Hob. 107.

11. Upon a *modus decimandi*, if pasture is turned into meadow and tillage, it restores not the tithes in kind, but the value. *Cowper v. Andrews*, Hob. 44.

12. So, if 2s. a year and a shoulder of every third deer have been paid for a^e park as a *modus*, the firm of tith- [*1385] ing remains, though the park be disparked. Hob. 37.

13. While tithes remain upon the ground, the owner of the ground cannot put in his cattle and eat his corn. *Shapcott v. Muford*, 1 Ld. Raym. 189.

14. The turning of cattle into them makes a fraudulent severance. *Gale v. Ewer*, Com. 24.

VIII. RELATIVE TO THE TAKING AWAY OF TITHES.

1. For the purpose of carrying away tithes, the rector may enter a close; but it must be by the usual way. 1 Saund. 323b. n. [i].

2. The parson is not obliged to take tithe of grass the day it is cut, but may let it be long enough to make it into hay. *South v. Jones*, 1 Stra. 245.

3. Case lies for not taking away tithes. *Shapcott v. Muford*, 1 Ld. Raym. 189.

IX. WHO IS ENTITLED TO THEM.

1. A layman is not, at common law, capable of taking tithes in prebend. *James v. Trollop*, 2 Show. 440. Cro. Eliz. 571.

2. But by way of retainer they may. *Wright v. Wright*, Cro. Eliz. 511, 512. S. C. 2 Show. 439.

3. So, a layman may take a *modus* in lieu of tithes. 2 Show. 440.

4. Tithes are of common right, and were due to the church before the council of Lateran, though not to any spiritual person in cur-

tain. *Slade v. Drake*, Hob. 296. *Sed vide Hicks v. Woodeson*, 4 Mod. 337.

5. Of common right all tithes belong to the parson. *Grene v. Austen*, Yelv. 86.

6. Tithe of clover belongs to him who has the tithe of hay. *Warthon v. Lisle*, Carth. 264.

7. Tithe of flax belong to the vicar as small tithe. *Wharton v. Lisle*, Carth. 264.

8. A vicar cannot have tithes, but by dotation, composition, or prescription, for all the tithes *de jure* appertain to the parson. *March*, 11. pl. 29.

9. The vicar shall not have tithes of the glebe without special words. *Mo*. 911.

10. If any place be not within a parish, the king is entitled to the tithes. 1 Ro. 454. 457. *Wright v. Wright*, Cro. Eliz. 511, 512.

11. They may be payable for agistment of cattle in one parish and ploughing in another. *Swales v. Lawther*, 5 Mod. 96.

12. Tithe of cattle on waste grounds, shall be paid to the parson of that parish in which the owner dwells. 1 Mod. 216.

13. Payment of tithes to the parson is a discharge against the vicar. *Grene v. Austen*, Yelv. 86.

14. But if the parishioners pay their tithe to a parson who came in by simony, it is at their peril. Hob. 168.

X. WHO MAY PRESCRIBE TO BE DISCHARGED.

1. Any man may hold land discharged of tithes. *J. Bridg*. 33.

2. A copyholder of inheritance of the land of a bishop may prescribe in *non decimando*. *Mo*. 618.

3. The council of Lateran is a general law received in England, and lands discharged of tithes by that council are discharged by law, as all lands belonging to the Cistercian order. *Steeley v. Ullethorn*, Hard. 101.

4. Upon a prohibition to suit in the spiritual court for tithes, held, that at common law none but spiritual persons, or the king, who is a mixt person, were capable of tithes in pernaney, and no layman, unless in special cases, though he was capable of a discharge of tithes, by grant or composition, or by prescription *sub modo*, though not by a prescription in *non decimando*. *Bishop of Winchester's case*, 2 Co. 43 b.

5. So, though a layman cannot prescribe in *non decimando*, yet there may be a custom to exempt him from tithes. *Hicks v. Woodeson*, 4 Mod. 341.

6. The clerk of the parish cannot prescribe for tithes. *Mo*. 908.

7. A layman may claim an exemption from the payment of tithes by a real composition; and as to the meaning of a real composition, see *Wright v. Evans*, Com. 650. n.

8. *Ecclesia ecclesie decimas solvere non debet*. *Blyncoe v. Marston*, Cro. Eliz. 479.

9. Spiritual persons, or the king, [*1386] who is *persona sacra*, being capable of tithes in pernaney, are capa-

ble of prescribing in *non decimando*, or to be discharged of the payment of them. *Wright v. Evans*, Com. 654. *Wright v. Wright*, Cro. Eliz. 475.

10. A prescription, that a bishop and his tenants at will, &c., are discharged of tithes, held good. *Wright v. Wright*, Cro. Eliz. 511, 512.

11. A spiritual man may prescribe in *non decimando* for himself, his tenants, and farmers. *Mo*. 425.

12. The king pays no tithes, but his lessee shall. *Wright v. Wright*, Cro. Eliz. 511, 512.

13. An assignee might hold discharged of tithes. *Id. ibid*.

14. The king's patentee being a lay person cannot do so. *Wright v. Evans*, Com. 656.

15. The king is not by virtue of his prerogative discharged of tithes for the ancient demesnes of the crown, though he be capable of a discharge *de non decimando* by prescription. *Compost v. —*, Hard. 315.

16. An abbot discharged of tithes *quandiu in manibus propriis*, makes a gift in tail; the donee and the issue shall pay tithes. *Farman v. Shireman*, Hob. 248.

17. So, though the tenant in tail suffers a recovery, yet he shall pay tithes. *Id. ibid*.

18. But if the land return to the abbot, it is discharged again. *Id. ibid*.

19. Cistercian lands (in *propriis manibus* of the owner) are discharged of tithes. *Cro. Jac*. 559.

20. Though an abbot had paid no tithes time out of mind, yet held they should be paid by an alienee without special cause shown; for it shall be intended a personal discharge, not a real composition. *Bolls v. Atkinson*, 1 Lev. 185.

21. Lands, parcel of the possessions of the prior of St. John of Jerusalem, that came to the crown by the statute of 32 Hen. 8. c. 24., are discharged from payment of tithes. *Fosset v. Francklin*, T. Raym. 225.

22. Templars' lands ought not now to be discharged of tithes, for by the common law a lay person was not capable of such a privilege. *Cro. Jac*. 58.

23. He who has the inheritance of the Cistercians, Templars, and Hospitalers, is discharged from them, but his lessees or farmers shall pay them. 3 Dy. 277. pl. 60.

24. A prohibition in *non decimando* by a hundred, is good, not by a parish or town. *March*, 25. pl. 59.

25. No one can prescribe in a *non decimando* against a spiritual person. *Wright v. Evans*, Com. 647.

XI. WHAT MODUS, &c. IN DISCHARGE OF TITHES IS GOOD.

1. Tithes may be discharged in five ways: 1st. By the common law; as, tithes shall not be paid of coals, quarries, bricks, tiles, &c., nor of the after-pasture of a meadow, &c., nor of rakings, nor of wood to make pales, &c.; 2d. By statute; 3d. By privilege; 4th. By

prescription; 5th. By composition real. 13 Co. 12.

2. A part of the land itself may be given in discharge of tithes. *Cowper v. Andrews*, Hob. 42 Mo. 913.

3. It is a good *modus decimandi* that every parishioner or inhabitant having or occupying a mansion-house, shop, warehouse, &c., within the parish, shall pay in lieu of tithes for the same 2s. *per annum* upon every 20s. rent; and such sum may be sued for in the ecclesiastical courts. *Graunt's case*, 11 Co. 15 b.

4. A *modus decimandi* to be discharged of tithes of the second hay, for making the first hay into cocks, is a good custom. *Hede v. Ellis*, Hob. 250.

5. A custom to be discharged of tithes of odd sheaves, because the parishioners usually takes the pains to make the sheaves in stakes, is good. Lat. 226.

6. A prescription that the parson has such land, or such a sum in lieu of tithes, is a good *modus*. *Croucher v. Collins*, 1 Saund. 142.

7. A *modus* as to the tithes of a water-mill, held good. Carth. 214.

8. On a suit for tithes of a mill, the plaintiff in his suggestion ought to prescribe in *non decimando*, and bring an affidavit of the truth of the fact. *Hart v. Hall*, 19 Mod. 243.

9. A *modus decimandi* may be part certain and part casual, but cannot be all casual, for so it may fall into a *non decimando*. *Cowper v. Andrews*, Hob. 40.

10. A *modus decimandi* goes [*1387] only to the* realty (the tithes), and not to the personality (the offerings). March, 81. pl. 131.

11. A parson may prescribe in *non decimando* for tithes of wood. *Anon.* 7 Mod. 157.

12. A custom to be exempted of the tithe of underwood used in a parish for fencing corn is good, but it must be shown that the tithes are paid to the parson. *Hicks v. Woodeson*, 4 Mod. 344.

13. A custom may be good, that underwood, &c., used for husbandry purposes on the premises shall be free from tithes, but it is not so of common right. 1 Saund. 141. n. [c]. 142. n. (1.)

14. A *modus* must be for a known separate district. 1 Saund. 142. n. [f].

15. Custom that the lord of a manor shall have all the tithes within his manor, he maintaining a chaplain in the church of D, is good. 1 Ro. 3.

16. A lord of a manor might prescribe, that in consideration of having immemorably paid an annual sum of money to the parson for all tithes within his manor, he was entitled to have all tithes in the manor; but in general, tithes cannot be appurtenant to a manor. *Bishop of Winchester's case*, 2 Co. 43 b.

17. The lord of a manor can also prescribe to have the tenth sheaf and cock to himself, in satisfaction of his payment. Mo. 463.

18. A prescription to pay the tenth cheese in lieu of milk is good; but not to pay the tenth quart of milk, except at the parsonage-house, or any other place; then it is good. *Austyn v. Lucas*, Cro. Eliz. 609.

19. If land be aliened by consent of the patron and ordinary, or be recovered after aid prayed of them, yet the tithe shall not revive. *Cowper v. Andrews*, Hob. 42.

20. An ancient grant of tithes in fee, at 5s. rent, and payment ever since, was allowed for a *modus*. *Trotter v. James*, Poll. 623.

21. A *modus* surmised, that the parson had had twenty acres of pasture and a close of wood in lieu of tithes, and proof only of the pasture; still it is good. Mo. 911.

22. A *modus decimandi* is an actual discharge of the tithe. *Cowper v. Andrews*, Hob. 42. 118.

23. A *modus* to the rector is a good discharge from payment of tithe to the vicar. 1 Mod. 216.

24. A *modus* to pay so much money for tithes of a park is good, although the park be disparked. 1 Ro. 176.

XII. WHAT NOT.

1. A prescription to be discharged of tithes in a vill is too particular, but it is good in a whole county or hundred. 4 Mod. 342.

2. A county or hundred cannot prescribe in *non decimando* for things titheable of common right. *Hicks v. Woodeson*, Salk. 655. Comb. 403. 1 Ld. Raym. 137. S. C.

3. Otherwise of things not titheable of common right. Id. *ibid*.

4. A custom alleged in *non decimando* in a whole hundred is void, without showing that there was a sufficient maintenance for the parson besides. S. C. 4 Mod. 336. 340.

5. A prescription or custom in *non decimando*, even against a lay impropiator, was held bad. *Wright v. Evans*, Com. 643. Carth. 393.

6. Prescription does not lie against a composition between the parson and vicar. Mo. 780.

7. A *modus decimandi* is not good of a thing for which no tithe is due *de communis jure*. *Leifield v. Tysdale*, Hob. 11.

8. A custom to pay no tithe of hay employed in foddering cattle is bad. *Selby v. Bank*, 12 Mod. 497.

9. A *modus* is void, which gives only a tenth during part of the year, instead of the whole year, and not in a more advantageous way. Holt, 672.

10. A *modus* to pay in specie less than the tenth part of the very thing that is tithes, is not good, unless payable in another manner. *Hill v. Vaux*, 2 Salk. 656. 12 Mod. 206. Carth. 461. S. C.

11. A *modus* to pay a load of hay for all tithes of hay is not good. *Anon.* 1 Ro. 172.

12. Tithe of hay is a discharge for agist-

ment in the same land; so tithes of corn for halm. *Greene v. Audlin*, Yelv. 86.

13. A prescription cannot be [*1388] suggested, time out of mind, to pay a modus for tithe hops, since they were not known in England till queen Elizabeth's time. 1 Vent. 61.

14. A modus that if the parson send a servant to pull part of the hops, he shall have tithes, is ill. *Stedman v. Lye*, 1 Ld. Raym. 504.

15. A penny paid for every milch cow in satisfaction of tithes of the milch kine and beasts agisted, is not a good modus, or prescription. *Sherington v. Flewood*, Cro. Eliz. 475.

16. Wood land converted into arable is not discharged of tithe within the statute 7 E. 6. 1 Ro. 39.

17. A modus for the tithe of one thing cannot be a discharge of the tithe of another. *Neiten v. Briggs*, 1 Ld. Raym. 242. Salk. 657. Cro. Eliz. 446.

18. Prescription to pay the tenth sheaf or cock for all tithes of the land the same year in which it is sown, is not good; because tithes are due for the rakings also, Mo. 278.

19. A modus that is uncertain is void. *Startup v. Doderidge*, 11 Mod. 60.

20. Thus, a modus payable on or about such a day, is bad; for the day must be certain. *Blackett v. Fenney*, 8 Mod. 375, 376.

21. So, a modus to pay 2s. in the pound of the true improved yearly rent or value of the land, is void. 2 Ld. Raym. 1158. *Archbishop of York v. Duke of Newcastle*, Salk. 657.

22. So is a modus to pay 2s. in the pound of the rent reserved. *Bine v. Doddridge*, 1 Ld. Raym. 696.

23. But otherwise it seems as to houses in London. Hob. 11.

24. A modus to pay full tithe for all sheep on the ground on a particular day, in lieu of tithe of sheep for the rest of the year, is bad. *Moor v. Field*, 1 Mod. 229.

25. A custom to pay the ninth day's milk, till a lamb be heard to bleat, is ill. *Hill v. Vaux*, 1 Ld. Raym. 359. Salk. 656. S. C.

26. A custom to pay the tenth lamb yeanned, in consideration whereof to be tithe free of all lambs not yeanned there, is ill. 12 Mod. 497.

27. A custom to have tithes of all the lambs in the parish, being reckoned together as if they were one man's, is void. *Barker v. Cocher*, Hob. 329.

28. A custom to pay tithes in kind for sheep if they continue in the parish all the year, but if they be sold before shear time but a halfpenny for every one so sold, is a bad custom; but custom in the same parish to pay no tithes for loppings or wood for fire or hedging was held a good custom. March, 79. pl. 128.

29. A custom of paying tithe of wool by the pound, and not by the fleece, is no modus. 2 Stra. 783.

30. Custom, that if a parishioner feeds his sheep with his grass till June or August, he may mow the coarse grass to feed them in winter without tithe, is void. *Selby v. Clarke*. 1 Ld. Raym. 677.

31. Tithes cannot be discharged by a verbal agreement for money. *Haules v. Bayfield*, Hob. 176.

32. Lease, or agreement to be discharged from tithes during the parson's life, cannot be without deed. Cro. Jac. 137. 613.

33. Where a vicar has used, time out of mind, or a long time, to take tithes or other profits, he shall not be concluded by their not being expressed in the endowment of the vicarage. *Twiss v. Brasenose College in Oxford*, Hard. 328, 329.

34. A release of all demands in the parishioner's land does not discharge tithes. 1 Leon. 300. Ow. 40.

XIII. WHAT DESTROYS A MODUS.

1. If the lessee pay tithes in kind, still it will not destroy a modus. *Mascall v. Price*, 176.

2. If there be a water corn-mill with one pair of stones, and a windmill, and a modus is paid in lieu of tithes for the water-mill, this modus is not destroyed by adding thereto another pair of stones, but it shall pay tithe for the additional quantity ground. *Grimley v. Fawlingham*, 4 Mod. 45.; but see *Talbot v. May*, cited 4 Mod. 46. *notis*.

XIV. WHEN TITHES ARE DISCHARGED BY UNITY.

1. Unity does not extinguish but merely* suspend tithes. Mo. [*1389] 40. 4 Leon. 47.

2. They are not discharged in right, (though in payment) by unity of possession. Hob. 44. 297, 298.

3. A general allegation of unity at the time of the dissolution, without averment that it is perpetual, is insufficient. *Priddle and Nepper's case*, 11 Co. 8 b. 12 Co. 46 a. 2 Brownl. 25. S. C.

4. Such unity ought to be, 1st, rightful; 2dly, equal with respect to the quantity of estate; 3dly, it must have been *perpetua a tempore cuius*, &c.; 4thly, free from payment of any tithes. Id. ibid.

5. If the parson purchase a manor within his parish, unity of possession discharges it of tithes; but when the possession is severed, they revive. 1 Dy. 43. pl. 21.

6. Unity of inheritance without occupation is not a perpetual discharge; if one prescribe to pay money in satisfaction of tithes, he may give in evidence that he himself being parson has retained the money. Mo. 527.

7. There is a difference where the discharge is by reason of the persons, as the Cisterrians, &c., there the patentee shall

pay; but if discharged by unity, there the patentee shall not pay tithes. *Blincoe v. Barksdale*, Cro. Eliz. 579.

8. The lands which were vested in the crown by the 1 E. 6. are not discharged from the payment of tithes by the 31 H. 8.; a general allegation of a discharge of tithes by unity of possession is not sufficient; but in the case of lands which came to the crown by the 31 H. 8., the king or his patentee may allege generally that the lands were held by the abbots discharged of the payment of tithes at the time of the dissolution: ecclesiastical corporations, houses not being religious, are not within the statute 31 H. 8. c. 13.: although the statute 1 E. 6. enacts "that the king shall have the lands in as ample manner as the colleges, &c., yet that clause does not extend to the tithes which are collateral to the land." *Archbishop of Canterbury's case*, 2 Co. 46 a.

9. A perpetual unity *a tempore cuius*, &c. till the dissolution, shall be *prima facie* a discharge of the land of payment of tithes. *Priddle and Napper's case*, 11 Co. 8 b.

10. Lands are not discharged by reason of unity, if the lessors or farmers paid tithes before the dissolution. *Wildman v. Oades*, Poll. 8. 11 Co. 8 b.

11. So, if the under lessee paid to the lessee before the dissolution, unity is no discharge. 8 C. Poll. 10.

12. Unity discharges monastery lands of tithes if they were discharged at the time of the dissolution. Mo. 420.

13. Perpetual unity of a church appropriated and the land, is no discharge of the tithes. *Gerrard v. Wright*, Cro. Jac. 608.

14. Unity of possession of a manor and rectory will not exempt the domeane lands from the payment of tithes when they come to be severed. *Fox v. Bardwell*, Com. 498.

15. Copyhold land belonging to a monastery is not discharged by unity. Mo. 219.

16. So, where an abbot, before the dissolution, leased for years the manor and rectory, lessee made a less lease of parcel of the manor, and took tithes of the lessee at the dissolution, the term expired, the land of which tithes were paid is not discharged; but the residue was discharged by the unity. Mo. 528.

XV. RESPECTING GRANTS AND LEASES OF TITHES.

1. A lease for years of tithes was good at common law. 2 Saund. 304 a.

2. Now, by 5 G. 3. c. 17., leases of tithes are good. *Eaton v. Sherwin*, 2 Show. 307. *notis*.

3. Tithes may be leased for life by statute 8 Ann. 2 Saund. 291. n. (1.)

4. An estate in them cannot commence in *future*. *Semb. Yelv. 132*.

5. A rent cannot be reserved out of a hare tiths only, to make the lease good within

the 13 Eliz. c. 10., because neither a distress nor assize can be brought thereof. *Holden v. Smallbrooke*, Vaugh. 204.

6. A lease of tithes by a lay impropiator has the same properties by statute 32 H. 8. as a lease of lands and tenements, except as to the remedy by distress. 2 Saund. 305.

7. Tithes cannot be granted or leased without^a deed. 1 Leon. [*1390] 23. 2 Leon. 73. 1 Lev. 25. 2 Saund. 297. n. (1.) Cro. Jac. 137. Lat. 176.

8. Except for a year. 1 Ro. 174. 1 Lev. 25.

9. A rector makes a verbal lease of his tithes for one year, at so much per acre; the lessee lets them to the respective landholders at 6d. per acre more; adjudged, the lessee is the occupier of the tithes, and not the rector. *Rex v. Fairclough*, 8 Mod. 61, 62.

10. Tithes are not grantable by copy, because not parcel of the manor; otherwise of common, or *prima vestura prati*. Cro. Eliz. 814.

11. A parson sells wood without speaking of tithes; he is entitled to the tithes of it. Palm. 38.

12. Though tithes pass by deed only, yet, where a rectory and the tithes of D are granted, if there is not livery, neither the rectory nor tithes will pass, because they were intended to be granted together. *Holden v. Smallbrooke*, Vaugh. 197.

13. In debt for rent under a lease of tithes, the indenture must be set out. 2 Saund. 297. n. (1.)

14. No remedy lies by distress or assize for rent reserved upon a lease of tithes for life. Cro. Jac. 173.

XVI. PROCEEDINGS AT COMMON LAW FOR NOT SETTING OUT TITHES, OR FOR TAKING THEM AWAY.

1. Where tithes of corn or hay are set out, the property is altered; not so of cheese, or other personal or mixed tiths. *Anon*, Ley, 70.

2. Tithes vest in the owner immediately after being set out. 1 Leon. 39.

3. Action for treble damages upon the stat. of 2 Ed. 6. for not setting out tithes may be brought in the temporal courts. Mo. 710.

4. Debt upon the 2 Ed. 6. *tem pro domine rege quam pro scipso*, does not lie. Mo. 912.

5. For the taking away of tithes by a stranger, action lies at common law. *Ibid*.

6. When tithes are set forth, and after detained, remedy lies either in the court Christian or at common law, but against a stranger who takes them, only at the common law. *Leigh v. Wood*, Cro. Eliz. 607.

7. If my corn be cut though a stranger take it away before severance, yet an action lies against me for the tithes. Cro. Jac. 324.

8. An action lies upon the statute of 2

Ed. 6. against any man that takes the tithes. March, 21. pl. 40.

9. He who is wrongfully collated by the bishop, is such an incumbent as may sue for tithes. *Gawdy v. Archbp. Canterbury*, Hob. 302.

10. An incumbent presented by simony cannot sue his parishioners for tithes. March. 84. pl. 139.

11. A parson cannot have an action for great tithes before he is inducted. *Anon.* 11 Mod. 46.

12. The farmer of a rectory can have debt on the 2 Ed. 6. for not setting out of tithes. Mo. 710.

13. Two or more may join in the action. 2 Saund. 117.

14. Husband and wife can join for not setting out tithes. Mo. 912.

15. If the executrix of the lessee of a rectory marry, she and her husband may join in an action of debt upon the stat. 2 E. 6. for not setting them out. 13 Co. 23.

16. Debt for not setting out tithes lies by the executor of the parson, but not against the executor of the parishioner. 1 Sid. 88.

17. No action lies against executors on the statute 2 & 3 Ed. 6. c. 13. for not setting out tithes. *Attorney-General v. White*, Com. 434.

18. Although by the said act the treble value is not limited to any one by express words, the person shall have the forfeiture, and may sue for it in the temporal courts. *Bedell v. Sherman*, 13 Co. 47. Cro. Eliz. 613. Moore, 912. Jenk. 279. Gwill. 206. S. C.

19. The executor of the parson is entitled to the forfeiture given by that statute. *Attorney-general v. White*, Com. 434. note.

20. In an action for not setting out tithes upon the statute of 5 & 6 Edw. 6., it is sufficient for the plaintiff to declare that he was *proprietary*, without showing a title. *Strode v. Birt*, 4 Mod. 422. Hard. 173.

21. Though the defendant was not alleged to be *subditus domini regis*, [*1391] yet held* good, because he was called *occupator terre*. *Phillips v. Kettle*, Hard. 173.

22. An averment in the declaration, that the defendant *grano seminavit*, is sufficient, and not too general. *Bedell v. Sherman*, 13 Co. 47.

23. In debt for a treble value on the stat. 2 Ed. 6., where it is not shown in the declaration that the defendant had not agreed with the parson, it is ill on demurrer, but good after verdict. *Austin v. Burcoe*, Comb. 283. Carth. 304. S. C.

24. In debt for not setting out tithes, on 2 & 3 Edw. 6., an omission to state that they had been payable within forty years next before the act, is fatal after verdict. 1 Saund. c. n. [i].

25. This action upon the statute 2 Edw. 6. c. 13. of tithes, is not within the statute

21 Jac. 1. c. 16. of limitations. *Jones v. Pope*, 1 Saund. 38.

26. But the action must now be brought within six years. 1 Saund. 38 c. n. [i]. 2 Saund. 67 c. n. [y].

27. In debt upon the 2 Ed. 6., not guilty is a good plea, and judgment shall be for treble damages. Mo. 914.

28. An assignment of them must be pleaded to have been by deed. 2 Saund. 297. n. (2).

29. In debt for not setting out tithes, the setting them out and taking them away himself is not good within the statute 2 & 3 Edw. 6. c. 13. *Anon.* 2 Show. 184.

30. Where tithes are alleged to be discharged by unity at the dissolution, the unity is traversable; if by prescription, the prescription is traversable. *Button v. Long*, Cro. Eliz. 584.

31. In debt on 2 Edw. 6. for tithes, it was held by the court that a verbal agreement to pay money to the parson in discharge of tithes, though it is not such an agreement which may pass the right, yet it is a good agreement within the statute to bar the plaintiff of his action of debt. *Barnard v. Ewens*, T. Raym. 14.

32. There must be a writ of inquiry after judgment. 2 Saund. 107 c. n. [b].

XVII. PROCEEDINGS IN THE SPIRITUAL COURT RELATIVE TO TITHES.

1. If after setting out tithes the occupier take them away, and convert them to his own use, he may be sued in the spiritual court for the double value, but not for the treble. *Sprat v. Heal*, 13 Co. 23.

2. If in trespass the right of tithes come in question between two parsons, the spiritual court has jurisdiction. 1 Leon. 59.

3. Tithes, although severed, may be sued for in the spiritual court, and if proof is not allowed there, an appeal lies. *Blackwell's case*, Cro. Eliz. 844.

4. A remedy lies for them against Quakers in the spiritual court, notwithstanding the statute. Holt, 657.

5. The suggestion for a prohibition against a suit in the spiritual court for tithes of barren land, must, by 2 & 3 E. 6. c. 13. s. 14. be proved within six months after the prohibition granted, for this is an affirmative suggestion. *Thomas v. Gifford*, 2 Show. 92.

6. And these six months shall be computed according to the calendar, and begin to run from the teste of the prohibition. *Straker v. Baynes*, 2 Show. 308. 2 Show. 92. *Foy v. Lister*, Salk. 554. Carth. 403.

7. If the modus is not proved within six months by the plaintiff in a prohibition, a consultation shall go, which was done, and sentence given; but a prohibition was granted upon payment of double costs, because the sentence was not given upon the merits, but only upon the default of proving a modus. *Pool v. Gardiner*, Carth. 463.

8. *Modus decimandi* may be sued for in the spiritual court, if the custom be agreed by and between both parties; but if the custom be denied, a prohibition must be awarded until it be tried at common law. *Scot v. Wall*, Hob. 247.

9. The spiritual court has no jurisdiction on a prescription in *non decimando*, otherwise *de modo decimandi*. *Hutton v. Barnes*, Yelv. 79.

10. If, on a suggestion that the land for which tithes are demanded was barren, and recently improved, a declaration in prohibition be ordered, and* after a ver- [*1392] dict finding that the lands were not barren, a consultation be awarded, and sentence accordingly in the court below, the court of Arches cannot proceed to repeal such sentence on an allegation that the lands were barren, and therefore not liable to pay tithes. *Owen's case*, 2 Show. 195.

11. In disputes between parson and vicar, or when all is in one parish, when the right of tithes shall be tried in the spiritual court, and the spiritual court has jurisdiction thereof, the common law court shall be ousted of the jurisdiction. 12 Co. 12.

12. A *modus* of four shillings surmised, where the proof was of four shillings and sixpence, yet held good. *Beal v. Web*, Cro. Eliz. 819.

13. A parson can sue *pro modo decimandi* in a court Christian; but if the prescription is denied, a prohibition lies. Lat. 210. Palm. 440.

14. A suggestion that the parishioner is to pay the tenth part of milk at the parsonage-house or any other place, is a good ground for a prohibition. *Dodd v. Ingleton*, T. Raym. 278. in margin.

15. It is a rule, that where a parishioner does any thing which he is not compellable by the law to do, which comes to the benefit of the parson there, if he demand tithes of the thing, in lieu of which that thing is done, a prohibition lies; and also it is a rule to make that titheable which of itself is not titheable. March, 65.

16. A suggestion that the executors were sued in the spiritual court for double damages for not setting out of tithes, is no ground for a prohibition. *Wilks v. Russel*, T. Raym. 95.

17. A prohibition was denied after sentence to stay a suit for tithe of faggots, on suggestion that they were cut from the stumps of old trees, because that matter had not been pleaded in the spiritual court. *Dike v. Brown*, 2 Ld. Raym. 835.

18. Where a man dwells in one diocese, and has lands in another, out of which tithes arise, he may be cited out of the diocese where he lives, for the suit is local by reason of his lands. *Machin v. Moulton*, Carth. 476. 3 Salk. 96. 1 Ld. Raym. 452. 534.

19. No prohibition on a libel for tithes, suggesting a grant by patent which is cognizable at common law, because the spiritual court has cognizance of the principal, &c. *Anon.* Comb. 29.

20. They cannot try a *modus* there, though the original suit be for a *modus*, because the prescription differs. *Godfrey v. Mathews*, Comb. 427.

21. But if the question be payment or non-payment, they may proceed. Comb. 427. S. C.

XVIII. PROCEEDINGS IN THE EXCHEQUER.

1. In an information in the Exchequer for tithes, the value of the tithes must be set forth. *Attorney-General v. Stvaite*, Hard. 4.

2. In a bill for tithes, the complainant did not show how he was entitled to them; yet held good. *Stone v. Ludlowe*, Hard. 321, 322.

3. A plea of the statute 13 Eliz. c. 20. was allowed to be good when pleaded to a bill brought by a lessee for tithes. *Bokenham v. Benfield*, Com. 392.

4. If a *modus decimandi* be alleged no otherwise than by way of answer to an English bill for tithes, the defendant must answer to all other parts of the bill; but if he pleads it, he need not answer to any other matter. *Langham v. —*, Hard. 130, 131.

5. In a suit for tithes, the defendant set forth in his answer that the lands were parcel of such a priory, and that the lands belonging to that priory were discharged by order, without more; yet held good. *Page's case*, Hard. 322.

XIX. EVIDENCE.

Upon the trial of a *modus decimandi*, the parishioners cannot witness one for another. *Howard v. Bell*, Hob. 92.

TITLE.

I. RESPECTING TITLE GENERALLY, p. 1393.

II. WHEN AND HOW TITLE SHOULD BE SHOWN IN PLEADING, p. 1393.

III.* RESPECTING SLANDER OF [*1393] TITLE, p. 1393.

I. RESPECTING TITLE GENERALLY.

1. A title for years is a title. *Partridge v. Strange*, Plow. 83.

2. No man's title shall be tried between strangers, where he himself is not party. *Wimbish v. Tailbois*, Plow. 54.

3. Priority of possession is a good title against him who has no title at all. *Crew v. Ramsey*, Vaugh. 299.

4. Though the defendant has no title, yet that will not avail the plaintiff, except he can make out a good one in himself. *Thornby v. Fleetwood*, 10 Mod. 415.

5. If the possession of land come to him that has title to it, it extinguishes or suspends the title. *Partridge v. Strange*, Plow. 88.

II. WHEN AND HOW TITLE SHOULD BE SHOWN IN PLEADING.

1. The plaintiff must recover by his own strength, and not by the defendant's weakness. *Tufton v. Temple*, Vaugh. 8. 58.

2. In replevin, a title is in general necessary to be shown in the avowry. *Herrington v. Bush*, 11 Mod. 220.

3. No man can traverse an office except he can make himself a good title. *Res v. Bishop of Worcester*, Vaugh. 64.

4. In order to recover any thing from another, it is not sufficient to destroy the defendant's title, but you must prove your own to be better. *Res v. Bishop of Worcester*, Vaugh. 58. 60.

5. Where the plaintiff claims an easement out of the defendant's soil, the declaration must set out the title. *Vernon v. Goodrich*, Stra. 6. *Stroud v. Birt*, Com. 7. 11 Mod. 53.

6. But in an action founded on the possession, and brought against a wrongdoer or stranger, there is no necessity to make a title. *Bound v. Brooking*, T. Jones, 148. *Anon.* 11 Mod. 2. *Stroud v. Birt*, Com. 7. *Bird v. Stroud*, 3 Salk. 12. 11 Mod. 53.

7. In an action on the case by the owner of an ancient ferry against a person who erects a new ferry near to his, the plaintiff may declare on his possession. *Blisset v. Hart*, Willes, 508.

8. So, in an action on the case by a commoner against a stranger and wrongdoer. *Greenhow v. Halsey*, Willes, 621.

9. But in an action against the lord, he must set forth his title. Willes, 621.

10. Where the party pleading derives a title to his adversary, and does not claim under it, he need not set forth the estate, as he must if he claims under it. Carth. 209.

11. Title need not be made in ejectment or trespass; otherwise, where land is demanded. *Knight v. Lodg.* Cro. Eliz. 671.

12. In a declaration it may be stated that A let, and not that A was seised and let; it is otherwise in pleas. 2. And. 100.

13. In debt for rent, the defendant pleaded that the plaintiff *nul habuit in tenementis*; he need not set forth his title. *Marckar v. Harris*, 3 Salk. 211. 302.

14. Defendant claiming as devisee of the entire land, need not show it to be of socage tenure. *Anon.* 3 Dy. 329. pl. 16.

15. In pleading title under a grant by letters patent of the land of an attainted person, an averment that the predecessor of the king was seised by the act of attainder, without alleging the death of the person attainted, or office found, though informal, is sufficient; *secus* (at common law,) if the grant had been by such predecessor. Case of *Alton Woods*, 1 Co. 40 b.

16. In a declaration, there is this distinction between a defective statement of title, and a statement of a defective title; the first

is cured by verdict of the statute of jeofails, the last is not. 1 Saund. 285 b. n. [i.] 2 Saund. 137 a.

III. RESPECTING SLANDER OF TITLE.

1. The title of land slandered will bear an action. *Earl of Northumberland v. Bryant*, Cro. Jac. 163.

2. If the party have loss by it. *Smead v. Badley*, Cro. Jac. 397. Palm. 529.

3. As, for saying, "Mr. S. has no more right to the farm of C than a mere stranger." 1 Ro. 244.

4. Slander of title lies, though the words were not spoken to any one who was* buying the land. *Wil-* [*1394] *iams v. Linford*, 2 Leon. 112.

5. An action lies for saying, "Thou art a bastard," if it be of an heir, or administrator as next of kin; so, if a man having land is called "alien." Palm. 300. 1 Ro. 244.

6. But there must be special damage. *Semb. Vaughan v. Ellis*, Cro. Jac. 213. 323. 535. 625. 642.

7. But to say to an heir "that he has none of the blood of his ancestors," is not actionable, for it does not import bastardy. *Harris v. Roberts*, 2 Show. 95.

8. Slander of title under a claim of right is not actionable. 4 Co. 16 b. 1 Saund. 243 d. n. [k.]

9. So, where the party professes an intention to dispute the right. 1 Saund. 243 d. n. [k.]

10. "Take heed how you buy it, for it is mine if every one had his own, and I will spend 20*l.* but I will have it;" no action lies. *Lowell v. Weller*, 1 Ro. 409.

11. If I say that "J S has no right to Blackacre (which is in his possession,) but that I have right," no action lies; but otherwise, if I say that "a stranger has right." 2 Ro. 447.

12. In slander of title, for alleging that "another had a lease for years of the plaintiff's land," it is no defence that such a lease was actually made, if the lease was void in law, because the defendant took upon himself the knowledge of the law, *et ignorantia juris non excusat*. *Mildmay's case*, 1 Co. 177 b.

13. Joint-tenants, &c., may join in this action. 2 Saund. 117.

14. In an action on the case for slander of title, the declaration ought to allege special damage. *W. Jones*, 196. 3 Keb. 141. pl. 11.

15. Unless the verdict find it was spoken maliciously. *Semb.* 3 Keb. 141. pl. 11.

16. Stating the damage thus, "whereby the plaintiff lost the sale, &c." is too general. 1 Saund. 243 d.

17. Malice must be alleged and proved. 1 Saund. 243 b. n. [d.]

18. Defendant says, that "plaintiff has no title to such a land," and pleads in justifica-

tion that "he himself has title to it;" this is not good, though it would have been if he had said so at first. *Moore*, 410.

19. In an action upon the case for slandering his title, for saying to an intended purchaser, "I know one that has two leases of his lands, who will not part with them at any reasonable rate;" the defendant justifies of two parol leases made to himself; this was held to be no justification. *Pennyman v. Ribantis*, Cro. Eliz. 427.

20. In an action for slander of title, the plaintiff declared that he was in treaty with J S for a lease of the manor of A at so much rent, and that the defendant, knowing of the treaty, published these words, "I have a lease of the manor of A for ninety-nine years;" and published a lease for ninety years, supposed to be made for one seized of the same manor before the plaintiff's purchase thereof to E D her late husband, and offered to sell it; whereas in truth the defendant knew it to be forged, by reason whereof the said J S did not proceed in the treaty for a lease; the defendant, by her plea, traversed that she knew the lease to be a forgery: upon demurrer, it was held that if the defendant had said that she herself had title, though it were false, no action would lie; and though it appeared by defendant's plea that she had no title, yet that would not make the count, which was insufficient to maintain the action, good; 2nd, that the action lay, because it was alleged that the defendant knew of the treaty for a lease to J S, and that the lease which she published as a good lease was a counterfeit one, by which the treaty was broken off; 3rd, that the plea was insufficient, because the defendant's knowledge of the forgery was not traversable. *Gerard v. Dickenson*, 4 Co. 18 a.

TITLE-DEEDS.

WHO IS ENTITLED TO THE POSSESSION OF THEM.

1. If A enfeoff B with warranty to him his heirs and assigns, and B convey with warranty to C, though C, as assignee, may vouch A, he is not entitled to the trust deed. *Buckhurst v. Fenner*, 1 Co. 1.

2. But if a thing which lies in [*1395] grant be* granted with warranty, and the grantee convey with warranty to a third, the latter has a right to the trust deed. *Id. ibid.*

3. The heir of the warrantor, though he has nothing by descent, is entitled to the deed by reason of the possibility of descent. *Id. ibid.*

4. The lord by escheat, as he cannot vouch, is entitled to the deeds. *Id. ibid.*

5. But where a man conveys with warranty, he has a right (unless there be an express grant of the deeds) to retain all evi-

dence which contain warranty, or serve to dereign the warranty paramount, or to maintain the title of the land; but not such as concern the possession. *Id. ibid.*

6. The counterpart of a deed does not pass unless granted. *Sutcliffe v. Constable*, Yelv. 223, 224.

[See also ante, tit. CHARTERS, Vol. I. p. 277.]

TOLL.

1. There are two sorts of toll, viz. toll-thorough and toll-traverse; the one is in the king's highway, and the other in a man's own soil. *James v. Johnston*, 2 Mod. 143.

2. Toll-thorough cannot as such be claimed; but a consideration for it must be shown. *Rex v. Corporation of Boston*, W. Jo. 162. *Warren v. Prideaux*, 1 Mod. 105. *Willes*, 111.

3. Otherwise of a toll-traverse; there a consideration is implied. *Willes*, 111.

4. When toll is claimed generally, it shall be intended toll-thorough. 1 Mod. 232.

5. Toll-traverse may be claimed as appurtenant to a manor by a *que estate*. *James v. Johnston*, 1 Mod. 231.

6. Toll is not incident of common right to a fair or market, but must be by prescription or grant; reasonable toll lies in grant, not excessive toll; toll of common right is due for live cattle; and for other things, stallage and piccage; and stallage and piccage are only due to the owner of the soil. *Mo. 474. Holloway v. Smith*, 2 Stra. 1171. *Anon.* 7 Mod. 12.

7. No toll is due by law but for goods sold, unless by special custom. *Leight v. Pym*, Lutw. [559].

8. The inhabitants of the dutchy of Lancaster are quit of toll. *Osbuston v. James*, Lutw. [579].

9. The king by his prerogative is free from all tolls; so are all spiritual persons; and the king by his grant can exempt any others. *Palm*. 85.

10. Toll is to be paid by the buyer and not the seller. *Leight v. Pym*, Lutw. [559].

11. Any goods of a person liable to pay toll are distrainable. *Vinkersterne v. Edden*, 1 Ld. Raym. 386.

12. Anchors and sails of a ship are distrainable for toll. *Id. ibid.*

13. A capital burgeess cannot be disfranchised for preventing the corporation from receiving a toll pretended to be due to it by prescription. *Rex v. Viccars*, 11 Mod. 214.

14. A wife cannot be endowed of a toll. *Palm*. 78.

15. A toll in Pensance market belonging to the crown, in right of the dutchy of Cornwall, is not discharged by a grant from the crown, exempting the inhabitants of Pensance "from all and all manner of toll, pontage, stallage, &c., all which king John

had granted to them to be discharged from," for king John never had the toll belonging to the crown in right of the duchy; but if the grant had been general, without referring to the tolls which the kings of England formerly had in this market, it would have been a good grant of exemption. *Hill v. Priour*, 2 Show. 34.

16. Toll being a profit *a prendre*, may be appurtenant to a manor; and the appurtenancy is not destroyed by the manor having come to the possession of the crown by the dissolution of the monasteries in the reign of Henry the Eighth. *James v. Johnston*, 2 Mod. 144.

17. The king can grant liberty to take toll generally, without expressing what sums; and if the party take outrageous sums, the franchise can be seized, or may be presented on the stat. Westm. 1. c. 30. Palm. 85.

18. As toll is not of necessity incident to a fair, if the king grants *feriam annuatim cum omnibus libertatibus et liberis consuetudinibus ad hujusmodi feriam** [*1396] *spectantibus*, by such general words no toll can be taken; but otherwise, if it had been usually paid. *Heddy v. Wheelhouse*, Cro. Eliz. 558. 592.

19. A general *indebitatus assumptit* will lie for tolls. *Steinson v. Heath*, 3 Lev. 400. *in notis*. *Anon*. 7 Mod. 12.

20. In claiming toll for repairing a harbour, there is no need to aver that it is in repair. *Vinkensterne v. Edden*, 1 Ld. Raym. 385.

21. In an action for disturbance of toll, the plaintiff need not set out his title, but may declare merely on his possession. 2 Saund. 113 b. 114.

22. Toll due in the port of Newcastle in consideration of the corporation's charge in maintaining the port, held good. *Vinkensterne v. Edden*, Holt. 674.

23. A prescription for toll for setting his goods on land within my manor, held good without consideration. *Crispe v. Belwood*, 3 Lev. 424.

24. A prescription to take toll for passing on an ancient navigable river through the plaintiff's manor, is bad in law. *The Mayor, &c. of Nottingham v. Lambert*, Willes. 111.

25. In prescribing for toll, the particular kind of toll must be stated; for if it be toll-thorough, a consideration must be laid; but if it be toll-traverse, a consideration is implied. *James v. Johnston*, 2 Mod. 143.

26. And as toll may be appurtenant to a manor, it may be claimed by alleging a *que estate* in the manor. S. C. 2 Mod. 144.

27. A prescription generally for toll of all goods brought within the limits of a certain manor, is bad; for every prescription to charge the subject with a duty must import a benefit, and show the reason why it is

claimed. *Warrington v. Moseley*, 4 Mod. 319. Comb. 297. S. C.

28. There can be no prescription for a toll-thorough. 4 Mod. 320.

29. A lessee for life or years, or tenant at will, may prescribe to be exempted from toll. *Warrington v. Moseley*, 4 Mod. 306.

30. A freeman of a corporation disfranchised without having been summoned, cannot be examined as a witness in the case of a toll claimed by the corporation. *Brown v. Corporation of London*, 11 Mod. 225.

TONNAGE AND POUNDAGE.

The subsidies of tonnage and poundage might be granted by the king so long as he lived. 12 Co. 33.

TORT.

1. An action founded on a tort may be joint or several. Carth. 171. 295.

2. A tort against the estate of the testator does not die with his person. *Williams v. Cary*, 4 Mod. 404.

3. Debt upon the statute for not setting out tithes, is founded on a tort, and not on a contract, and therefore one defendant may be found guilty, and the other may be acquitted. *Bastard v. Hancock*, Carth. 361.

TOWN-CLERK.

The office of town-clerk is an office for life, unless restrained by charter or prescription. *Reg. v. Corporation of Durham*, 10 Mod. 147.

TRADE.

I. RESPECTING TRADE GENERALLY, p. 1397.

II. RESPECTING FREEDOM OF TRADE, p. 1397.

III. RELATIVE TO RESTRAINTS OF TRADE;—

(a) *By acts of parliament compelling an apprenticeship*, p. 1397.

(b) *By grant of the king*, p. 1398.

(c) *By a bye-law*, p. 1398.

(d) *On agreement between the parties themselves*, p. 1398.

(e) *By custom*, p. 1398.

IV. RESPECTING INDICTMENTS AND INFORMATION FOR EXERCISING A TRADE WITHOUT HAVING SERVED AN APPRENTICESHIP, p. 1398.

V. RESPECTING ACTIONS FOR USING A TRADE CONTRA- [*1397]
RY TO THE STATUTE, p. 1399.

I. RESPECTING TRADE GENERALLY.

1. Music is no trade, but a science. *Company of Musicians v. Green*, 8 Mod. 211.

2. A decoy for wild ducks is a kind of trade, and therefore an action on the case

will lie for maliciously preventing the wild ducks from coming to the decoy. *Keeble v. Hickeringill*, 11 Mod. 130. 11 East, 574. S. C.

3. No assembly for buying or selling can be without license, and these licenses, when granted, cannot be repealed without cause of forfeiture. *E. I. Co. v. Sandys*, Skin. 198.

4. Trading with an alien enemy is illegal. 2 Saund. 201.

5. Some cities and boroughs claim a liberty of excluding foreigners from buying or selling merchandizes within such city or borough. *Rex v. Kilderby*, 1 Saund. 312.

6. All cheats and abuses of tradesmen are indictable. *Anon.* Comb. 16.

7. Insurance on trade is void. 2 Saund. 201.

8. A power to place out children's fortunes to interest, or other way of improvement, must be understood exclusively of trade. *Cock v. Goodfellow*, 10 Mod. 495.

9. The usual course of dealing in trade is proper evidence. Holt, 300. 464.

II. RESPECTING FREEDOM OF TRADE.

A man may be free of a trade three ways. *Mayor and Commonalty of Colchester v. Goodwin*, Carter, 121.

III. RELATIVE TO RESTRAINTS OF TRADE;—

(a) By act of parliament compelling an apprenticeship.

1. At common law, it was lawful for a man to use what trade he would without being an apprentice to it. *Rex v. Kilderby*, 1 Saund. 312. The case of the *Tailors of Ipswich*, 11 Co. 53 a. *Hobbs v. Young*, 3 Mod. 312.

2. And in general, no mechanic or merchant can be hindered from trading but by act of parliament. *E. I. Co. v. Sandys* Skin. 133. See 12 Co. 33.

3. Any one who used any art or mystery at the time of the passing of the 5th Eliz. c. 4. might use the same art or mystery after the act, although he had not been an apprentice therein for seven years; but he could not use a different art or mystery. *Taylor v. Shottles*, 13 Co. 9.

4. The trade of a brewer is an art and mystery within that statute. *City of London's case*, 8 Co. 129 b. 13 Co. 9. S. P.

5. A barber is a trade within the statute; and so are upholsterers, tailors, &c. *Anon.* 1 Lev. 87. 1 Keb. 329. S. C. *Rex v. Sellers*, 1 Lev. 243.

6. A serge-maker may be indicted on 5 Eliz. c. 4. for using the trade of a dyer, in dyeing his own serges, if he has not served as an apprentice to the trade. *Rex v. Price*, 11 Mod. 169.

7. Exercising a trade by others (not apprentices) for profit, is within the statute. *Hobbs v. Young*, Holt, 66, 67. 3 Mod. 318. Carth. 163. Comb. 179.

8. But the journeymen who so work for hire are not within the statute. *Hobbs v. Young*, 3 Mod. 310. 317.

9. The restraints of 5 Eliz. c. 2. for following a trade without having served as an apprentice to it, do not extend to trades carried on in country villages. *Rex v. Twinn*, 1 Mod. 26.

10. Nor to petty chapmen. 3 Mod. 315.

11. One who brews and bakes for his own use, does not exercise any art, &c., against the statute 5 Eliz. *City of London's case*, 8 Co. 129 b. and 130 a.

12. Following a trade for seven years is sufficient without any binding. *Reg. v. Meddax*, Salk. 613. *Rex v. Celler*, Comb. 354, 255.

13. Serving an apprenticeship partly in and partly out of England, is sufficient. *The Queen v. Morgan*, 10 Mod. 70.

14. So, a service of apprenticeship beyond sea, and without deed. *Frith v. Twinn*, 1 Ld. Raym. 738. *Rex v. Fax*, 1 Salk. 67. *Anon.* 2 Show. 155 n.

15. By the custom of London, an apprentice* to one trade may [*1396] use any other. *Rex v. Bagshaw*, Cro. Car. 347.

(b) By grant of the king.

Grants of the king prohibiting trade are void. 3 Mod. 131.

(c) By a bye-law.

1. Trade cannot be restrained by any bye-law. *The Horners v. Barlow*, 3 Mod. 159.

2. If a power be granted by charter to a company exercising a particular trade in a particular place, to make bye-laws for the government of all persons exercising that trade in that place, the company is enabled make bye-laws, binding as well on persons exercising that trade, who are not members of the company, as on those who are. *Butcher's Company v. Mercey*, 6 Mod. 124. n.

3. A bye-law made by a corporation, that no butcher shall slaughter any beasts within the walls of the city, is good, for it is not in restraint, but in regulation of the trade. *Peirce v. Bartram*, 6 Mod. 124.

(d) By agreement between the parties themselves.

1. A man may restrain himself by promise or obligation not to use a trade in a particular place or town, especially if the time is also limited. 2 Saund. 156. 3 Mod. 128. March, 77. pl. 121. Ib. 191. pl. 238. W. Jo. 13. *Broad v. Jollyfe*, Cro. Jac. 596. *Colman v. Clark*, 7 Mod. 230. 10 Mod. 27. 85. 130.

2. Though the contrary was formerly held. *Clark v. Company of Tailors in Exeter*, 3 Lev. 241. *Clarke v. Comer*, C. T. Hardw. 52. *Thomas v. Sorrell*, Vaugh. 356.

3. There must, however, be a reasonable consideration, though the agreement be by specialty. S. C. 3 Lev. 242 in *notis*. *Mitchell v. Reynolds*, Fort. 296. 10 Mod. 130. 2 Saund. 156. Cro. Jac. 596.

4. As, where the defendant has been taken

in as a servant without money, where a considerable sum might be reasonably expected. *Cheesman v. Ramby*, Fort. 298. 2 Stra. 739. 2 Ld. Raym. 145, 146. S. C.

5. A promise or bond not to use a trade in a particular place is void, if it be without consideration; but if it restrain generally, it is void, though there be a consideration. *Aleyn*, 67.

6. A perpetual restraint as to time in a particular place may be good. 10 Mod. 132. 135.

7. So, a restraint with particular customs is good. 2 Saund. 156.

8. A promise, that if a man exercises a certain trade in a market, he will pay 100*l.*, is good. *Palm*, 172.

9. But if the breach of the condition does not apparently tend to the damage of the obligee, the restraint is void. *Mitchell v. Reynolds*, 10 Mod. 133. 135.

10. A bond with condition not to buy sheep's trotters of any person the obligee bought of, adjudged ill, and tending to a monopoly. *Thomson v. Harvey*, Comb. 121, 122.

11. So, if it be a general restraint throughout England. 10 Mod. 28. 131, 132. 2 Saund. 156.

12. If it be a total restraint in all places for a certain time, *quære*. *Mitchel v. Reynolds*, 10 Mod. 85. 137.

(e) *By custom.*

1. A custom in general restraint of trade is illegal. *Mayor of Winchester v. Wilkes*, 11 Mod. 48.

2. But a custom to restrain a man from using a trade in a particular place is good. 3 Mod. 128.

IV. RESPECTING INDICTMENTS AND INFORMATION FOR EXERCISING A TRADE WITHOUT HAVING SERVED AN APPRENTICESHIP.

1. Justices of peace have not power to take an indictment for exercising a trade, not having served an apprenticeship. *Reg. v. Taylor*, 2 Ld. Raym. 767.

2. An information *qui tam* on the above statute lies at sessions. *Farrer q. t. v. Williams*, 2 Mod. 427 *notis*.

3. Baron and feme cannot be jointly indicted for exercising a trade, &c., because it is the exercise of the husband. *Reg. v. Atkinson*, 2 Ld. Raym. 1248.

4. An information or indictment lies only in the proper county. *Barns v. Hughs*, 1 Lev. 249.

5. An indictment for using the trade of a merchant-tailor was quashed, because not a trade within the statute. *Reg. v. Harper*, 2 Ld. Raym. 1188.

6. In indictment for exercising trade, &c. it is best to aver it was a trade at the time of making the statute. *Reg. v. Slaughter*, Holt, 68.

7. But it is not necessary. Comb. 268.

8. An indictment for using a trade used in Great Britain instead of England, at the time of the statute 5 Eliz., was quashed. 1 Stra. 552.

9. In indictments for using a trade, the trade must formerly have been expressed in Latin. *Reg. v. Reed*, Comb. 212. See also 286. 288.

10. An indictment on the 5 Eliz. c. 4. s. 31. against a person for using a trade without having served an apprenticeship to it, stating that he had not served either in England or Wales, is bad, for the words of the statute are general, that if he has served an apprenticeship in any trade, he may use such trade any where within the realm of England or Wales. *Anon.* 2 Show. 155. *Reg. v. Fox*, 12 Mod. 251.

V. RESPECTING ACTIONS FOR USING A TRADE CONTRARY TO THE STATUTE.

1. An action of debt on the 5 Eliz. c. 4. for using a trade in any county not having been an apprentice seven years, lies in any of the courts of Westminster. *Forest q. t. v. Wire*, 2 Mod. 248. *Raynor v. Filler*, 3 Lev. 71. 1 Lev. 249. *Contra*, *Anon.* Holt, 38. See also *Clappe v. Edgecombe*, 2 Lev. 204.

2. The informer may prosecute for his moiety of the forfeiture within the year, but the king may prosecute after the year. *Reg. v. Franklyn*, 3 Salk. 351. *note*.

TRAVERSE.

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VI. CONSEQUENCE OF A TRAVERSE BEING WANTING, OR BADLY MADE, AND HOW AIDED, p. 1406.

I. WHAT MATTERS ARE TRAVERSABLE.

1. No person can traverse an office unless he can make himself a good title. *Reg. v. Bishop of Worcester*, Vaugh. 64.

2. If a false office be found of one dying seized of a reversion or remainder, the party grieved (if it be a remainder) cannot traverse till the death of tenant for life, but if a reversion, immediately. *Mo.* 723.

3. The probate of a will is not traversable. *Chichester v. Philips*, T. Raym. 406, 407.

4. Matter within the jurisdiction of the college of physicians is not traversable contrary to their determination. *Groenvelt v. Burwell*, 1 Ld. Raym. 467.

5. The king licenses A to go beyond sea for a certain purpose, provided, that if he converses with fugitives, the license shall be void; by privy seal he commands his return;

the messenger certifies a conversing with fugitives into Chancery, which is sent into the Exchequer, and his land is seized; this certificate is not traversable. 2 Dy. 176. pl. 30.

6. A coroner's inquisition may be removed into the court of King's Bench, and there traversed. *Rex v. Ripley*, 2 Show. 199. *Rex v. Clark*, 7 Mod. 16.

7. Matter of record cannot be traversed. *Fanshawe v. Morrison*, 2 Ld. Raym. 1140.

8. The sheriff's return cannot be traversed. 2 Mod. 10.

9. The return of a writ of restitution cannot be traversed. 3 Mod. 6.

10 If the sheriff return a *rescous*, the party was formerly entitled to traverse it, but not now. 3 Dy. 255. pl. 6. *ante*, p. 1209. div. V. pl. 1.

11. *In favorem vite*, an averment may be against a sheriff's return. 3 Dy. 349. pl. 14.

12. There may be a traverse of [*1400] a *devastavit** returned by the sheriff. *Johnson v. Burton*, Cro. Eliz. 860. 886.

13. The presentment of a court-leet is traversable. *Rex v. Ripley*, 2 Show. 199. Carth. 74.

14. A certificate by a bishop for non-payment of tenths is traversable, for he does it only as an officer, and not as a judge, as in case of bastardy. *Reg. v. Blancher*, Cro. Eliz. 80.

II. WHEN THERE MAY OR OUGHT TO BE A TRAVERSE IN PLEADING.

1. Where any thing is pleaded directly contrary to matter in the declaration, the plea is not good without a traverse. 1 Sid. 301.

2. A traverse must be taken where there is no confessing and avoiding. Cro. Eliz. 754.

3. A traverse may be of a precise material allegation, though unnecessary. 2 Saund. 206. n. (21.) n. (22.) Ib. 207 a. n. (24.)

4. When the charge in the declaration is not fully answered, there must be a traverse; as, if the defendant be sued as executor, and plead that another person was made executor. 2 Mod. 168.

5. A man must traverse that which is most material. *Whately v. Conquest*, Carter, 217.

6. The thing traversed should be issuable. 3 Mod. 320.

7. It must be of some preceding allegation in the adverse pleading. 1 Saund. 312 d. n. (4.)

8. The substance of the action is traversable; so is the conveyance to the action, if it entitle the plaintiff thereunto, if the defendant cannot wage his law; otherwise, if he may do so. *Kimersly v. Cooper*, Cro. Eliz. 169.

9. It may be of matter of right resulting from facts. 1 Saund. 23 a. n. (5.)

10. In a writ of intrusion of ward, the marriage unsatisfied, plaintiff having alleged

a tender of marriage, defendant may traverse it. *Pomerey v. Wichehale*, 3 Dy. 255. pl. 6.

11. In *assumpsit*, satisfaction being pleaded, an issue on the acceptance is good. *Young v. Ruddie*, Salk. 627.

12. Any part of what the defendant makes his title is traversable. *Moor v. Pudsey*, Hard. 316, 317.

13. A consideration executory is traversable, therefore a venue must be laid. *Sexton v. Mills*, Salk. 22.

14. In debt for fees of knighthood, it is alleged in the count, that the defendant voluntarily took upon him the said degree; a plea, that he took it upon him in *sola obedientia* to the king's command, is ill without a traverse. *Duppa v. Stephens*, Lutw. [133. 135.]

15. Whatever is necessarily understood, intended, and implied, in pleading, is as much traversable as if it were expressly alleged. 2 Saund. 9 c. n. (14.) *Muston v. Yateman*, 10 Mod. 302.

16. When it is material to state true time in a plea, and it differs from that laid in the declaration, the latter must be traversed. 1 Saund. 81 a. n. (3.) 269 a.

17. A justification in trespass of a seizure for rent ought to traverse the taking before and afterwards. 1 Sid. 293.

18. The defendant must traverse the place laid in the declaration, if he avow in another, which appears to be different on the face of the avowry. 1 Saund. 347 a. n. (1.)

19. When the plea makes the action local, the plaintiff may traverse a material point, notwithstanding the traverse of the place. *Serie v. Darford*, 1 Ld. Raym. 121.

20. The place should be traversed where the matter of justification is local, but not where it is transitory. *Sands v. Lane*, Cro. Eliz. 567. 2 Leon. 79. *Peacock v. Peacock*, Cro. Eliz. 705.

21. There may be a traverse of the place assigned in a replevin. Hob. 16.

22. Avowry for a rent-charge, stating the grantor to be seised in fee; a plea that it was an estate-tail, should traverse the seisin in fee. 3 Dy. 312. pl. 90.

23. That the defendant is bailiff, is traversable in trespass, but not in replevin. *Harrison v. Button*, 1 Ld. Raym. 233. But see *Trevilian v. Pine*, 11 Mod. 112.

24. In trespass and justification by command or license of another, the command is traversable. *Britton v. Cole*, 1 Ld. Raym. 318. *Harris v. Leven*, Fort. 234.

25. So, in replevin, and consuance damage feasant, the command or license is traversable; but not for rent. Id. *ibid*.

26. Where the defendant is charged with* a malicious tort, [*1401] and pleads in excuse, he must traverse the malice or default charged on him. 2 Leon. 94, 95.

27. In deceit against an attorney for ap-

pearing to an action without warrant, and by covin pleading *non est informatus*, plea, that the action was against the plaintiff and B jointly, and that B retained him, &c., must traverse the covin. 3 Dy. 361. pl. 6.

28. Where it is presented that A ought to repair a highway *ratione tenuræ* of land encroached, the *ratione tenuræ* ought to be traversed, and not the encroachment. *Lanyon v. Carne*, 2 Saund. 161. 166.

29. Where a thing is to be done by covenant upon request, the request is traversable. 2 Leon. 5.

30. Action on the case upon an *assumpsit* in London; the defendant pleads concord in another county of all matters in all counties, except London, and traverses the promise in London; the plaintiff may reply, that he promised in London, and traverse the concord. Mo. 428.

31. A wrong writ is pleaded to an action upon a bail-bond; the plaintiff replies a right writ; he ought to traverse the other writ, but it is well upon a general demurrer. *Anon.* 1 Barnes, 562.

32. Traverse of a recovery in an inferior court is good above. *Butcher v. Oldworth*, Cro. Eliz. 821.

33. If one prescription be contrary to another, the first prescription alleged must be traversed. 2 Mod. 104. 2 Leon. 209, 210. *Murgatroid v. Lew*, Carth. 117.

34. Where a prescription and presentation are alleged, the presentation is traversable, not the prescription. 1 Ro. 235.

35. Where interest is in land, or arises out of it, the plaintiff cannot reply *de jure sua propria*, but ought to traverse the right. *Cockerel v. Armstrong*, Com. 582.

36. In trespass against five for fishing in a several and free fishery, one of the defendants may plead property in his master, and that he did it by his command, and traverse the plaintiff's free fishery, as alleged by him in his declaration. *Wine v. Rider*, 2 Mod. 68.

37. A traverse may be taken, that the cattle escaped for want of enclosure. *Clerke v. Johnson*, Lutw. [569].

38. Trespass for driving sheep, *per quod* they lost their lambs; a plea saying he took them as a distress, without traversing the tortious driving, is bad. 3 Leon. 15.

39. In avowries and trespass, if a freehold is pleaded, it must be traversed. *Radborne v. Kennadale*, 3 Salk. 354.

40. Where in trespass the defendant pleads an assignment of a term made to him, which is expired, and justifies on another day, and not on the same day which is laid in the declaration, he ought to traverse the time before the assignment and after the end of it. 2 Saund. 295.

41. It must be taken when the plea varies from declaration in nature or quantity of estate alleged. 1 Saund. 209 *a. n.* (8).

42. When both parties convey from one person, the mesne conveyance is traversable. Cro. Eliz. 798.

43. One pleading a seisin generally, traverse may be taken that he is sole seised. *Gilbert v. Parker*, Salk. 629.

44. When different leases are pleaded, the first lease must be traversed, and not the last; otherwise of feoffments. 1 Ld. Raym. 237.

45. In trover and conversion, the conversion is traversable. Cro. Eliz. 97.

46. The *virtute cujus* of an *habeas corpus* was traversed, and held good. *Beale v. Simpson*, Lutw. [241].

47. Debt upon a lease of four acres, the defendant pleads a lease of five acres, and an entry into the fifth; he ought to traverse that he leased the four acres only. *Salmon v. Smith*, 1 Lev. 263. 1 Saund. 207. 1 Sid. 405. T. Raym. 173.

48. If the defendant allege seisin of a manor, and thereupon justify for a heriot, and the plaintiff reply, that B was jointly seised with him, he must traverse that the defendant was sole seised. *Snow v. Wiseman*, 2 Mod. 60.

49. If a devise to a man and his heirs and if he die without issue that it shall remain, be pleaded generally as a devise in fee, the other side may traverse the devise. *Wright v. Gerrard*, Hob. 310.

50.* There is a difference between an assise of *darrein presentment*, and a *quare impedit*; in the former the last presentation is traversable, but in the latter the matter only is traversable. *Windsor v. Archbishop of Canterbury*, Cro. Eliz. 687.

51. In replevin, on the question, who ought to keep the inclosures, the avowant stated himself to be seised in fee, though he needed not to have set out any particular estate, but generally that he was seised of the close; yet having done so, the precise estate is traversable. 3 Dy. 365. pl. 32.

52. There is a difference where title is made by feoffment, there a traverse is necessary; otherwise of a grant of a particular estate, for he must have that by lawful means. *Helier v. Whytier*, Cro. Eliz. 651.

53. If one party plead an assignment, and the other reply a surrender, he must traverse the assignment. 2 Dy. 110. pl. 39.

54. In *ejectione firmæ*, supposing a demise by C, plea that before C had any thing, B was seised and enfeoffed A, who died seised, and his son leased to defendant, who was possessed till ousted, and the son disseised by the said B, who afterwards enfeoffed the said C, who demised to plaintiff, a replication, protesting against the feoffment to A, and the dying seised, may traverse the disseisin, though the feoffment or dying seised might both be traversed at the election of plaintiff. 3 Dy. 365. pl. 34.

55. Where the king's title is traversed, he

may maintain his title against the traverse, or may traverse the affirmative of the other. *Willion v. Berkley*, Plow. 243.

56. The king has his election to traverse or join in demurrer. *Rex v. Jervise*, T. Jones, 9.

III. WHEN NOT.

1. That which is inducement or conveyance is not traversable. *Butterfield v. Benson*, Carter, 206. *Anon.* Com. 229.

2. The supposal of a writ or declaration is not traversable. *Pullein v. Benson*, 1 Ld. Raym. 355.

3. A traverse shall never be taken of matter of law, but of matter of fact only. Plow. 231. *Kellicot v. Bosan*, Yelv. 199, 200. 1 Saund. 23. n. (5).

4. A matter sufficiently confessed and avoided cannot be traversed. 2 Saund. 28. 1 Saund. 22. n. (2). 209 a. *Anon.* 3 Salk. 353. *Rex v. Archbishop of Armagh*, 2 Stra. 837.

5. Matter not alleged is not traversable. 1 Ld. Raym. 39.

6. A traverse of an immaterial allegation is bad. *Waltham v. Sparkes*, 1 Ld. Raym. 42. 1 Saund. 15. n. (2). 81 a.

7. The time of delivery of a writ to the sheriff shall not be traversed. *Redman v. Idle*, Lutw. [536].

8. Matter alleged out of time is not traversable. 1 Ld. Raym. 356.

9. A traverse cannot be taken of matter properly laid under a *protestando*. 2 Saund. 103.

10. A traverse should not be taken if the plea be consistent with the declaration. 1 Saund. 132 c. n. (4).

11. Though additional facts be alleged. 1 Saund. 209 a.

12. In replevin, if the defendant at any time had the cattle in the place laid in the declaration, he must not traverse it, but plead specially, and then traverse the taking. 1 Saund. 347 a. n. (1).

13. In an action upon a bail-bond, the arrest is not traversable. *Watkins v. Perry*, 1 Stra. 444.

14. In an action for keeping a dog accustomed to bite mankind, the *scienter* is not traversable. 1 Sid. 21. 2 Sid. 127.

15. The quantity of the thing is not traversable in an avowry, but the quality only. Plow. 94. *Payne v. Bingham*, 3 Lev. 228.

16. If the declaration and avowry agree in the place, but differ in the quantity, the defendant may state the true quantity, and proceed without a traverse. 1 Saund. 347 a, b.

17. A presentment in a court leet is traversable in replevin, not in trespass, or in an action against the judge. *Greenwell v. Burwell*, 1 Ld. Raym. 470.

18. In an action for an escape, the plaintiff declared on a voluntary escape; bar, that

he re-took the prisoner on fresh pursuit; it is good, without a traverse of the voluntary escape. Lutw. [135].

19.* A traverse cannot be of the tender of the *modus*, but must [*1403] be of the prescription itself *de modo*. *Cowper v. Andrews*, Hob. 43.

20. A traverse cannot be taken on a *per quod virtute ejus* and the like. 1 Saund. 23. n. (5). 298. n. (3).

21. The intent of an indenture is not traversable. *Kidder v. Weste*, 3 Lev. 167.

22. A man was bound to pay money at such a place; in debt brought against him, he pleaded that he paid the money at the place; this is not traversable. March 77. pl. 122.

23. A consideration executed is not traversable in *assumpsit*. *Lamplugh v. Brathwaite*, Hob. 106.

24. A traverse must not be made of any allegation in the declaration, so as to compel plaintiff to prove more than he would be bound to do under the general issue. 2 Saund. 207 a.

25. In trover, if the defendant justifies the trover at the place laid in the declaration, and the conversion at another place, it is good without a traverse. *Hill v. Haukes*, 1 Ro. 1. 44.

26. If the defendant justifies all the trespass, there is no need of a traverse. Mo. 864.

27. A traverse ought not to be in trespass after an averment of *quæ est eadem*. 2 Saund. 5. n. (3). 295 b. n. (2).

28. Where a matter is expressly pleaded in the affirmative, which is expressly pleaded by the other party in the negative, the next ought to be an issue, and no traverse, for otherwise they will plead in *infinitum*. *Hayman v. Tennant*, T. Raym. 199. *Huish v. Phillips*, Cro. Eliz. 755.

29. It is not necessary where there are two affirmatives, but where they do not agree. *Earl of Shrewsbury v. Stanhope*, Poph. 67.

30. Defendant, sued as executrix, pleads in abatement that she is administratrix; she need not traverse the intermeddling before, or her being executor. *Powers v. Cooke*, 1 Ld. Raym. 63. *Bowyer v. Cook*, 5 Mod. 146.

31. To an action of detinue on an absolute contract, defendant may plead that the contract was conditional, without a traverse. 1 Dy. 30. pl. 201.

32. When the defendant makes title by a later grant from the same party, there the plaintiff needs not traverse it. Cro. Car. 581.

33. When the defendant in replevin makes consuance, or avows that the property is in himself, it seems to be sufficient without a traverse. *Loveday v. Mitchell*, Com. 947.

34. One shall not traverse the command of a bailiff who requires one to aid him to prevent a rescue. *Bridgewater v. Bythway*, 3 Lev. 113.

35. In replevin, matter suggested for a re-

turn in a plea in abatement is not traversable. *Fboe's case*, Salk. 93.

36. In replevin, you cannot traverse your being a bailiff, nor can you traverse *de injuria sua propria sans tali causi, absque hoc* that he was a bailiff; for that is traversing the whole avowry. *Jeffs v. Bolton*, Fort. 349.

37. Avowant makes title by descent as collateral heir of P, *eo quod* the said P died seized without issue; plaintiff, claiming by devise from R, must traverse the dying seized, for the descent is not traversable. 3 Dy. 366, pl. 36.

38. If the tenant plead a jointure made to the demandant, and acceptance of it, the demandant may plead a refusal without traversing the acceptance, for it was not material for the tenant to plead it. *Digby v. Fishers*, Hob. 104.

39. A traverse should not be taken in replication of the justice of the debt, when an executor pleads a judgment recovered. 2 Saund. 50, 51.

IV. How IT SHOULD BE MADE.

1. There ought to be some special inducement to a traverse. *Horn v. Lewins*, Fort. 234.

2. An inducement to a traverse ought to be matter traversable. 2. Leon. 32.

3. In pound-breach, the defendant pleads satisfaction of the cause of distress, and the plaintiff's license; the satisfaction ought to be specially traversed; but a verdict for the plaintiff on a general traverse will be good. *Cotesworth v. Betison*, 1 Ld. Raym. 104.

4. Justification on a public act of parliament may be traversed generally. *Chauncey v. Winde*, 1 Ld. Raym. 700.

5. When a justification is made by force of a custom, it must be particularly* traversed, and not the cause generally by *de injuria, &c. absque tali causa*, *Banks v. Parker*, Hob. 76.

6. In trover for a chain, which defendant knowing, &c. sold, and the money converted, a plea traversing the selling, and concluding with a verification, is bad. 2 Dy. 121, pl. 14.

7. To an avowry for rent, the plaintiff cannot plead *de son tort demeane*, and traverse that any thing was in arrear, but ought to plead *riens arrear*. *Horne v. Lewen*, 1 Ld. Raym. 641.

8. The traverse must not be too large. 1 Saund. 81 a. n. (3). 269 a.

9. Where the plaintiff claims common in six acres, and the defendant shows that the plaintiff had common in forty acres, he ought to traverse the common in six acres only. *Salmon v. Smith*, 1 Saund. 207.

10. If one pleads a good matter, but does not rely on it, but makes it only an inducement to other matter, it will not avail him, and he thereby gives liberty to the other party to traverse the last matter. *Haseard v. Centrell*, Lutw. [41].

11. A traverse must not be too narrow. 1 Saund. 268. n. (1). 312 d. n. (5).

12. In a replication, the plaintiff may narrow his traverse to the part of the plea only which answers the declaration. 1 Saund. 268. *et seq.*

13. Where, in *assumpsit*, the plaintiff declares that *navis armamenta, &c. submersa spoliata fuerunt*, if the defendant will traverse, it ought to be in the disjunctive. 2 Saund. 206, 207.

14. When in a *quare impedit* the defendant traverses any part of the plaintiff's count, it ought to be such part as is inconsistent with his title, and being found against the plaintiff, destroys his title. *Tyfton v. Temple*, Vaugh. 8, 9, 10.

15. The defendant in transitory actions cannot traverse the time and place alleged in the plaintiff's declaration, without a special justification. *Cole v. Hawkins*, 10 Mod. 253.

16. A plea that a bond was *prime deliberatum* such a day, ought to traverse that it was delivered before. *Pullein v. Benson*, 1 Ld. Raym. 354, 356, 357.

17. Where a justification goes only to a particular time, there the traverse should be *absque hoc* that he is guilty before or afterwards. 1 Ro. 406.

18. Where the place laid in the declaration is traversed, there must not be both a traverse, and a *quæ est eadem*. 2 Saund. 5. 5 a. n. (a).

19. Traverse ought not to be taken where the action is transitory; but it must be taken where the justification is local. 1 Saund. 8. 85. 2 Saund. 5 b.

20. In debt for rent of three chambers let by the plaintiff, the defendant pleads a demise of three chambers and a dining-room, and an entry by the plaintiff into the dining-room, and prayed judgment; he ought to traverse the demise of the three chambers only. *Salmon v. Smith*, 1 Saund. 207, 209.

21. In this case, the plaintiff ought to maintain his lease as he has declared; for if he traverse the entry into the dining-room, it will be a departure from his declaration. *Id. ibid.*

22. A traverse must be taken on some allegation expressly or inevitably implied in the adverse pleadings. 1 Saund. 312 d. n. (4). 2 Saund. 10. n. (14).

23. He who traverses the king's title must show a title in himself. *Rez v. Lenthall*, 3 Mod. 146.

24. A traverse in an action for damages must not be such as to tie plaintiff up to prove the whole damage laid in his declaration. 2 Saund. 207. n. (24).

25. A traverse which sufficiently answers the material point of the declaration is good. 2 Saund. 5.

26. There may be a traverse against a traverse. *Knight v. Lodg*. Cro. Eliz. 671.

27. As, where the place is made material by the pleading. *Mo.* 350.

28. The defendant traversed the day where it was not material, yet the plea was allowed. *Hawe v. Planner*, 1 Saund. 14.

29. The king may waive his own title, and traverse another's, but it is not so in the case of a common person. *Butterfield v. Benson*, Carter, 207.

30. In a proceeding by extant, tested the 6th July, against the surety by bond of a debtor of the crown, defendant claims property in the debts and effects seized under an inquisition, to make out which he pleads that the fiat for the extent was granted the 5th October; that* the extent in reality [*1405] issued on that day; that the surety had committed an act of bankruptcy on the 3d of October; that a commission issued against him, tested that day; and that a provisional assignment was made to defendant upon 4th October of all his goods, debts, &c.: he then traverses, that at the time of the inquisition, the persons therein named were debtors to the surety, or that he was entitled to the goods mentioned therein; this traverse is neither immaterial nor double, and was held good on special demurrer. *Chesman v. Nainby*, 2 Stra. 749.

31. In dower, if the tenant plead an existing lease made by the husband for ninety-nine years before any title of dower accrued, and show that the lessor afterwards granted the reversion to J S, and died, a replication, that the lessor made a feoffment in fee, with a traverse that the reversion was granted to J S, is good. *Anon.* 2 Mod. 18.

32. The traverse of an arrest *virtute warranti*, is ill. 1 *Ld. Raym.* 405.

33. In replevin, the defendant says that the goods are his, *absque hoc* that they are the plaintiff's; the plaintiff replies that they are his, *absque hoc* that they are the defendant's; this is an immaterial issue. *Hobtown's case*, Skin. 65.

34. Rent of 20*l.* per annum was granted out of A, to commence from the time that a distress should be taken for rent issuing out of B; in bar of the avowry, upon a distress taken for the rent of 20*l.* in A, there is a traverse *absque hoc* that any distress was taken for rent arrear, &c. in B; this is a complicated traverse, and not good. *Amias v. Chaplein*, Skin. 63, 64.

35. The inducement to a traverse is insufficient where the traverse is a thing immaterial. *Newland v. Collins*, Com. 302.

36. A double traverse is ill. 3 *Lev.* 244.

37. When, in an action on the case for words, the party sets forth other words in his plea than the plaintiff supposes in his count, with a traverse to the words spoken, and those words confess no slander, they are void. *Johns v. Gittins*, Cro. Eliz. 239.

38. Covenant for rent as assignee of lessor, who was seized in fee; a plea, that lessor con-

veyed away the fee before he made the lease, with a traverse that he was afterwards seized in fee, is too general, and ill, as it ties up plaintiff to prove the estate alleged in the declaration, when any other would do. *Palmer v. Ekins*, 2 Stra. 817.

39. A justification was at a place in S, traversing that he was guilty out of the county of S; the traverse is bad. 1 *Ro.* 265.

40. In an action upon the case for a recompense for service performed, the defendant's plea and traverse therein is bad, if it put only part of the time of service in issue. *Ostons v. Rogers*, 1 Saund. 268, 269.

41. *Absque hoc aliter vel alio modo vel alibi*; issue thereon and verdict is bad for the uncertainty. *Masters v. Wood*, 2 *Lev.* 164.

42. A traverse *absque hoc quod legitimus modo oneratus*, is not good. *Calthorpe v. Heyton*, 2 *Mod.* 55.

43. In a replication to a plea of a release of errors, a traverse that it was a release of the errors in that judgment is ill. *Desenant v. Rafter*, 2 *Ld. Raym.* 1054.

44. Traverse of a seisin in fee is ill, where a less estate would be sufficient. *Palmer v. Ekins*, 2 Stra. 818.

45. A man pleaded the descent of a copyholder in fee; the defendant, to take away the descent, pleads that the ancestor surrendered to the use of another, *absque hoc* that the copyholder died seized; the traverse is naught. *March*, 21. pl. 48.

46. A traverse that A was *rite et legitime* seized in fee such a day, and granted a copyhold, is naught. *Helliott v. Selby*, 2 *Ld. Raym.* 902.

47. A traverse that puts matter of record in issue to the county, is ill. *Fewkes v. Morrison*, 2 *Salk.* 531.

48. To ancient demesne pleaded in bar in ejectment, a replication that they are pleadable at common law, with a traverse that the tenements are parcel *de antiquo dominico*, adjudged ill upon demurrer. *Hopkins v. Pace*, 1 *Show.* 271.

49. He should have traversed that the manor was ancient demesne, or else that those tenements were held of that manor. *Id.* *ibid.*

V.* EFFECT OF A TRAVERSE. [*1406]

1. Where a traverse goes to the matter, all before is waived; *aliter*, where to time only. *Green v. Goddard*, *Salk.* 642.

2. A traverse of matter of justification in trespass, admits that the trespass justified is the one complained of in the declaration. 2 *Saund.* 5 c.

3. Traverse that a manor is not defendant's freehold, admits it to be a manor, which therefore need not be proved. 2 *Dy.* 183. pl. 58.

4. That which is immaterial is not admitted by not being traversed. *Rex v. Bishop of Chester*, *Salk.* 561.

VI. CONSEQUENCE OF A TRAVERSE BEING WANTING, OR BADLY MADE, AND HOW AIDED.

1. An immaterial traverse is bad on special demurrer, but aided on general demurrer. 1 Show. 242. 1 Saund. 14. n. (2). 20 a. n. (1). 207 c. *Sed Vide Lambert v. Cook*, 1 Ld. Raym. 238.

2. In replevin, traverse, that the consant was bailiff, is aided by verdict. *Redding v. Low*, 1 Ld. Raym. 405.

3. A traverse contradictory in itself, will be good after verdict. 1 Ro. 38.

4. Though a traverse upon a traverse be naught, yet issue may be taken upon the second traverse, if it be not demurred to. *Digby Fitzherbert*, Hob. 104.

5. An immaterial traverse may be passed over, and the inducement traversed. 1 Saund. 22. n. (2). *Crosse v. Hunt*, Carth. 99, 100.

6. Or it may be demurred to. 1 Saund. 22. n. (2). 22 a. n. (4).

7. A substantial traverse cannot be waived. 1 Saund. 22. n. (2).

8. The want of a traverse is aided by a general demurrer. 1 Sid. 234. 3 Mod. 320. *Bradburn v. Kennerdale*, 3 Mod. 319. *Sed vide* 2 Mod. 60. 1 Show. 242. *contra*.

TREASON.

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VIII. HOW PARDONED, p. 1409.

I. WHAT CONSTITUTES THE CRIME OF TREASON.

1. Killing the king's messenger is treason. The case of *Mines*, Plow. 333.

2. To go in a warlike manner with a multitude to assault a privy counsellor at his house is treason. *Bensted's case*, Cro. Car. 583.

3. Assembling to expel strangers, remove counsellors, reform magistrates, break open prisons, deliver prisoners, pull down inclosures, bawdy-houses, &c., is treason. *Rez v. Messenger and Others*, J. Kely. 70. 76. *Rez v. Darrel*, 10 Mod. 322.

4. And so it is in those that join with them, though they know not their intent. S. C. J. Kely. 77.

5. Levying war is high treason, though it

be not levied against the king's person. *Friend's case*, Holt, 682.

6. A subject conspiring abroad for the invasion of this kingdom, though it is not put in execution, is guilty of treason by compassing the king's death, and shall be tried according to 35 H. 8. c. 2. *Story's case*, 3 Dy. 298. pl. 29.

7. If on a proclamation of enmity for receiving and protecting rebels, a subject procures money to be sent from a foreign prince to the receivers or rebels, though it is intercepted, it is treason; so [*1407] if he conveys or distributes such money among them. 3 Dy. 298. n. (a.)

8. Conspiring to levy war, if nothing was done upon it, was not treason at common law, but is made so by statute 1 Car. 2. *Anon. J. Kely. 19. Dall. 14.*

9. The breaking of a prison wherein traitors are in durance, and causing them to escape, is treason, although the parties did not know there were any traitors there. *Bensted's case*, Cro. Car. 583.

10. Listing, &c., with an intent to depose the king, is high treason within the clause of compassing the death of the king. *Harving's case*, 2 Vent. 317.

11. Joining with rebel subjects of the king's ally, or fighting under the command of an enemy prince, is treason. *Vaughan's case*, Salk. 635.

12. Although such fighting be directly (and only) against such ally; for it is adhering to the king's enemies. *Id. ibid.*

13. One acting as counsellor only, may yet be a traitor. *Coke's case*, J. Kely. 12. 23.

14. So, if one shows his liking or approbation. J. Kely. 12.

15. So, acting as a soldier, though by command of his superior officer. J. Kely. 13.

16. So, though the acting by authority of parliament. J. Kely. 14.

17. There may be a levying war without actual fighting. *Vaughan's case*, Salk. 635.

18. Coining money was high treason at common law before the statute of 25 Edw. 3. c. 2. *Case of Mines*, Plow. 316.

19. Counterfeiting the great seal, petit seal, sign manual, or signet, or fixing an old seal to a writing, is high treason. 2 Ro. 50.

20. One of the clerks in Chancery glued together two pieces of parchment, on the uppermost of which he wrote a patent, to which he obtained the great seal, the label going through both the skins; he then took off the written patent, and on the blank skin he wrote another patent, and published it as a good patent; whether this is treason or only a great misprision: if this had been a counterfeiting the great seal within statute 25 Hen. 8. c. 12, the party might have been indicted generally of high treason for counterfeiting the great seal. *Leak's case*, 12 Co. 15.

21. Words in the future tense concerning the person of the king will be treason; as if a

man say, "if the king will not do such an act, he shall not be king." 1 Ro. 185.

22. To say, "that the king being excommunicated, may be lawfully deposed and killed," is treason. *Ibid.*

23. It will be treason if a man write treasonable matter, though he send it enclosed in a box to the king. 2 Ro. 89.

24. Printing treasonable positions is a compassing of the king's death. *Twyn's case*, J. Kely. 22.

25. A *non compos mentis* cannot commit felony, but he can be attainted of treason. 2 Ro. 324. 337.

26. Several agree to levy war, and some of them only do it; it is treason in all, for all are principals. *Anon. J. Kely. 19. Dall. 14.*

27. Where two conspire to commit treason, and one only executes it, both are traitors, and this at common law before the statute 25 Ed. 3. st. 5. c. 2. 1 Dy. 98. pl. 56.

28. The intent is material in treason, although no act is executed. *Rez v. White*, Sav. 31.

II. WHAT DOES NOT.

1. Uttering of false money knowingly, is neither treason nor misprision of treason. *Rez v. Clarke*, J. Kely. 33.

2. No words are treason unless made so by some particular statute, as by the 25 Edw. 3. c. 2. *Pine's case*, Cro. Car. 117. 333.

3. Since that statute there can be no constructive treason. 3 Salk. 358.

4. Nothing is treason in the intention by statute which was not treason in the execution at common law. *Rez v. Lymerick*, J. Kely. 76.

5. An alien enemy cannot be guilty of high treason. *Rez v. Tucker*, 1 Ld. Raym. 1.

III. RESPECTING MISPRISION OF TREASON.

Knowingly to receive the maker of false coin is not treason, but misprision [*1408] of treason. 3 Dy. 296. pl. 21. *Rez v. Kendal*, 1 Ld. Raym. 67.

IV. INTENTION TO COMMIT TREASON.

An intention to commit a treasonable action is finable. *Rez v. Cooper*, 5 Mod. 207.

V. IN WHAT PETIT TREASON CONSISTS.

1. It is petit treason in the wife to murder her husband. *Pigot v. Pigot*, Cro. Car. 531, 532.

2. If a wife procure the murder of her husband by a stranger in her absence, it is not petit treason in her, but she is accessory to murder only, for the crime is but murder in the principal. 3 Dy. 254. pl. 103.; 332. pl. 25.

3. But the wife so conspiring with a servant, though her husband be killed in her absence, is guilty of petit treason. 3 Dy. 332. pl. 25.

4. If a son or daughter-in-law kill their father or father-in-law, it is petit treason. *Dall. 14.*

5. If a servant kills his master or mistress, it is petit treason. *Flow. 86.*

6. So it is if a servant kills his master out of his service upon malice conceived against him whilst his servant. *Flow. 260.*

VI. RELATIVE TO OVERT ACTS.

1. Cruising is an overt act of adhering, &c., and so is listing and marching. *Vaughan's case*, Salk. 635.

2. Gathering men and exciting them to rise against the king, is an overt act of imagining his death. *Harding's case*, Holt, 678.

3. An intention to levy war is an overt act to kill the king. *Rez v. Loyer*, 8 Mod. 92.

4. Being present at and agreeing to a resolution upon debate to kill the king, is an overt act of high treason. *Rookwood's case*, Holt, 686.

5. Words of persuasion or of consultation only, an overt act of treason in compassing the king's death. *Charnock's case*, Salk. 631.

VII. RELATIVE TO THE INDICTMENT FOR TREASON;—

(a) Form of the indictment.

1. In an indictment for compassing the king's death, the treason being first laid, the overt act need not be laid *preditorie*. *Cranburn's case*, Salk. 633.

2. But it must where the treason consists in such act. *Id. ibid.*

3. An indictment for levying war or adhering to the king's enemies in general, without showing particular instances, is not good. *Vaughan's case*, Salk. 634.

4. An indictment for treason for preaching these words, "we have had two wicked kings;" innuendo, Charles the First, and Charles the Second; "but if we," innuendo, the people, "stand to our principles, we shall beat our enemies;" innuendo, the king and his loyal subjects, is bad; for as the words, discharged of the innuendoes, do not import a treasonable intention, they cannot be rendered treasonable by innuendoes. 2 Show. 411.

5. An indictment for high treason must conclude *contra ligeantias sue debium*. *Rez v. Tucker*, 1 Ld. Raym. 1. *Carth. 317. 12 Mod. 51. S. C. 3 Lev. 396.*

6. An indictment of a subject *contra ligeantias sue debium* is well, without *naturalis*, &c. *Cranburn's case*, Salk. 633.

7. Otherwise where an alien is indicted. *Id. ibid.*

8. And judgment may be reversed for want of these words. *Tucker's case*, Salk. 630.

9. Indictments of treason, &c., cannot be supplied by intentment. Salk. 631. *lb. 375. 3 Lev. 396.*

(b) Pleading, trial, and verdict.

1. A copy of the indictment is not granted after pleading. Salk. 634. *vide 153., &c. Rookwood's case*, Holt, 683.

2. A man may be allowed to withdraw his plea of not guilty in high treason, and to plead guilty. *Rez v. Knightly*, Holt, 398.

3. The attorney-general, by sign manual, may confess the plea of not guilty in high treason. *Rez v. Oglethorp*, 11 Mod. 114.

4. The ceremony for the prisoner of holding up his hand at the bar upon an arraignment of treason, is only for the making known the person of the offender to the [*1409] court; for if he answers that^a he is the same person, it is all one. *Viscount Stafford's case*, T. Raym. 408.

5. An indictment of high-treason may be tried by *nisi prius*. *Stapleton's case*, T. Raym. 367.

6. On a trial for high-treason at the Old Bailey, it is no cause of challenge against a juror that he had not a free-hold of 40s. a year. *Rex v. Lord Russel*, 2 Show. 311.

7. A *tales de circumstantibus* may be awarded in case of treason, by the statute of 4 & 5 Phil. & Mar. cap. 7., where the king is a party. *Stapleton's case*, T. Raym. 367.

8. Treason done beyond sea may be tried in Middlesex. 3 Salk. 358.

9. A special verdict finds against a prisoner that he was present among traitors, hallooing, &c.; yet if he is not found to be consenting, he is not guilty. 2 Ld. Raym. 1585.

(c) Evidence.

1. In treason, evidence may be given of a treasonable conspiracy, at any time before or after, so it be not after the finding of the indictment. *Charnock's case*, Holt, 301, 302.

2. Two witnesses are not necessary to every overt act; one witness to one overt act, and another witness to another overt act, of the same species of treason, are sufficient. *Lewick's case*, Holt, 688.

3. One witnessing of his own knowledge, and another by hearsay from him, though at the third or fourth hand, are two sufficient witnesses in high-treason. 1 Dy. 99. pl. 68.

4. When a prisoner is charged with the offence of killing the king, and the evidence is that he at several times laboured it, and by several ways, and to each particular time and fact there is but one witness, and yet every of the said facts conduces directly to the effecting and perpetration of the fact and treason charged upon the prisoner, such evidence is sufficient within the statute; but otherwise it had been, if the facts had been tending to another several treason. *Viscount Stafford's case*, T. Raym. 407.

5. A confession of treason, if not made in open court, must be proved by two witnesses. 1 Saund. 262. n. [g].

6. A promise of pardon is no objection to an evidence in the case of treason. *Rex v. Darrell*, 10 Mod. 321, 322.

7. The prisoner cannot demand it as a right that the witnesses be examined apart, &c.; but the court can grant it as a favour. *Vaughan's case*, Holt, 689.

(d) Judgment.

1. The judgment is to be given by the chief justice. J. Kely. 11.

2. If a known subject of this realm indicted for treason plead that he is a liege subject of another king, and refuse to answer

to an indictment, he shall have judgment as if convicted. 3 Dy. 300. pl. 38.

3. Treason may be found several years before the time alleged in the indictment. J. Kely. 16.

4. An attainder in high-treason was reversed, because judgment was given without asking the offender what he had to say why he should not, &c. 3 Salk. 358.

5. An attainder of treason was reversed, because there was no arraignment or demanding judgment, and because there was a process of *venire facias* instead of a *capias*, and also that it did not appear that the party was asked what he had to say why sentence, &c. *Anon.* 3 Mod. 326.

6. The record of an indictment for high-treason without an *allocutus* before judgment, is erroneous. *Rex v. Geary*, 1 Show. 132. 2 Salk. 630. S. C.

7. A judgment on an indictment for high-treason, in which the words *ipso vivente comburentur* are left out in the entry of the judgment, is erroneous. *Rex v. Walcot*, 4 Mod. 395. 401. Holt, 680. Carth. 349. 12 Mod. 95. Salk. 632. S. C.

VIII. HOW PARDONED.

No treason can be pardoned but by express words mentioning it. *Sir W. Rawleigh's case*, Cro. Jac. 495.

TREES.

1. Oak, ash, and elm trees are universally timber; other trees, such as beech, may be so by custom. 2 Saund. 259.

2. Dotards without any timber in them,* if blown down by accident, belong to the lessee; but if timber trees be blown down, the lessor shall have them. *Herlakenden's case*, 4 Co. 62 a.

3. Trees growing cannot be denominated goods and chattels. *Rex v. Harris*, 11 Mod. 113. 121.

4. A copyholder for life cannot cut timber trees. *Anon.* 11 Mod. 68.

5. A custom for a copyholder to cut trees is void. 11 Mod. 68.

6. When a tree is severed, the property belongs to him in remainder in fee. *Paget v. Cary*, 5 Co. 76 b.

7. Lessee for life or years has but a special interest or property in the trees being timber, as things annexed to the land; and if the lessee, or any one else, sever them from the land, the property and interest of the lessee is thereby determined, and the lessor may take them. *Herlakenden's case*, 4 Co. 62 a.

8. If they are severed pending a lease, the owner of the inheritance may immediately bring trover for them. 2 Saund. 47 b. n. [f].

9. If lessor fell, lessee can bring trespass; unless there is an exception of the trees in the lease. 1 Saund. 322 b.

10. Lessor may bring an action of waste against lessee for felling or damaging, or

trespass, if the trees be excepted in the lease. Id. *ibid*.

11. Both lessor and lessee may have an action for injuries committed by a stranger. Id. *ibid*.

12. If a lessor leases the land, excepting the trees, and afterwards grants the trees to the lessee, the lessee has in judgment of law an absolute and divided property in them. *Herlakenden's case*, 4 Co. 62 a.

13. If there be an exception of the trees, the lessor has a power, incidental to it, to enter to fell and take away the trees. 1 Saund. 322 a.

14. Timber cut between a fine and the entry to avoid it cannot be recovered as meane profits at law. 1 Saund. 319 a. 359. n. [m].

15. If there be a lease for life, and afterwards the lessor gives the trees to another, and then the lessee dies, such donee cannot take them. 4 Co. 62 a.

16. If the declaration allege a cutting, and the evidence be of a stubbing, it is a fatal variance. 2 Saund. 238.

TRESPASS.

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VI. RELATIVE TO INDICEMENTS FOR TRESPASS, p. 1434.

I. NATURE OF THE ACTION OF TRESPASS.

1. A possessory right only, without property, is sufficient to maintain an action of trespass. *Templeman v. Cross*, 10 Mod. 25. 27.

2. But without possession trespass is not maintainable. *Skinner v. Newton*, 10 Mod. 141.

3. An *ejectione firmis* is quasi an action of trespass. *Saunders v. Plummer*, Orl. Bridg. 224.

4. Trespass is an action of less certainty than replevin. *Read v. Hawke*, Hob. 16.

5. In trespass *quod clausum fregit*, &c., it is clear that if he in whose time the offence was committed die, no action will lie. *Saunders v. Plummer*, Orl. Bridg. 224.

6. But where the personal estate has been rendered less beneficial, trespass survives to an executor in cases within the 4 Edw. 5. c. 7. Latch, 168. 1 Saund. 217. *Russell's case*, 5 Co. 27. n.

II. WHEN AN ACTION OF TRESPASS IS MAINTAINABLE;—

(a) *In respect of the party bringing the action*;—

1. By whom it lies.

1. An action of trespass will lie against a wrong-doer by one who has possession, though he has no title or property. *Waller v. Rumball*, 4 Mod. 392. 1 Leon. 215. 1 Saund. 347 c. n. [d.]

2. One who has a crop and the first vesture of a meadow can have trespass; so also one who has *herbagium parci*. Mo. 302. *Contra*, 3 Leon. 213.

3. A copyholder for a term of underwood without the soil can bring trespass *quare clausum fregit*. Mo. 355.

4. If a man has a seat in a church, he can maintain trespass for breaking it; but where he claims only liberty to sit there, he can have an action on the case only. 2 Ro. 140.

5. Trespass will lie for master of a ship for goods taken away shipped on board, and he must declare on his possession. *Mikes v. Caley*, 12 Mod. 383.

6. Trespass may be brought by one to whom property has been given, though he have never taken actual possession, for the property draws to it the possession. Lat. 214.

7. If a vendor sell goods by sample, to be delivered to the vendee within a [*1412] month,* and take earnest, and within a month send them by his servant to the premises, and when part are unloaded the rest are distrained for toll, the delivery is complete, so as to entitle the vendee to bring trespass for the seizure. *Blakey v. Dimsdale*, 6 Mod. 162. n.

8. It lies by a sheriff to recover goods seized by him in execution. *Williams v. Groyn*, 2 Saund. 46 c. 47. *Tyrral v. Bash*, Cro. Eliz. 639. *Wilbraham v. Snow*, 1 Mod. 30.

9. It lies by a commoner for damage done in the common. Jenk. Cent. 144.

10. If A defraud B of goods, and sell them to C, and B, after notice that C claims property therein, replevy them, C may bring trespass for the taking. *Leonard v. Stacy*, 6 Mod. 69.

11. It lies for a carrier to recover things entrusted to him. 2 Saund. 47 b.

12. It lies for a borrower to recover from a stranger the thing borrowed. 2 Saund. 47 c.

13. If a stranger holds a tenant by *elegit* out of the lands extended, trespass lies for the tenant by *elegit* against the stranger. *Underhill v. Devereux*, 2 Saund. 72.

14. So, one that has free warren may have trespass against any but the owner of the soil for hunting there. *Smith v. Kemp*, Salk. 637.

15. In trespass for fishing in his free fishery, the jury find specially that the place where, &c., is parcel of the manor of D, and that the plaintiff is seized of this manor in fee, and conclude that they find for the

plaintiff, if he could have an action of trespass for fishing in his fishery, within his own land; and adjudged that the plaintiff may have such a fishery; for though divers may have liberty to fish there beside himself, this is *libera piscaria* in his manor. *Gippe v. Woolcot*, Skin. 677.

16. Lessee at will may bring an action of trespass in his own name. *Geary v. Bearcroft*, Carter, 66.

17. Lessee at will dies, and his heir enters, the lessor shall have an action of trespass against him before entry. S. C. Carter, 66, 67.

18. It lies for a feme inheritrix after her husband's death against a lessee for years, for cutting down trees (excepted in the lease) in the husband's life, who was not entitled to be tenant by the curtesy. *Park v. Fyfield*, Comb. 453.

19. Otherwise, if the husband had been entitled to be tenant by curtesy. Id. ibid.

20. If the trees are become dotards, yet that does not divest the property of the lessor. Id. ibid.

21. A disseisee after regress can have trespass for all the meane profits against the lessee or feoffee of the disseisor. *Holcome v. Rawlins*, Mo. 461.

2. By whom it does not lie.

1. Trespass *quare clausum fregit* is not maintainable by him that has but the ear grass after the first mowing. *Hitchcock v. Harry*, 3 Leon. 213.

2. Trespass is not maintainable by an intruder upon the lands of the crown. Plow. 54 b.

3. A man bargains and sells lands; bargainee cannot maintain an action of trespass before entry, though he may surrender, assign, or release. *Geary v. Bearcroft*, Carter, 66.

4. It does not lie for the lessor after the breach of a condition by nonpayment of rent, and before entry for the same. *Browning v. Boston*, Plow. 138. 142.

5. Where a lease is made for years, to commence at a day to come, the lessee shall not have trespass before entry. S. C. Plow. 142.

6. The heir shall not have trespass before entry into the land descended to him. Id. ibid.

7. The father cannot have an action of trespass for beating his son, if it be not laid *per quod servitium amisit*. *Hunt v. Wootton*, T. Raym. 259.

8. A father shall not have an action for the loss of the marriage of his son and heir, except when a stranger takes him by force and marries him; but if the son marries himself, or a stranger procures him to marry one, the father has no remedy. Id. ibid.

(b) *With respect to the person to be sued;—*

1. Against whom it lies.

1. If A requests B to take goods, &c.,

though B does it, yet A is a trespasser. *Britton v. Cole*, Comb. 434.

2.* Persons concerned only as [*1413] appraisers in making a wrongful replevin, are trespassers. *Leonard v. Stacey*, 6 Mod. 69.

3. It will lie against a lunatick for hurting a man. *Weaver v. Ward*, Hob. 134.

4. It lies against a servant, or one intrusted to sell goods in a shop, if he embezzle any to his own use. 1 Leon. 87, 88. Mo. 248.

5. So, if a tenant at will cut trees. Mo. 248.

6. After a rule of court to vacate judgment, trespass lies against him that took the goods in execution. *Turner v. Filgate*, T. Raym. 73.

7. If one, who pays a *modus decimandi* through mistake set forth his tithes, yet he may have trespass against the parson for taking them. *Cosper v. Andrews*, Hob. 42.

8. It lies, if goods are wrongfully taken in execution by the sheriff, against the person who sued out the writ; it matters not whether that person has indemnified the sheriff. 2 Saund. 47 m.

9. It lies for a copyholder against his lord, for cutting his trees. 1 Leon. 272. *Sed vide Ashmead v. Ranger*, Salk. 638. Com. 71. S. C.

10. It lies against an inferior tradesman for hunting. *Bennet v. Tulboys*, Carth. 382. 1 Salk. 212. S. C.

11. Trespass lies against a sheriff, or those who act in his aid, for making a replevin after notice of a claim of property. *Leonard v. Stacey*, 6 Mod. 140.

12. Where a justice of peace commits one as a reputed father of a bastard, which after appears to be no bastard, an action of trespass and imprisonment lies against the justice. *Dr. Groinzel's case*, Comb. 482.

13. An officer of customs is liable in trespass for a wrong seizure, notwithstanding probable cause. *Leglise v. Champante*, 2 Stra. 820.

14. If bailiffs break open doors to execute process, the party injured may have an action of trespass against them; but the court will not grant an attachment against them, unless it appear to have been an abuse of the process of the law. *Anon.* 6 Mod. 105.

15. A servant is suable without the master, for trespass done by command of the master. *Sands v. Child and others*, 3 Lev. 352.

2. Against whom it does not lie.

1. Trespass will not lie against a lessee who holds over his term without an actual entry. *Trevillian v. Andrew*, 5 Mod. 384.

2. No action of trespass will lie for a lessee for years against the lessor, although he distrain without cause. *Anon.* 11 Mod. 209. n. See also Dall. 3.

3. Trespass does not lie against one who finds goods, or one to whom goods are bailed

or lent, though he refuse to deliver them. 1 Ro. 130. 2 Saund. 47 p.

4. If a defendant in custody upon mesne process tender a bail bond with sufficient sureties to the bailiff, and he refuse it, yet an action of trespass will not lie against him; but the party injured may seek his remedy by action on the case against the sheriff. *Smith v. Hall*, 2 Mod. 32.

5. It will not lie against the sheriff for executing process, though it were erroneous. *Cox v. Barnsly*, Hob. 48.

6. Trespass and false imprisonment will not lie against the gaoler of a liberty, for delivering a prisoner committed to his custody, under a warrant from the bailiff, although the arrest was made out of the bailiff's jurisdiction. *Oliet v. Bessey*, 2 Show. 149. 205.

7. It will not lie against a pound-keeper for merely receiving cattle, though the taking was tortious, if in so doing, he keep within the strict line of his duty. 2 Show. 149. *notis.*

8. An officer shall not be made a trespasser by relation. Comb. 124.

(c) *In respect of the subject matter;*—

1. What is sufficient to sustain an action of trespass.

1. Taking cattle from one who has them in his custody, is taking from his person. *Green v. Goddard*, 2 Salk. 641.

2. Lifting up a hatchet is an assault. 1 Ro. 328.

3. Trespass lies for an accidental hurt. *Underwood v. Hewson*, 1 Stra. 596.

4. As, where one trained soldier hurts another in skirmishing. *Weaver v. Ward*, Hob. 134.

5. Where the defendant's dog chased sheep* out of one man's [*1414] land over the land of another, it was held to be a trespass, though he recalled his dog as soon as he could. Lat. 119.

6. If a lease be made with exception of the trees, and a power reserved to the lessor to enter and cut them down, he may assign this power to another person; but if it be not properly pursued the lessee may maintain trespass both against the lessor and his assignee. *Warren v. Arthur*, 2 Mod. 317.

7. An action of trespass lies for the making of an excessive distress, in case the distrainer had not any right to distrain. *New v. Munday*, Bay. 184.

8. It lies for the mesne profits pending a writ of error in Cam. Scac. *Thasford v. —*, Comb. 455, 456.

9. An action of trespass lies upon the statute of 2 E. 6. against any man that takes the tithes after being severed. March. 21. pl. 49. 2 Ro. 82.

10. Trespass lies for fishing in *libere piscaria*, and taking his fish. *Smith v. Kemp*, Salk. 637. Carth. 285, 286. Comb. 11. 433. 464. Skin. 349.

11. It lies for hunting conies. *Sutton v. Moody*, 5 Mod. 375.

12. Causing the plaintiff's fishery to be overflowed, by putting down the defendant's own wear, is a trespass, and may be joined with another trespass. *Courtney v. Collet*, 1 Ld. Raym. 274.

13. It lies for erecting a stall in a market without agreeing for the stallage. *The Mayor of Northampton v. Ward*, 2 Stra. 1238.

14. So, for setting the end of a bridge on the plaintiff's soil, though a highway. *Lade v. Shepherd*, 2 Stra. 1004.

15. Trespass lies for killing a mastiff. *Wright v. Bainton*, 1 Saund. 84, 85.

16. Disturbing one in the use of his franchise is a trespass. *Rex v. Soley*, Salk. 594.

17. Trespass lies for taking a servant from his master. *Rex v. Darnley*, 6 Mod. 182.

18. A master may bring trespass for seducing his servant to leave his service, although such servant is only retained as a journeyman. *Hart v. Aldridge*, 6 Mod. 101. n.

19. It lies for the master for beating his servant, by which he lost his service. *Rosiere v. Sackins*, Holt. 460.

20. It lies for entering a man's house, and assaulting himself, children and servants, and frightening of them, without alleging any special damage, and the frightening the family, &c. is good by way of aggravation. *Newman v. Smith*, Holt, 699, 700.

21. If an account be stated between A and B, by which it appears that A is indebted to B in such a sum, and A signs the account, and afterwards by false and sinister insinuations gets it into his hands and tears it, he is a trespasser. *Rex v. Crisp*, 6 Mod. 175.

22. When an entry, authority, or license, is given to any one, either by the common or statute law, and he does not pursue it, or abuses it, he shall be a trespasser *ab initio*, but not where the entry, authority, or license is given by the party. *Six Carpenters' case*, 8 Co. 146 a. 4 Mod. 391.

23. The bailiff of an inferior court, who abuses the process of the court, is a trespasser *ab initio*. *Brigs v. Collinson*, 6 Mod. 71.

24. Formerly, if a landlord distrained barrels of beer for rent, and drew the beer out of the barrels, he was considered as a trespasser *ab initio*; but now, by 11 G. 2. c. 19. s. 20., distresses for rent shall not be deemed unlawful for any irregularity afterwards, nor the party deemed a trespasser *ab initio*; but the parties grieved thereby may recover satisfaction for the special damage, and no more, in an action of trespass, or on the case. *Dod v. Monger*, 6 Mod. 216. lb. note.

25. If a man cut and carry away corn at the same time, it is trespass and not felony. *Emmerson v. Anson*, 1 Mod. 89, 90.

26. When a party has been convicted of burglary or stealing, trespass may be sup-

ported against him for the same act. *Semb. Markham v. Cobb*, W. Jo. 147. Lat. 144.

27. Trespass *quare vi et armis clusum fregit* lies to the plaintiff's damage of 20s.; the minuteness of the damage is not material. *Lambert v. Thurston*, 3 Mod. 275.

2. What not.

1. It is no trespass unless it be involuntary and such as could be prevented, and to the damage of another, Lat. 13.

2. An action does not lie for a dog's breaking* a close where the [*1415] master is not present. *Mason v. Keeling*, 1 Ld. Raym. 608. Poph. 161. W. Jo. 131. *Sed vide* Lat. 119.

3. Trespass will not lie against the master of a dog which has killed sheep, unless he knew it to be mischievous. 1 Dy. 25. pl. 162.

4. It never lies where the taking is lawful, or at least excusable. 2 Saund. 47 p.

5. If a ship is seized for a forfeiture under the navigation act, it is no trespass, though not brought to judicial condemnation. *Roberts v. Wetherell*, Salk. 223. note.

6. Trespass does not lie against the lord who distrains for rent not due. *Goodman v. Aylin*, Yelv. 148. Dall. 3.

7. It lies not for taking beasts in one county and impounding them in another, but an action on the statute. *Woodcroft v. Thompson*, 3 Lev. 48.

8. Where one, who has a right to enter into his neighbour's yard, lawfully fixes a spout there, which does damage, not by the mere act itself, but by the consequence of it, trespass does not lie, but case. *Reynolds v. Clarke*, 2 Ld. Raym. 1399. 8 Mod. 572. Fort. 212. 1 Stra. 634. S. C.

9. But where the original act was a wrong in itself, there trespass *vi et armis* lies. S. C. 8 Mod. 275.

10. If a horse be delivered to ride to A, and he is ridden to B, trespass does not lie, but an action on the case. 1 Ro. 128.

11. An act of omission cannot make a party a trespasser *ab initio*. *Six Carpenters' case*, 8 Co. 146 a.

12. Trespass does not lie for a nonfeasance. *Shapcott v. Mudford*, 1 Ld. Raym. 188.

13. It does not lie for him who takes only the profits out of another's land, but an action on the case. 2 And. 7.

14. Barking of trees by the lessee's cattle, when the trees are excepted, is no trespass. *Glenham v. Hanby*, 1 Ld. Raym. 739.

15. If a man let land, excepting the trees, and grants liberty to the lessee to lop them, and afterwards the lessor cuts them, the lessee can bring an action on the case, but not trespass. Palm. 211.

16. If a man have my goods by my delivery, and I afterwards demand them, and he refuses to deliver them, an action of trespass *vi et armis* does not lie, because here was no tortious taking; but in such case trover well lies. *Put and Hardy v. Sir Wm.*

Rawsterne and Sir Tho. Beckford, T. Raym. 472.

17. Laying hold of a horse is no trespass, without particular damage. *Slater v. Swann*, Stra. 872.

18. By the common law, every man may come upon his neighbour's land for the defence of the realm; and every man may make bulwarks and trenches upon another's land for the defence of the realm; so, for securing a city or town, a house shall be pulled down if the next be on fire; and so also the suburbs of a city in time of war may be pulled down for the common safety. Case of *Pre-rogative*, 12 Co. 12.

19. Trespass for taking money is bad, if it appear either on the evidence or the pleadings on the part of the plaintiff to have been a felonious taking, unless the offender has been prosecuted for the crime. *Luttrell v. Reynell*, 1 Mod. 283.

20. It will not lie for taking a negro. *Chamberlain v. Harvey*, 5 Mod. 187. Carth. 396.

21. Trespass will not lie in England for breaking and entering the plaintiff's house in Canada. *Rex v. Hooker*, 7 Mod. 193.

III. WHEN SEVERAL ACTIONS ARE SUSTAINABLE.

1. When a trespass is continued from day to day, it is in law a several trespass on each day. 1 Saund. 24. n. (1.)

2. Removing goods (wrongfully taken at first) from one place to another, is a several trespass at each place. Id. ibid.

3. Trespass may be joint or several at the plaintiff's election. *Anon.* 12 Mod. 331.

4. But a man cannot have a double satisfaction for the same trespass. 2 Ro. 224.

5. There can be but one satisfaction taken though against several trespassers; but the plaintiff has election of the best damages where there are several damages assessed. *Cooke v. Jennor*, Hob. 66.

6. Actions of trespass against [*1416] different defendants* are not to be joined by the court. *Bayly v. Bayly*, 1 Stra. 420.

IV. WHEN FORCE MAY BE USED TO REMOVE A TRESPASSER.

1. Where in entering A's close there is only force in law, A cannot lay hands on the trespasser before a request to depart; *aliter*, where actual force is used. *Green v. Goddard*, Salk. 641.

2. Trespass does not lie for chasing plaintiff's sheep out of defendant's land which were trespassing there. *Millen v. Fawtrey*, W. Jo. 131.

V. PROCEEDINGS IN THE ACTION;—

(a) Parties.

1. Trespass for taking the wife's goods must be by the husband only. *Whittingham v. Broderick*, 7 Mod. 105.

2. The declaration may allege the trespass to have been *simul cum quodam homine* ig-

note, but not *simul cum* one J. S. *Healy v. Broad*, 1 Leon. 41. 3 Leon. 77.

3. On an original in trespass against one, the plaintiff cannot declare against him with a *simul cum*, though the defendant cannot take advantage of it without oyer. *Billinge v. Crosby*, Comb. 260.

4. But otherwise, where the writ is against two. Id. ibid.

5. A declaration in trespass against the defendant *simul cum* J. S. outlawed *ad sectam querentis*, is not good. 3 Leon. 202.

(b) In what court it lies.

1. Trespass *vi et armis* cannot be tried in an inferior court. *Lambert v. Thurston*, 3 Salk. 359. *Wing v. Jackson*, 1 Mod. 215. *Sed vide Lane v. Robinson*, 2 Mod. 102.

2. Trespass *vi et armis* may be brought in B. R., and the damages laid to any amount, though under 40s. *Lambert v. Thurston*, Carth. 108.

(c) Venue.

1. The venue in real property is local. 1 Saund. 300 c.

2. In trespass to the person it is transitory, except in actions against officers within the statute, as constables, &c. and their assistants, when it must be laid in the proper county. *Stiles v. Cox*, Vaugh. 111—117.

(d) Declaration;—

1. Of the writ part and count part.

1. The declaration ought to reduce the generality of the writ to particularity, and should state the number, &c. in certain. *Playter v. Waine*, 5 Co. 34 b.

2. The recital of a writ may aid a defect in the count. 2 Stra. 1023.

3. If a writ of trespass be for entering into a house and two closes, and the declaration state a trespass in a house and in one close and one toft, the variance is fatal; for a toft only signifies the ground on which a building was before erected, and so excludes the idea of a close. *Skidmore v. Bouchier*, 2 Show. 93. 225.

2. The charge must be positive.

1. The declaration is not good if by way of recital only, and not directly affirmative. Cro. Car. 553.

2. This is the rule in K. B.; but otherwise in C. B. *Semb. Andr.* 21.

3. A declaration in trespass *quod cum* or *quare cum*, instead of "for that, &c.," or "and whereas also, &c." instead of "and also for that, &c." is bad, though *quod cum*, &c. is good in ejectment, or in an action on the case. 1 Ro. 55. 1 Stra. 621. 3 Lev. 238. Skin. 33. *Dennis v. Esley*, 2 Show. 447. *Cholmely v. Morton*, 2 Show. 180, 181.

4. In trespass for killing the plaintiff's dog, if the declaration be by recital "whereas, &c.," the court will after verdict permit it to be amended by the bill. *Wilder v. Healy*, 7 Mod. 427. *Hall v. Douglas*, ib. 489.

5. In assault and battery, with two counts, the first was good, the second was with *cumque etiam*, and entire damages; judgment was arrested. *Rudge v. Onon*, Fort. 376.

6. A second count in a declaration in trespass, beginning with *quod cum*, may be amended. *Wilder v. Handy*, 2 Stra. 1151. *Marshal v. Riggs*, 1162.

7. *Necnon de eo quod*, after a *quod cum*, is a positive charge. *Dobs v. Edmonds*, 2 Stra. 681.

3. Relative to the statement of the force.

1. Though there be no fence, [*1417] yet the declaration^a must be *clausum fregit*, for every man's ground is fenced in the eye of the law. 10 Mod. 140.

2. A declaration in trespass without *vi et armis* was formerly bad on general demurrer. *Wildgoose v. Burgess*, Salk. 636. Cro. Jac. 443. *Anon.* 12 Mod. 24.

3. Though the omission of *vi et armis* in the count part in trespass in C. B. did not hurt, if those words were in the writ. Lutw. [638].

4. It may, however, be omitted, since the statute that takes away the *captiatur pro fine*. *Day v. Markett*, 2 Ld. Raym. 985.

4. Relative to the statement of the place.

1. In stating the place, naming a vill or parish is sufficient. 1 Saund. 347 a.

2. In trespass for breaking a house in such a parish and ward in L. upon not guilty, the jury found the house was in the parish, but not in the ward; but held good, being admitted by the parties, and that the latter words were superfluous. *Hassall v. Juxon*, Cro. Eliz. 283.

5. Relative to the statement of the time.

1. In false imprisonment, if it be set out that defendant imprisoned plaintiff for a long time generally, or without speaking of the time, this is sufficient after verdict; and so it is upon general demurrer. *Webb v. Turner*, Andr. 252.

2. The plaintiff need not particularly state the trespasses in the order of time wherein the trespasses were done. *Sims v. Gregory*, Aleyn. 22, 23.

3. If trespass be brought for breaking his close at one day, the plaintiff may maintain his action by showing any one of several trespasses which were committed before the action was brought. *Digby v. Fitzharbert*, Hob. 104.

4. In trespass with a *continuando*, the party is not obliged to prove the precise time alleged in the *continuando*, but he ought to prove a trespass at some time within the time alleged; but he may waive the *continuando*, and give a single trespass in evidence. *Wilson v. Powell*, Skin. 641.

5. Where the declaration in trespass states the erection of a nuisance, and that it still remains, the *adhuc* refers to the time of the

writ issued or plaint exhibited, and not to the time of declaring. *Carter v. Calthorpe*, 3 Lev. 345.

6. Trespass for breaking and entering the plaintiff's close and treading down his beans, laid with a *continuando* from the 29th of September to the 2nd of February following, is good. *Anlaby v. Welborne*, 2 Show. 462.

7. Trespass for breaking the plaintiff's close, treading down his grass, and hunting and killing his rabbits, on divers days and times from such a time, with a *continuando* of the said trespass as to all the particulars, is good; for although one act cannot be continued from one day to another, yet an act may be daily continued. *Monkton v. Ashley*, 6 Mod. 38. 2 Salk. 638, 639. Ld. Raym. 974. S. C.

8. Trespass for breaking the plaintiff's house and taking the corn, with a *continuando* of the whole trespass for a month, is good. *Wilson v. Howard*, 5 Mod. 179.

9. Trespass for taking goods 1. *Aprilis, continuando usque 1. Junii*, was held good. *Butler v. Hedges*, 1 Lev. 210.

10. Where corn, &c. is taken away on several days, it is best to lay it taken, &c. *tali die et diversis diebus et vicibus inter (talem) diem et (talem) diem*. *Anon.* Comb. 427.

11. Trespass *quare clausum fregit*, and digging up slate, laid with a *continuando*, is good, for the trespass shall be referred to that charge which may be continued. *Clayton v. Gillam*, 2 Show. 196.

12. Breaking a house or a hedge may be laid with a *continuando*, but not throwing down a house. *Fonlteroy v. Aylmer*, 1 Ld. Raym. 240.

13. Trespass *quare domum suam fregit 1. Martii, continuando* till 1. June, is not good, but for cutting the grass, it is good. *Nappier v. Curtis*, T. Raym. 396.

14. Trespass for throwing logs into the plaintiff's close, with a *continuando*, is not good; but if *diversis diebus et vicibus* were in, it would be good. Id. *ibid*.

15. Trespass for digging up posts, breaking his close, and carrying away the posts, &c., *continuando*, &c., the *continuando* held ill upon demurrer; but after^a a verdict is good by reference. [*1418] *Clayton v. Gillam*, Skin. 42.

16. *Continuando* cannot be of taking loose chattels, but it may be *diversis diebus et vicibus*. *Fonlteroy v. Aylmer*, 1 Ld. Raym. 240.

17. There can be no *continuando* of acts that terminate in themselves, as killing a hare, &c. *Monkton v. Parkley*, Holt, 697, 698. Salk. 639.

18. Trespass for cutting a tree, or killing so many rabbits on a particular day, or entering a rick-yard and taking so many loads of hay on a particular day, laid with a *continuando*, is bad. 6 Mod. 40.

19. A trespass in cutting down such a number of trees cannot be continued. *Brook v. Bishop*, Salk. 639. 7 Mod. 152.

20. But if laid with a *continuando*, the *continuando* is void; and if entire damages be given, they shall be intended for such trespasses as are well laid, and nothing given for the *continuando*. *Gillam v. Clayton*, 3 Lev. 93. *Brook v. Bishop*, 7 Mod. 152. Holt, 698. Salk. 408. *Anon.* 12 Mod. 24. *Horner v. Bridge*, Holt. 696. 698.

21. Where a trespass is laid with a *continuando* for more than six years, and the statute 21 Jac. 1. c. 16. is pleaded, and entire damages, it must be intended only for that which falls within the six years, and that the jury rejected the beginning of the trespass. *Aldridge v. Duke*, 3 Mod. 111.

22. If a declaration for a nuisance for stopping water running to a mill lay the offence with a *continuando* after the time when it appears the nuisance was abated, yet the plaintiff shall recover for the damages done before. *Kendrick v. Bartland*, 2 Mod. 253.

6. When title should be shown.

1. In trespass, plaintiff need not make title; as, in trespass for diverting a water-course, the plaintiff need not show title thereto. *Rex v. Jenner*, Fort. 378. *Glyn v. Nichols*, Comb. 41. 43.

2. In trespass for taking timber or corn annexed to the land, making title to the land is sufficient. 1 Ro. 406.

3. If an ouster be laid in the declaration, a re-entry must also be laid, in order to recover the mesne profits; but if there be an entry, it may be laid with a *continuando* if it will bear one, and the plaintiff may recover damages for the entry and the mesne profits. Holt, C. J. 6 Mod. 40.

4. Declaration in trespass *per quod servitium amissi*, is good without showing a retainer. 1 Sid. 177.

5. A declaration in an action for damages is good upon the possession against a wrong doer, without stating further title. 6 Mod. 21.

6. If trespass is assigned before the commencement of the plaintiff's estate in the land, the action fails of itself, and colour need not be given by the defendant. Plow. 264.

7. Statement of the cause of action.

1. In trespass for taking goods or cattle, the things taken must be described with certainty, and not described generally as goods and chattels, &c.; this is bad after verdict. 2 Saund. 74. 379. 5 Co. 34 b. 1 Str. 637. *Wyat v. —*, Fort. 377.

2. In trespass *quod duas acras terras fod. subvert. &c. et asportavit*, judgment was stayed, because the defendant did not express the quantity of earth carried away, for the two acres relate only to the ground dug. *Highway v. Derby*, 2 Vent. 174.

3. A declaration in trespass *quod tres pecias terras fregit, &c.*, was held bad upon error. *Skinner v. Newton*, 10 Mod. 140.

4. A count in trespass that "the defendant *clausum fregit et herbam suam et pratum, viz. decem acras prati*, of the value of, &c. in the close aforesaid, then and there growing," is bad. *Anlaby v. Welborne*, 2 Show. 465.

5. But trespass for entering his house and taking *several. claves, &c.* was held good, without showing the number. Salk. 645. See *Anon.* 1 Vent. 272.

6. In trespass *quare arbores succidit*, the declaration was held insufficient, because not expressed what kind of trees. 1 Vent. 53.

7. So of fishes, for not stating the number and kind; and not aided by verdict. *Anon.* 1 Vent. 272. 329.

8. Trespass for carrying away *diversa onera equina* of gravel, held bad for uncertainty, and not aided by verdict. *Blake v. Clattie*, 2 Vent. 73.

9. So, *diversas pecias maheremii cepit, &c.** naught for the [*1419] uncertainty. *Leachmere v. Toplady*, 2 Vent. 262.

10. In trespass for taking and carrying away goods, the value of the goods must be stated. *Anon.* 2 Show. 147.

11. Trespass omitting the value of the goods is ill on a general demurrer. 2 Lev. 230.

12. Declaration in trespass for taking goods is bad, unless it state the goods to be the plaintiff's; but it may be made good by the defendant's plea. 1 Sid. 184.

13. Trespass for taking and carrying away certain beasts of the plaintiff, viz. one horse, &c., and also one hat, is not good, unless "the property of the plaintiff" be repeated in the declaration after each article. *Dannel v. Collingdell*, 2 Show. 395.

14. In trespass for taking "two cows at A, and also a load of wheat, the goods of the plaintiff there found," the words "the goods of the plaintiff" refer only to the wheat; and therefore, the trespass for taking the two cows is ill laid, inasmuch as the declaration does not state that they were the goods of the plaintiff. *Jose v. Mille*, 6 Mod. 15.

15. Trespass *quare duas equos epul D. et triticum de bonis proper. ipsius A cepit*, held ill, because the property of the horses not shown, and the damages entire. Salk. 640.

16. Trespass for fishing in his several fishery, and taking *pisces*, without saying *meum*, held well. *Fontleroy v. Aylmer*, 1 Ld. Raym. 239. *Holland's case*, 2 Lev. 158. 3 Keb. 524. 1 Vent. 278. See *vide Gip v. Wollicot*, Comb. 464.

17. For breaking and entering a free fishery, and taking the fish *ipsius generatis*, held bad, for he had not such a property as to call the fish his own. *Upton v. Dunkin*, 3 Mod. 97. Comb. 11.

18. In trespass for breaking the plaintiff's close, the corn growing there shall be intended to belong to the proprietor of the soil, unless a special title thereunto be shown. 2 Saund. 401.

10. Trespass for killing *cuniculos suos* in his close, held well. *Sutton v. Moody*, 1 Ld. Raym. 251.

20. For entering his close and taking a load of hay, not saying his hay, held ill after verdict. *Terry v. Stradwicke*, 2 Lev. 156.

21. Trespass *vi et armis* for taking the mare *ipius querentis*, necnon bona et catalla sequent., and sums them up, but does not say that they were the goods *ipius querentis*; and on demurrer it was held, the plaintiff might have judgment for the mare, and release the action for the residue. *Cutforth v. Taylor*, T. Raym. 395.

22. Trespass for injuring his "messuage or tenement" is good. *Scoble v. Skelton*, 2 Show. 195.

8. Statement of the damage.

1. In trespass, the amount of the damages must be stated and proved. *Dove v. Smith*, 6 Mod. 153.

2. In this action a matter may be laid for aggravation, for which alone no damages could be recovered. *Holt*, 699.

3. Trespass, for breaking the plaintiff's house, and assaulting and beating his servant, is good. *Salmon v. Bullock*, 2 Show. 478.

4. For the assault, &c. may be inserted by way of aggravation of damages. *Salk*. 642.

5. Where the declaration was for entering into a ship, taking away goods, converting them, assaulting and menacing the mariners, and imprisoning the master, so that they could not proceed on their voyage, it was objected that here was case and trespass *vi et armis* and trover and conversion, all jumbled in one count; but it was held good, as it was only in aggravation. *Clayton v. Coatsworth*, 1 Show. 179, 180.

6. In trespass against husband and wife, the declaration may state the conversion to have been to their own use. 2 Saund. 47 m.

7. The conversion is merely surplusage, and laid as aggravation. 2 Saund. 47 m.

8. If a wife be falsely imprisoned, a declaration by husband and wife, with a *per quod* his domestic concerns remained undone, and concluding to the damage of both, is good. *Russel v. Corn*, 6 Mod. 127. Comb. 184.

9. Trespass for entering the house of A, and taking the goods of B, *ad damnum ipsorum*, after a verdict and entire damages, the judgment was arrested. *Maddox v. Taylor*, 8 Mod. 370.

10. Trespass by a dean and [*1420] chapter, for* entering into the close of the dean, is not good, for the chapter ought not to join. *Wolley v. Robinson*, Cro. Eliz. 200.

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11. Where the churchwardens brought trespass for taking a bell out of a church in the time of their predecessors, and laid it to be *ad damnum ipsorum*, it was held bad, for it ought to be *ad damnum parochianorum*; otherwise if taken away in their time. *Hadman v. Ringwood*, Cro. Eliz. 145. 179.

9. Conclusion.

1. Trespass *quare clausum fregit, pedibus ambulando, &c.*, et in clauso *pred. venatus fuit*, (the defendant being an inferior artificer,) *contra formam statuti*, the ill conclusion vitiates the declaration. Comb. 420, 421.

2. The omission of *contra pacem* makes the declaration ill. 1 Ld. Raym. 38. 2 lb. 985.

3. The omission of the conclusion of *contra pacem* was formerly held to be matter of substance, but it must now be specially demurred to. Comb. 168. 2 Chit. Pl. 847. n. (c).

4. The want of *contra pacem* is aided after verdict by the 21 Jac. 1 c. 13. *Musgrave's case*, W. Jo. 172.

5. Trespass laid in the time of King William, and against the peace of Queen Anne, is bad on demurrer, but good after verdict. *Day v. Musket*, 6 Mod. 80. Salk. 640.

6. Where the plaintiff counts of a trespass done part in a former king's time and part in the present king's time, he shall allege it to be against the peace of both kings. Plow. 38. 1 Ro. 259. 1 Show. 28.

(e) Pleas;—

1. General issue.

1. A justification cannot be given in evidence on the general issue. 11 Mod. 64. n.

2. If a horse run away with his rider and hurts any one, it cannot be justified as a battery, because, being involuntary, it is not a battery. *Gibbons v. Pepper*, 1 Ld. Raym. 38. Salk. 637. 4 Mod. 404. S. C. 3 Wils. 411.

3. If a dog kill sheep without his master setting him on, to trespass for that killing he need only plead the general issue. 1 Dy. 29. pl. 195.

4. Upon not guilty pleaded, a freehold may be given in evidence. *Bartholomew v. Ireland*, Andr. 109.

5. In trespass against baron and feme, wherein the feme is only charged with the trespass, if they plead *quod ipsi non sunt culp.*, it is ill. Lutw. [596].

6. If one pleads *non culp.* to a trespass, and afterwards justifies the same trespass, the whole plea is ill. Lutw. [524. 590.]

2. Tender.

1. A tender was not pleadable in bar of a voluntary trespass before the statute 21 Jac. 1 c. 16, except to prevent impounding cattle. *Giles v. Harris*, 1 Ld. Raym. 255. Prac. Ca. K. B. 168. *Cubit v. Harrison*, Cro. Eliz. 820.

2. Tender of amends is not pleadable to

trespass for taking goods. *Baillie v. Vavash*, 1 Stra. 549.

3. License.

To trespass for entering a house, the defendant may plead a license to enjoy the premises from such a day until such a day. *Hall v. Seabright*, 1 Mod. 15. 2 Mod. 7.

4. Award.

In trespass, an award upon the matter is a good plea. 1 Ro. 270. *Nichols v. Grunnon*, Hob. 50.

5. Criminal conviction.

A conviction on an indictment of larceny may be pleaded in bar to an action of trespass for taking the same goods. *Luttrell's case*, 6 Mod. 77.

6. Release.

1. A release generally is no bar in trespass. Plow. 46. *Westlake v. Perce*, 1 Sid. 293.

2. If the defendant in trespass plead a release, he must traverse all trespasses after; if a feoffment, all before; if a license, all before and after. *Digby v. Fitzherbert*, Hob. 104.

3. A release to one trespasser discharges all. Hob. 66.

7. Pardon.

The first entry in trespass being pardoned, all that depends on it is pardoned* also. *Strickland v. Thorpe*, Yelv. 126.

8. Former recovery.

A judgment and execution, &c., against one trespasser is pleadable in bar by the others. *Rawlinson v. Oriol*, Comb. 144, 145. 1 Leon. 19. 3 Ib. 122. *Morton's case*, Cro. Eliz. 30.

9. Special justifications;—

(a) Generally respecting them.

1. A plea of justification is sufficient if it shows any thing that excuses the trespass, and the number named in the declaration is immaterial. 1 Saund. 346 c. 347 b.

2. Excuse avails not in trespass, without unavoidable necessity. *Dickinson v. Watson*, T. Jones, 205.

3. A servant cannot justify trespass by the command of his master. *Mires v. Solebay*, 2 Mod. 244.

4. A justification must answer the whole trespass as laid in the declaration. *Roberts v. Morgan*, 11 Mod. 219.

5. In trespass for false imprisonment for the non-payment of a fine, if the defendant justify, he must answer the fine. *Oliet v. Bessey*, 2 Show. 205.

6. A special justification must be of matter of fact, and not of record. 6 Mod. 40.

7. A justification for taking cattle for part of rent due for one half-year, without showing how the other was satisfied, is not good. *Hunt v. Braines*, 4 Mod. 402.

8. In trespass for imprisonment, a justification by order of a court of conscience to carry the plaintiff to the comptor, was held ill, because the imprisonment was confessed, but not shown to be in the comptor. *Swinstead v. Lyddal*, 1 Salk. 408.

9. If a constable plead that he set one in the stocks for not watching, he must aver that the party dwells in his parish. 3 Leon. 208, 209.

10. That the place is a freehold is good in an action of trespass *quare clausum fregit*, but not in action of trespass for taking and carrying away his goods. *Alstone v. Hutchinson*, Carth. 176.

11. If in justification of a battery, it be pleaded *quod mollior manus imposuit*, because the plaintiff entered into his close, the defendant ought further to show that the plaintiff endeavoured to eject him, or dispossess him. Mo. 846.

12. A justification must confess the trespass. *Gibbon v. Pepper*, Salk. 637, 638. 1 Saund. 27, 28. *Rowe v. Tuttle*, Willes, 15.

13. In a justification by prescription for a way, the defendant must show in certain a *quo*, &c. and *ad quem locum* the way leads. *Anon.* 2 Leon. 10.

14. The plea should follow the day laid in declaration. 2 Saund. 5 a.

15. If defendant traverse the day laid in the declaration, he must also traverse all other times when he had no justification. 2 Saund. 295 c.

16. A justification of imprisonment by process, ought to traverse that he is guilty at any time after the plaintiff was discharged. *Truscott v. Carpenter*, 1 Ld. Raym. 231.

17. If the defendant in trespass justify for the day in the declaration, yet he must traverse all trespasses before or after the day, unto the time of the action brought. Hob. 104, 187.

18. If in trespass the defendant justifies at the same time and place at which the plaintiff counted, he need not aver that it is the same; but it is otherwise if he justifies at another time and place. 21 H. 7. fc. 41. Sav. 17.

19. If the defendant justifies the trespass at another time, and not at the precise time laid in the declaration, yet if he avers it is the same trespass whereof the plaintiff complains, the plea is good in substance. 2 Saund. 6.

20. If the plaintiff lay the trespass at C, and the defendant's justification is not local but transitory, the defendant ought to justify in the same place where the plaintiff has declared. *Wright v. Ramcott*, 1 Saund. 85. 2 Saund. 5 b. *Read v. Hawke*, Hob. 16.

21. The defendant pleaded an arbitration in bar; it was held bad, because the place of the submission was not alleged, nor performance, nor any answer to the *vi et armis*. *Hare v. Gorge*, Cro. Eliz. 66.

22. The justification may be in a place different from that laid in the [*1422] declaration, without* a traverse. 1 Saund. 347 a. 2 Saund. 5 b, c.

23. The conclusion *quas est eadem*, with a traverse of the place, is good, without a traverse of the time. *Bodley v. Wilkins*, 3 Lev. 227.

24. Where the justification is at the same time and place, there needs no averment that it is the same trespass. *King v. Phippard*, Carth. 281.

25. If there is a *quas est eadem*, there must not be a traverse also. 2 Saund. 5 a.

26. If the plaintiff gives a name or quantity, the defendant cannot vary or give another name or quantity, but should plead the common bar, *protestando* the name or quantity. 2 Saund. 103 b.

27. One may count on possession, but not justify without making title. *Pell v. Garlick*, 12 Mod. 507.

28. He who claims interest under an act in law, may justify without showing it. *Leafield v. Helier*, Cro. Jac. 317.

29. In trespass one may justify as bailiff to a corporation without deed. *Flow*, 91.

30. One who justifies as requesting a sheriff to execute process, must show the record that is the foundation of the process. *Britton v. Cole*, 1 Ld. Raym. 309.

31. Thus, the person at whose suit one is outlawed, cannot justify the taking of goods by a *levari facias*, without showing the outlawry or the command of the sheriff. S. C. Comb. 469, 470.

32. In a special justification to an action of assault and false imprisonment, the cause of the commitment must be set forth in the plea. *Wytham v. Dutton*, 3 Mod. 160.

33. A justification that the plaintiff was presented at the manor court, and that he, the defendant, took the man as bailiff of the lord of the manor for a forfeiture, &c. is not sufficient, for he ought to have shown specially the authority under which he acted. *Lamb v. Mills*, 4 Mod. 377, 378.

34. In a justification under a precept from a borough court, it must be stated by what authority the court was held. *Cooper v. Darly*, 11 Mod. 364.

35. Where justification is pleaded by way of excuse to an action of trespass for the taking of any thing, the defendant must aver the fact to be done, and set forth the warrant to him directed, and the taking *virtute warranti*; and not generally, that he took it by virtue of a mandate. *Mathews v. Cary*, 3 Mod. 138.

36. A justification under a judgment in an inferior court by *taliter processus*, is good. *Lane v. Robinson*, 2 Mod. 102.

37. A justification under a judgment in a court baron, was held ill, because a *levari facias* was set forth when it should have been a *distringas*. 3 Salk. 219.

38. In a justification in trespass for taking goods, the officer need only show a writ of execution; *secus*, of a common person, unless in aid of the officer by his command. *Britton v. Cole*, Salk. 409.

39. A justification in trespass by virtue of process out of a piepowder court, must show the cause of action, and that it arose within the jurisdiction. *Cholmely v. Morton*, 2 Show. 181.

40. In trespass, the justification of taking by an officer must set forth a warrant or precept. Holt, 488. 555. *Atkinson v. Crouch*, Salk. 407.

41. But in a justification by a constable and others in his aid in taking a feme covert presented as a common scold in the leet, the defendant is not compelled to show the warrant of the seneschal, because it is only inducement. Mo. 847.

42. The plea of justification to trespass under process in an inferior court, need not allege that the cause of the plaint arose within the jurisdiction, or that the officer returned the writ. *Croucher v. Goodwin*, 2 Mod. 59. *Adams v. Freeman*, Say. 81.

43. But in general a justification under a returnable process is ill, without showing a return of it. *Middleton v. Price*, 2 Stra. 1184.

44. The distinction is, that where the principal officer justifies under a returnable process, he must show that the writ was returned, otherwise of a subordinate officer. Holt, 408, 409. *Freeman v. Bluet*, Salk. 409. 12 Mod. 396.

45. Where a serjeant at mace justified under* a precept on a plaint in replevin, it was held ill, because [*1423] it was not shown to be returned. S. C. Salk. 409.

46. In justifying under a writ, it is not enough to show where returnable, but it must also be shown whence it issued. *Gray v. Hart*, Salk. 517.

47. It is not necessary for the defendant in an action of trespass for a false imprisonment, who justifies the imprisonment under a *capias* of an inferior court, to set out all the proceeding in that court. *Adams v. Freeman*, Say, 81, 82.

48. To trespass for taking cattle damage feasant, if the defendant justify under a lease, it is sufficient for him to say that he was possessed of the place where, &c. without stating a particular title. *Searl v. Bunton*, 2 Mod. 70.

49. In trespass for breaking the plaintiff's close, it is not enough for the defendant to say he was possessed of a parcel of corn there, and that he entered to mow it, without showing a special title thereto. *Pearle v. Bridges*, 2 Saund. 401, 402. 3 Keb. 61 S. C.

50. In trespass for taking four loads of wheat, and four loads of rye, &c., a justification that they were taken by the church-

warden from the rector, under a sequestration from the bishop for not repairing the chancel, must aver that the chancel was out of repair, that no more was taken than was sufficient for the repair, and answer the taking of the different sorts of grain. *Walwyn v. Auberry*, 2 Mod. 259. 1 Mod. 259. S. C.

51. Where the trespass is transitory, the plaintiff cannot pretend a right to the place; therefore in such case the defendant may justify by possession only. *Anon.* Salk. 643. 2 Saund. 401 a. 402.

52. In trespass *quare clausum fregit*, a justification under a right of common must set out defendant's title specially. 1 Saund. 346.

53. Where the party and the officer join in a justification which is ill as to one of them, judgment shall be against both. *Middleton v. Price*, 2 Stra. 1184.

(b) In respect of trespasses to the person;—

i. What are good.

1. *Son assault demeine* is a good plea in mayhem, where the first assault was violent. Salk. 642.

2. A wife may justify an assault in defence of her husband; so may a servant in defence of his master, but not *vice versa*. *Leeward v. Barilee*, Salk. 407. 1 Ld. Raym. 62. S. C.

3. A defendant may justify an assault and battery, by pleading *molliter manus imposuit*, &c., in order to arrest, &c., Willes, 10. 16. *Titley v. Forall*, Willes, 690. *Tottage v. Petty*, C. T. Hardw. 358.

4. A person, though neither constable, churchwarden, or other officer, may justify an action of assault and battery, by pleading that the plaintiff disturbed the congregation while the minister was performing the rites of burial, and that he *manus molliter imposuit* to prevent such disturbance. *Glover v. Hynde*, 1 Mod. 168.

5. Pleading to an imprisonment includes an arrest, and omitting the naming of the arrest makes no discontinuance. 2 Ld. Raym. 1100.

6. So, one may justify a battery in defence of his possession of lands or goods, by pleading *molliter manus imposuit*. Willes, 16. n. b.

7. Or even without pleading *molliter manus imposuit*, if actual force be used by the plaintiff. *Id.* *ibid.*

8. In trespass and false imprisonment for taking a man in execution on a judgment or process of an inferior court, the plaint and process are sufficient to justify the officer, although there was no cause of action arising within the jurisdiction of the court. *Squib v. Hob.* 2 Mod. 30. *Higginson v. Martin*, 2 Mod. 195. S. P. *Crowder v. Goodwin*, 2 Mod. 59.

9. Process upon an erroneous judgment will justify the party and the officer; upon an irregular judgment, the officer only. *Phillips v. Biron*, 1 Stra. 509.

10. A bad writ or warrant will justify the officer who executes it, if the court or magistrate had jurisdiction. *Morse v. James*, 7 Mod. 246.

11. An officer may justify by the writ only, but the party not without judgment. 3 Lev. 20.

12.* To trespass in a hundred [*1424] court, a justification under a *taliter processus* is good. *Lane v. Robinson*, 2 Mod. 102.

13. To trespass and false imprisonment, the defendant may plead in justification that he was servant to the sheriff, attending him at the time of the assizes, from whom he received a command to bring the plaintiff (being another to the sheriff's servant) from the conventicle, and that finding him there he did *molliter manus imponere* on the plaintiff, and brought him before his master, &c. *Anon.* 2 Mod. 167.

14. In trespass for false imprisonment, and detaining him in custody until he had paid 11s., the defendant justified by virtue of an order of a court of conscience to pay 10s. and 4d.; which not being paid, he took him, &c.; and held good, without justifying for the whole 11s. *Swinstead v. Lydall*, 5 Mod. 293. Skin. 664. S. C.

15. Assault, battery, *et tantas minas imposuit, quod non audebat*, &c.; the defendant pleads *son assault demeine quoad* the assault and battery, and says nothing to the minas; still it is good, because the threats are not actionable, except to increase the damages. Mo. 704.

16. If the defendant in justification of an arrest pleads that the bill of Middlesex was prosecuted against the plaintiff, whereupon the sheriff made and directed a warrant to arrest him, it shall be intended that the bill was delivered to the sheriff before the making of the warrant, until it be specially shown to the contrary. 1 Saund. 299.

17. To trespass and false imprisonment, the defendant may justify by virtue of an attachment out of the court of Chancery. *Furlong v. Bray*, 1 Mod. 272.

18. In trespass of assault, battery, and wounding, the defendant may plead not guilty as to the wounding, and justify the assault and battery, without any repugnancy. March, 98. 106.

19. A recovery in a former action for an assault, is a good bar to a second action for a new consequence of the same assault. Holt, 12.

20. Every one may justify the apprehending of a common cheater with false dice, to carry him before a justice of the peace. *Hellday v. Oxenbridges*, Cro. Car. 235.

21. That a robbery was committed, and

common fame charged the plaintiff with it, is a good justification to trespass for apprehending and carrying him to prison. 2 Dy. 236. pl. 26.

22. An attempt to rescue is a good justification in an action for an assault, but it must be pleaded. *Anon.* 11 Mod. 64.

ii. What are not good.

1. A master cannot justify a battery to save his servant. *Palm.* 54.

2. An assault is not justifiable in defence of one's possession of a house or close. *Leeward v. Bately*, 1 Ld. Raym. 62.

3. It must be pleaded that he *molliter manus imposuit*. 8 C. Salk. 407.

4. *Son assault demerme* is not a good plea where any time intervenes between the assault, or where the second assault is excessive. *Cockroft v. Smith*, 11 Mod. 43.

5. Accord, though executed in part, is no good plea to an act of trespass and assault. *Cock v. Honychurch*, T. Raym. 203.

6. In trespass, the defendant pleads that the trespass was done by him and J R, and that it was accorded between the plaintiff and the said J R, that the said J R should abate 14s. due to her from E (the plaintiff's father) in satisfaction and avers that she had; the plea was held ill on demurrer for not showing how the 14s. was abated. *Hilman v. Uncles*, Skin. 391.

7. Battery in a church cannot be justified by a *molliter manus*, except by the churchwardens. *Cockroft v. Cockroft*, Comb. 17.

8. A wounding cannot be justified in defence of the person. 1 Ro. 19.

9. If in trespass for assault at L, defendant justifies in defence of the possession of his close at S, *absque hac* that he is guilty, otherwise than at S, the traverse is bad. 1 Ro. 19.

10. A plea of *molliter insultum fecit*, instead of *molliter manus imposuit*, is bad. 1 Sid. 441.

11. In false imprisonment at C, the defendant justified by process out of the stannary court of A, and traversed the imprisonment out of the jurisdiction [*1425] of the stannaries; it was held a bad traverse, because C might be within the stannaries. *Lutw.* [394].

12. In trespass and false imprisonment, the defendant justifies under a process *quæ est eadem*, &c.; and traverses being guilty *aliter*, &c.; it is an unnecessary traverse, and ill upon special demurrer. *Courtney v. Satchwell*, 2 Stra. 694.

13. The defendant in an action of trespass cannot justify the throwing down of a ladder upon which a person is, although the ladder were unlawfully erected upon the land of the defendant. *Collins v. Renison*, Say. 139.

14. One cannot justify a battery by barely showing an arrest. *Williams v. Jones*, C. T. Hardw. 298.

15. Justification of imprisonment by pro-

cess is not a sufficient justification of a battery. *Truscott v. Carpenter*, 1 Ld. Raym. 231.

16. A sheriff's officer cannot justify trespass under a *ca. ss.* on a judgment which was afterwards reversed. *Byron v. Philip*, 11 Mod. 378.

17. A justification under a returnable process, is ill, without showing a return of it. *Middleton v. Price*, 2 Stra. 1184.

18. Trespass for taking and imprisoning the plaintiff cannot be justified under an order of the court of Chancery. *Furlong v. Bray*, 1 Mod. 272.

19. Where the party and the officer join in a justification, which is ill as to one of them, the whole fails, and judgment shall be against both. *Middleton v. Price*, 2 Stra. 1184. *Philips v. Biron*, 1 Stra. 519. C. T. Hardw. 62. S. P.

20. Where in a justification of imprisonment under process of the chancellor's court of Oxford, the defendant set out a custom for the plaintiff in that court to make oath that he has a personal action against the defendant, and that the plaintiff believes the defendant will run away, upon which (oath being made) the judge may grant a warrant, such custom was held not supported by an affidavit, stating that the plaintiff suspects the defendant will run away. *Smith v. Boucher*, C. T. Hardw. 69.

21. A plea by a servant that the plaintiff having assaulted his master, he then and there assaulted the plaintiff in defence of his master, was adjudged ill on demurrer, the word having relation to a time past. *Barker v. Reynolds*, W. Kely. 134.

22. In trespass of assault battery wounding and false imprisonment a plea of not guilty as to the assault and battery, and a justification as to the false imprisonment, without saying any thing as to the wounding or battery, is bad, for the whole charge is not answered. *Anon.* 2 Mod. 187. 2 Vent. 193.

23. In trespass of assault, battery, and imprisonment until the plaintiff should pay £11 10s., if the defendant justifies by reason of an execution, and a warrant thereon for £11, without mentioning the 10s.; the plea is bad. *Harding v. Fearnie*, 2 Mod. 177.

24. A justification of an arrest by a warrant on a *capias*, without showing out of what court it issued, is ill. *Lutw.* [616, 617].

25. A justification by warrant of sessions the 10th October, and the sessions commenced the 9th of October, and it is not shown that it was continued by adjournment, &c., to the 10th, is ill. 2 Lev. 229.

26. A justification by the bailiff of a corporation to imprison any subject at their pleasure for a misbehaviour is bad. 2 Leon. 34, 35.

27. A soldier justified in battery by misfortune in discharging his gun at the common muster; it was held that he could not say he could not avoid it; where the defendant jus-

tifies the whole, there is no need of a traverse. Mo. 864.

(c) In respect of trespasses to personal property:—

i. What are good.

1. The sheriff may justify by grant of a replevin, without showing the property of the goods to be in the plaintiff in replevin. *Milles v. Davies*, Com. 590.

2. In trespass for taking cattle, a plea that the defendant was possessed of the place where, and took them damage feasant, is good, without showing further title. *Harrington v. Bush*, 11 Mod. 219. 1 Saund. 346 a. *Onway v. Bristol*, 10 Mod. 37. *Searle v. Bunnion*, 2 Mod. 70. *Contra*, Lutw. [628. 632. 472].

3. But it is otherwise if any [*1426] place be specially* laid down in the declaration. 10 Mod. 37.

4. To trespass for chasing sheep, &c., possession of the *locus in quo* is a sufficient justification. 1 Saund. 221.

5. When the defendant justifies (in trespass for taking the plaintiff's goods, and converting them, &c.,) taking them as a distress for rent, the taking and converting are considered as the same thing; and therefore it is not inconsistent in a plea of justification, as to the taking and converting, to say, that he took all the goods as a distress, and afterwards to say that he left part of them in the plaintiff's possession. *Willes*, 55.

6. Trespass for taking and driving his beasts, so that one of them died; the defendant justified damage feasant; it is good, without traversing the *via quod*, that being laid out for aggravation of damages. *Leech v. Midgley*, 1 Lev. 283.

7. To trespass for taking a mare, a justification under the lord of the manor, stating, that he and all those, &c., *semper habuerant curiam legalem*, &c., and that the defendant by process from the said court took the mare as a forfeiture for disobeying the order of the said court, is good. *Lamb v. Mills*, 4 Mod. 377.

8. To trespass for an injury done to the plaintiff's pig, a plea in bar that the plaintiff impounded and detained the pig, without saying "and still detains," is good. *Jasper v. Edowes*, 11 Mod. 21.

ii. What are not good.

1. It is no plea in trespass for cutting his nets and oars, that he cut them because he found the plaintiff fishing with them in his waters; he ought to have taken them damage feasant. *Reynell v. Champenoon*, Cro. Car. 228.

2. "That the mastiff did run violently in and upon a certain dog of the defendant, and did bite him," is no justification for killing him. *Wright v. Ramscot*, 1 Saund. 85.

3. To trespass for taking money, the defendant shall not be permitted to show that the taking was felonious. 1 Mod. 283.

4. To trespass for immoderately riding the plaintiff's mare, the defendant cannot plead that the plaintiff lent him the mare and gave him a license to ride, and that by virtue of this license he and his servant rode the mare by turns. *Bringle v. Morrice*, 1 Mod. 210.

5. In trespass for taking cattle, the defendant justifies for a heriot, and obtains a verdict; yet if it appear that the plaintiff mistook the nature of his action, and that he ought to have brought trover instead of trespass, this recovery cannot be pleaded in bar to trover for the same goods. *Putt v. Royter*, 2 Mod. 319.

6. In trespass for taking his beasts, the defendant justifies under a replevin in the hundred court of the bishop of S, and shows that the bishop, &c., have, upon complaint to the steward, refused to grant replevins in the court or out of it to replevin cattle, and that one had taken the beasts of J S, and that he levied a plaint in the said court before the steward; and the steward commanded him to replevin the beasts, &c.; the plaintiff demurs, and adjudged for the plaintiff; for the defendant having shown the property in a stranger, the plea amounts to the general issue. *Hallet v. Birt*, Skin. 674.

7. In trespass *vi et armis* for taking the plaintiff's goods in Dale, the defendant cannot plead in justification generally, that the place where is his freehold, and that the goods were there damage feasant. *Eleois v. Lambe*, 6 Mod. 117.

8. Trespass for taking a ship; the defendant pleaded in bar that he was captain of a man of war, and took her on the high seas as prize, and prosecuted and condemned her in the admiralty court as a prize; it is not good without showing how she was prize. 1 Show. 6.

9. Probable cause of seizure is not a justification to a custom-house officer. *Legtise v. Champante*, 2 Stra. 820.

10. To rescous for one hundred and twenty sheep, defendant pleads a good justification as to forty, and as to the others, says, he could not separate them; held bad, for he ought to have restored them in convenient time. *Palm*, 123.

11. In trespass for taking a distress, a justification not setting forth by virtue of any precept, is bad. *Mathews v. Cary*, Carth. 75.

(d)* In respect of trespasses to real property:— [*1427]

i. What are good.

1. Possession in the defendant is sufficient to justify his putting in his cattle. *Falde v. Ridge*, Yelv. 75.

2. In an action on the case for entering the plaintiff's house and taking his goods, justification in aid of a bailiff who had a writ of execution, held good, though not said to be by his command or desire. *Semb. Templemen v. Case*, 10 Mod. 25.

3. To trespass for spoiling his grass, &c.,

the defendant may plead generally that he was possessed, without showing his lease, or for what time, &c., because collateral to the thing in question. *Yelv. 75.*

4. To trespass for pulling down hedges, the defendant may plead that he had a right of common in the place where, and that the hedges were made upon his common, so that he could not enjoy his common in as ample a manner, &c. *Mason v. Caesar*, 2 Mod. 65.

5. To an action of trespass, the defendant may justify that there was a highway from such a place to such a place, that the plaintiff stopped the same so as he could not pass, and that therefore he went over the plaintiff's land. *Abor v. French*, 2 Show. 28.

6. In trespass, a justification for a way that J S (the lessor to the defendant) was seized of such a field, and that J S, and all those whose estate he had, did, time out of mind, &c., held well after verdict, though the seisin in fee was not particularly set forth. *Muston v. Yateman*, 10 Mod. 228, &c. 300, &c.

7. Trespass for taking forty sheep, and chasing of them, by reason of which chasing one of them died; the defendant pleads that the place in which the chasing is supposed was his freehold, and that he *leniter* chased them, *quæ est eadem transgressio*; the plaintiff replies, and justifies for common; defendant rejoins by inclosure; the plaintiff demurs, and held, the bar was bad, without a traverse. *Anon. T. Raym. 185. Cro. El. 384.*

8. In trespass for a forcible entry, *liberum tenementum* is a good plea. *Bartholomew v. Ireland*, Andr. 109.

9. *Ejectione firme* is a good bar in trespass against the same party. *Kempton v. Coopers*, 1 Leon. 313. 3 Leon. 194.

ii. What are not good.

1. A man cannot justify a trespass upon another's close for fear. *Gilbert v. Stone*, Aleyn. 35.

2. To an action *quod warren. fregit*, it is no bar to say it is the defendant's freehold, for it may be so, and yet the plaintiff have warren there too. *Anon. 2 Leon. 202.*

3. *Liberum tenementum* is not a good plea, if the declaration ascertains the place. 1 Saund. 300 a.

4. In trespass *quare clausum fregit*, the defendant pleads *liberum tenementum*, without saying when, it is bad. *Bolton v. Canham*, Poll. 132.

5. Trespass for destroying the plaintiff's common in six acres; a justification in three acres only is ill. *Mosse v. Bennett*, 8 Mod. 120, 121.

6. In trespass against two, one defendant cannot plead a tenancy in common between the plaintiff and the other defendant; but if he do, a replication of sole seisin, traversing the tenancy, may conclude in the country. *Haywood v. Davis*, 7 Mod. 105.

7. In trespass for breaking a close at D,

justification in S, traversing the trespass in D, amounts but to the general issue. 1 Dy. 19. pl. 109.

8. Trespass for entering his land, taking his hops, and destroying his poles; defendant justifies that the ground was his own, and that he took the poles damage feasant; and on demurrer adjudged for the plaintiff, for the defendant cannot justify destroying a thing distrained. *Sparke v. Keeble*, 8 Mod. 330.

9. Justification (in trespass) under a custom for all the inhabitants of a town to walk and ride over a close of arable land at all reasonable times in the year, was holden bad, because it appeared in the plea that trespass was committed when the corn was standing, though the defendant averred that it was a reasonable time. *Bell v. Wardell*, Willes, 202.

10. To trespass against several persons for entering into a brewhouse and keeping possession, and taking away 50s., if the defendants justify under a* [*1428] warrant from commissioners of excise by an act of parliament, giving them authority to act upon the neglect or refusal of two or more of the justices of the peace, and do not state in his plea that two justices refused to take cognizance of the matter, such justification is bad. *Dashwood v. Cooper*, 2 Mod. 284.

11. In trespass for breaking and entering the plaintiff's house, and carrying away his goods; a plea of not guilty as to the breaking, and a justification by virtue of process from an inferior court, as to the entering, without saying any thing as to the carrying away, is bad. *Briggs v. Collinson*, 6 Mod. 70.

12. In trespass *quare clausum fregit*, the defendant justified, because he said he had a right of fishing there by prescription, but does not say what kind of fishery he claimed, and for that cause the plea was held naught. *Anon. Hard. 407.*

13. Count for breaking his close, digging in his soil there, and taking and carrying away stones dug up; bar, by a prescription to dig and take stones for repairing the defendant's house; plea ill, because it was not said that the stones were employed in repairing the said house. *Lutw. [582].*

14. The defendant justified by a presentment for a nuisance in a court leet, without saying *per mandatum* of the steward, and held naught. 1 Show. 62.

15. In trespass, defendant pleading that plaintiff (a minor) by indenture and letter of attorney therein enfeoffed the defendant's father, and afterwards by indenture confirmed the said tenement, &c., *habendum*, &c., and descent to himself, is bad; 1st, because livery by letter of attorney of an infant is a disseisin; 2dly, because the confirmation is pleaded of a tenement, &c., *habendum*, &c., when the land did not pass by the confirmation; 3dly,

because defendant's father is not averred to be seised; 4thly, because plaintiff is not averred of full age at the time of the confirmation; 5thly, because no profert of either of the indentures. 2 Dy. 108. pl. 33.

(f) *Replication.*

1. In trespass, the plaintiff need only falsify the defendant's title. *Cary v. Holl*, 2 Stra. 1238.

2. If a battery be outrageous, so that a *molliter manus imposuit* be not true, it ought to be specially shown, otherwise it will be a good justification. *King v. Tebbart*, Skin. 387.

3. In assault and battery, if the defendant pleads *son assault demene*, the plaintiff may show it was a justifiable assault; and if it be pleaded *tempore quo*, there needs no traverse or averment. *King v. Pepper*, Comb. 227.

4. In false imprisonment, the defendant justified by process of an inferior court; the plaintiff replied that the cause of action arose out of the jurisdiction, *absque hoc* that it arose within the jurisdiction; the traverse is ill, being of matter not alleged before; but no advantage is to be taken on a general demurrer, and then the residue of the replication will stand. *Gwinne v. Poole*, Lutw. [390].

5. In trespass and justification by command of another, the command is traversable. *Britton v. Cole*, 1 Ld. Raym. 310.

6. The being bailiff may be traversed. 1 Saund. 347 c. 347 d. 347 c. n. [c].

7. Trespass for battery at H; justification by *molliter manus imposuit* in defence of his possession of a close in C; replication, that in the said close there was a way by permission, wherefore, &c., and thereupon the plaintiff with violence assaulted him, &c., *absque hoc quod molliter manus imposuit*; the traverse is good. *Searle v. Darsford*, Lutw. [603, 604].

8. In trespass for taking goods, if the defendant justify by command of the lord of the manor of whom the plaintiff held by fealty and rent, and that for the non-payment of the rent he took the goods by way of distress, the plaintiff may reply, that the place where is *extra, absque hoc* that it is *infra feudum*, without taking the tenancy upon him. *Sherrard v. Smith*, 2 Mod. 103.

9. To trespass for assault, battery, and false imprisonment for thirteen years, if the defendant plead the statute of limitations generally, a replication that the writ was sued out on such a day, and that it was within six years from that time, and a general verdict thereon is good. *Aldridge v. Drake*, 2 Show. 493.

[*1429] 10.* To a plea of *liberum tenementum*, the plaintiff may reply, that the place in question is the soil and freehold of the plaintiff, and not the soil and freehold of the defendant. *Lambert v. Stroother*, Willes, 218.

11. To a plea of *liberum tenementum*, the

plaintiff may reply in either of three ways; 1st, he may traverse the defendant's plea, and then it is immaterial whether or not he sets forth his own title; 2d, he may admit the freehold to be in the defendant, and insist on a lease or some other title under him; or 3dly, that before the defendant had any thing in the premises, A B was seised in fee, and made a lease either to the plaintiff or to a person under whom he claims, which is subsisting, without confessing or denying the defendant's plea. Willes, 225.

12. Where the plaintiff declares upon a possession only, and the defendant pleads *liberum tenementum*, the plaintiff must show a title in the replication. *Vernon v. Goodrich*, Stra. 5.

13. In trespass, the defendant pleaded that A was seised, who enfeoffed C, who enfeoffed D, whose estates the defendant had; the plaintiff may traverse which of them he will. *Read's case*, 6 Co. 24 a. Mo. 574. S. C.

14. And so in all cases where the defendant does not claim by any mean conveyances from the plaintiff himself. *Id. ibid.*

15. In trespass, it was pleaded in bar, that J S (seised) made a lease to defendant; the plaintiff replied, that after J S was seised, the father of the plaintiff became seised, and from him it descended to the plaintiff, traversing the lease, and held good. Mo. 574.

16. In trespass the defendant pleads that Hen. 8. was seised in fee, and so the land descended to the now king, and that he as servant, &c.; the plaintiff replies, "that Hen. 8. granted to the plaintiff, and does not traverse the dying seised of king Charles, though it might come to the king otherwise;" but held good. T. Raym. 137, 138.

17. In trespass, defendant conveying by several descents in tail, the plaintiff cannot convey by a feoffment from one of the meane ancestors, and traverse his dying seised, but he ought, *protestando* to the rest, to plead the feoffment to be by the last ancestor, and traverse his dying seised. 2 Dy. 107. pl. 25.

18. If a defendant allege seisin of a manor, and thereon justifies a trespass for taking a heriot, and the plaintiff replies that B was jointly seised with him, he must traverse that the defendant was sole seised, or it will be bad on demurrer. *Snow and others v. Wiseman*, 2 Mod. 60.

19. The bar in trespass said that A C was seised in fee of the place where, &c., and devised it to T C, under whom the defendant claimed; the replication was, that before the said T C *aliquid habuit*, &c., others were seised and derived a title from them to himself; it seems to be ill, and that it ought to have been said, that before the said A C *aliquid habuit*, and because the seisin of A C is not answered either by confession, &c. Lutw. [561.]

20. A license to the husband to enter with

his wife was pleaded; replication, that he did not license the husband and wife to enter, is ill. 2 Lev. 194.

21. In trespass and justification under a freehold in A, a replication that B (long before seised in fee) enfeoffed the plaintiff, whom A disseised, and that afterwards he re-entered, and continued seised until, &c., is bad. 2 Dy. 134. pl. 10.

22. Trespass for taking five cart loads of hay; bar, that he was seised *tempore quo*, &c., of the tithes of hay of the said close, and that the said five cart loads, &c., were tithes severed, &c.; replication, *de injuria sua propria*, *absque hoc* that the said five cart loads were tithes severed; the traverse is ill. *Payne v. Brigham*, Lutw. [553.]

23. Trespass for an injury done to the plaintiff by the defendant's pig; plea, that the plaintiff impounded and detained the pig; the plaintiff being bound to keep the thing distrained at his peril, cannot reply that the pig escaped against his will and consent from the pound; but his remedy is by writ *de parco fracto*. *Jasper v. Eadowes*, 11 Mod. 21.

24. In an action of trespass and false imprisonment, the defendant justifies under a *ca. sa.* out of the court of Bristol; the plaintiff replies and pleads a private act of parliament for erecting a court of conscience in Bristol, and shows that the [*1430] defendant had recovered but

5s. damages, and 50s. costs; and show that he had arrested the plaintiff contrary to the act; to which the defendant rejoined, upon which the plaintiff demurred; and adjudged against the plaintiff; for he ought to have pleaded this matter in the court of Bristol, and shown that he was an inhabitant, if he would have the benefit of the act; and if they had proceeded there he might have had an action. *Skin*. 350. 366. 407.

25. A replication that the *locus in quo* was the plaintiff's estate of inheritance, and his own proper lands, is not sufficient, because it does not show possession or right of entry; it may be a property in remainder or reversion. *W. Kely*. 153.

26. In trespass, plea that A was seised in fee, and demised to the defendant; replication, that B was seised in fee, and demised to plaintiff, traversing that A had any thing, is bad. 2 Dy. 112. pl. 48.

27. In an action of trespass for driving plaintiff's cattle, &c., defendant pleaded that a house and two acres in B, in the county of N, were parcel of the manor of T, in the same county, and demised and demisable, &c., by copy, &c., in fee simple, &c., according to the custom of the manor, of which manor W, late bishop of N, was seised in fee, in right of his church; and prescribed to have common of pasture, for him and his customary tenant of the said house, and two

acres of land, in a great piece of pasture land called B common, for all cattle; and at every time of the year that the said Bishop, at such a court, &c., granted the said house and two acres of land by copy to one M, to him and his heirs, and that the plaintiff put his said cattle in the said great piece of pasture, whereof the defendant, as servant to the said M, and by his commandment, *moliter* drove the said cattle out of the said place; the plaintiff replied, *de injuria sua propria absque tali causa*; and upon demurrer the replication was held to be bad. *Crogate's case*, 8 Co. 66 b.

28. When a man justifies in defence of his possession, the plaintiff may reply *de injuria sua propria*, &c., because the title does not come in question. *Serle v. Darford*, 1 Ld. Raym. 121.

29. To a plea of *son assault demesne* in trespass, replication *de injuria sua propria*, is good. Lat. 128.

30. To a justification under a process from an inferior court, a replication *de injuria sua propria absque tali causa* is good, as it traverses all the proceedings in the court below. *See quere, Lane v. Robinson*, 2 Mod. 103.

31. When by the defendant's plea any authority or power is mediately or immediately derived from the plaintiff, although no interest be claimed, the plaintiff ought to answer it, and not reply generally *de injuria sua propria*. *Crogate's case*, 8 Co. 66 b.

32. When an estate or matter of record is pleaded, it is bad to reply generally *de injuria sua propria*; for that only applies to personal torts. Lat. 221. 1 Ro. 47.

33. When the defendant justifies taking the goods as a distress for rent, the plaintiff in his replication must either admit or deny the rent in arrear; replying *de injuria sua propria* is improper. *Willes*, 54.

34. A replication *de injuria sua propria absque tali causa* is bad where the defendant insists on a right. *Cooper v. Monke*, *Willes*, 54. *Cockerill v. Armstrong*, *Willes*, 99. Com. 582. S. C.

35. When the defendant in his own right, or as servant to another, claims any interest in the land, or any common, or rent going out of the land, or any way of passage upon the land, &c., *de injuria sua propria* generally is no plea; but if the defendant justifies as servant, *de injuria sua propria* (in some cases) with a traverse of the commandment, that being made material, is good; for the general plea *de injuria sua propria* is proper when the defendant's plea consists merely upon matter of excuse, and of no matter of interest whatever. *Crogate's case*, 8 Co. 66 b. *Cockerill v. Armstrong*, 7 Mod. 247.

36. And it is immaterial whether the defendant insists on the right in himself, or whether he justifies by command of another claiming that right. *Willes*, 102.

37. In trespass for pulling down hurdles, &c., the defendant justified by prescription to have a free course for sheep in the place where, &c., and because the [*1431] plaintiff erected hurdles without* leave of the lord of the manor, the defendant cast them down, *prout*, &c.; the plaintiff replied of his own wrong without cause, and held nought, for he should have traversed the prescription. 4 Leon. 17.

38. So it is bad where the replication puts several matters in issue; as where replied to a plea (to trespass for taking cattle) that A was seised in fee of the *locus in quo*, and that defendant as his servant took the cattle damage feasant. Willes, 99. *Bell v. Wardell*, Willes, 204.

39. So a plea *de injuria sua propria absque tali causa* to a cognizance for rent is bad. Willes, 100. n. a.

40. *Absque tali causa* refers to the whole plea, and not only to the commandment, for all make but one cause. *Crogate's case*, 8 Co. 66 b.

41. Defendant justifies and concludes *quæ est eadem*; plaintiff replies *non est eadem*; it is ill. 3 Lev. 92.

42. *Son assault demesne* pleaded to a trespass of assault and battery; the plaintiff replies that the defendant came into his house and continued there after the plaintiff desired him to depart, upon which he commanded his wife to put him out of the house, *quæ mollior manus super* the defendant *imposuit et hoc*, &c., but does not say *quæ est eadem transgressio*; and adjudged a good replication, for it being *eodem tempore quo*, it is good without such a conclusion; but if they vary in time, then it is necessary to say *quæ est eadem transgressio*. Skin. 387.

43. Where the plea alleges a certain act to have been a consequence of another act, and the replication traverses it as being previous to that act, the replication not being *ad idem*, is bad on demurrer. *Humphreys v. Churchman*, C. T. Hardw. 289.

(g) *New assignment.*

1. In trespass, if the place where, &c. be not named, the defendant may state another time, and put the plaintiff to a new assignment. *Marshall v. Ditchin*, 1 Mod. 89.

2. A new assignment may be made in the replication, though no place at all be assigned in the declaration, and issue may be joined upon it. Hob. 176.

3. A man may take a new assignment to a special bar as well as to a common bar, if he will. March, 105. pl. 179.

4. If a man bring trespass for taking his cattle in Black acre on such a day, and the defendant justify the taking at another place damage feasant, the plaintiff may make a new assignment if there were two takings. *Elwis v. Lamb*, 6 Mod. 119.

5. If plaintiff instead of new assigning or

traversing the *quæ est eadem* traverse the justification, he is estopped from saying that the trespass in the plea is other than that complained of. 2 Saund. 5 e.

6. If in trespass the defendant pleads that the place where, &c. is his freehold, and the plaintiff replies *de injuria sua propria, absque hoc* that it is his freehold, this is not a new assignment. Lutw. [587, 588].

7. Plaintiff must ascertain the place in a new assignment. 1 Saund. 347 a.

8. A new assignment must give a name to the place, or abutments. 3 Dy. 264. pl. 39.

9. New assignment *extra viam* in the same close, need not say *alia quam in barra*. 1 Ld. Raym. 91. 551.

10. A new assignment in one acre of land or meadow is void for uncertainty. 3 Dy. 264. pl. 39. 2 And. 103.

11. Trespass *in domo*; a new assignment may be made in a house and barn. 2 Leon. 184, 185.

12. The place more accurately described in a new assignment is taken to be that mentioned in the declaration. *Jeffries v. Pitter*, Keny. 389.

13. The new assignment in this action is parcel of count, and if bad abates the writ. 1 And. 31.

(h) *Pleas to the new assignment.*

1. If the plaintiff makes a new assignment, the defendant can make a fresh justification. Mo. 540.

2. The defendant cannot take issue upon the place newly assigned that it is one and the same, but he must plead to the trespass. Mo. 460. *Punster v. Crouch*, Cro. Eliz. 493.

3. But if the defendant hit some of the places of the trespass, he shall not waive* that and answer all [*1432] *de novo*. *Pettyman v. Lawrence*, Cro. Eliz. 812.

(i) *Rejoinder.*

1. The defendants justified in trespass under a right of common pasture; the plaintiff replied, an inclosure and approvement of the place, where, &c. by the lord of the manor, averring a sufficiency of common left for the defendants, "and all other persons of right having and using commons, &c.;" the defendant traversed the sufficiency in those words; and after verdict for the plaintiff on an issue on that traverse, the court refused to grant a replender, saying those words meant "all persons having a right to use the common." *Painham v. Pacey*, Willes, 532.

2. To a justification of trespass and false imprisonment under process of an inferior court, if the plaintiff reply that the cause of action did not arise within the jurisdiction, the defendant may rejoin that the plaintiff alleged in his declaration that it did arise within the jurisdiction. *Higginson v. Martin*, 2 Mod. 195.

(j) Evidence.

1. Under the general issue, the plaintiff is not bound to prove the trespass committed on the day laid in the declaration. 2 Saund. 295 b.

2. The right cannot be given in evidence on not guilty. 6 Mod. 153.

3. Neither the plaintiff nor defendant is tied to the time in the declaration or plea. 2 Saund. 5 b. n. [2].

4. Where a trespass is laid with a *continuando* improperly, evidence of one fact only can be given. 2 Ld. Raym. 977.

5. Repeated acts of trespass if intended to be given in evidence, must be confined to the time laid in the declaration. 1 Saund. 24. n. (1.)

6. But the time may be waived, and a single trespass, committed at any time before action brought, proved. *Id. ibid.*

7. In assault and battery, if the defendant justifies, and the plaintiff replies *de injuria sua propria*, he cannot give in evidence a battery at another time. *Anon. Comb. 50.*

8. In trespass *quare clausum fregit*, and all local actions, the plaintiff cannot prove a trespass any where but where it is laid in the declaration, nor lay it any where but where done. *Watrend v. Van Moses*, 8 Mod. 322.

9. If in trespass *quare clausum fregit* he pleads *liberum tenementum*, and issue is taken thereon, he may show any close that is his freehold. *Helvis v. Lamb*, Salk. 453.

10. But if the plaintiff gives the close a name, the defendant must prove a freehold in the close so named. S. C. Salk. 453.

11. A new assignment specially naming the place and its abutments, the abutments, as well as the name, must be proved. 2 Dy. 161. pl. 46.

12. In trespass against the sheriff for goods taken under a *feri facias*, brought by a plaintiff in a former execution, the sheriff must prove the judgment. *Lake v. Billers*, 1 Ld. Raym. 733.

13. In trespass for making replevin after notice of a claim of property, the notice only is in issue. *Leonard v. Stacy*, 6 Mod. 69.

14. In trespass, evidence can be given of matters though not in the declaration which arise *ex turpi causa*. *Shippora v. Basset*, 1 Sid. 225.

15. A mayhem is good evidence of wounding in an action of assault, battery, and wounding. *Thompson v. Trevanion*, Holt. 286.

(k) Verdict, damages, and judgment.

1. In trespass against two for taking a gun, if one justify the taking in his own defence, and the other plead "not guilty," and is found guilty, and the other issue is found for the defendant, judgment may be given upon the verdict, on the general issue, for the verdict on the special issue, though found against the plaintiff, does not totally destroy

his action. *Marlar v. Ayliffe*, cited 6 Mod. 10.

2. But in trespass against two for taking goods, if one plead the general issue and is found guilty, and the other justify the taking by gift, and this special plea is found to be true, judgment cannot be given on the verdict against the defendant who pleaded the general issue, because the verdict on the other defendant's special plea totally destroyed* the plaintiff's [*1433] action. *Staple v. Haydon*, 6 Mod. 10.

3. If the defendant be acquitted of the special matter, the *vi et armis* shall not be inquired into. *Lawe v. King*, 1 Saund. 81. 1 Lev. 216. 2 Keb. 237. 7 Hen. 6. 13 b. 1 H. 7. 19.

4. So, if the defendant be acquitted of the special matter by judgment upon demurrer, the *vi et armis* shall not be tried although the defendant has taken issue upon it. S. C. 1 Saund. 81. 82.

5. After verdict, the *continuando* shall extend to such only of several trespasses laid with it, as are capable thereof. 1 Saund. 24. n. (1). *Fondleroy v. Aylmer*, 1 Ld. Raym. 240, 241. *Brook v. Bishop*, 2 Ld. Raym. 823. *Kendrick v. Bartland*, 2 Mod. 253.

6. Trespass for taking his goods (*inter al.*) *unam sataginem*, *Anglice*, a frying-pan; on entire damages given, it being moved in arrest that *satago* was no Latin word, and signifies nothing, but it ought to be *sartago*, it was adjudged for the plaintiff, for if it signify nothing, no damages are given for it. *Smith v. Warner*, T. Raym. 15.

7. Though the trespassers who are jointly sued sever in their pleas and issues, yet the one jury shall assess damages for all. Hob. 66.

8. A judgment is given against one of the defendants in trespass; a *nolle prosequi* entered afterwards against the others will not aid it. *Coux v. Louther*, 7 Ld. Raym. 602.

9. Where the two defendants sever in their pleas, and the jury find for one defendant, and against the other, the plaintiff can have no judgment against either; otherwise it is if the plaintiff had brought several actions. *Forster v. Jackson*, Hob. 54.

10. Where the two defendants sever in their pleas, and the plaintiff has a verdict and judgment against one, though he entered a *nolle prosequi* against the other, yet this is no discharge of his companion; otherwise it is if there had been a nonsuit or a *nolle prosequi* against one before judgment. *Parker v. Lawrence*, Hob. 70. 180.

11. Damages are divisible in trespass, and may be released as to part. 2 Saund. 379 a. n. (14).

12. Trespass *quare clausum fregit*, and *pisces suos cepit*, &c., without showing the number or nature of the fish, upon not guilty pleaded, and verdict for the plaintiff with

damages, judgment was arrested. *Playter v. Warne*, 5 Co. 34 b.

13. But if the damages had been severed, viz. so much for taking the fish, and so much for breaking the close, then the plaintiff could have taken his damages for breaking the close with costs. *Id. ibid.*

14. Trespass *vi et armis quare phasianos suos et perdices suos cepit*, held good by the court after a verdict. *Usher v. Bushnel*, T. Raym. 16.

15. In trespass of assault and battery against two, if one pleads to issue and the other demurs, yet the damages shall be assessed entirely against them both. *Jefferson v. Morton*, 2 Saund. 26.

16. Where two defendants confess a trespass, the damages cannot be severed. *Onslow v. Archard*, 1 Stra. 422.

17. When in trespass the defendants plead several pleas, all triable by one and the same jury, and both issues are found for the plaintiff, the jury cannot sever the damages. *Heydon's case*, 11 Co. 5 a. Jenk. 269. 1 Brownl. 233.

18. Trespass against several persons for several things taken at several times, part by one and part by another, damages shall be joint against all. *Smithson v. Garth*, 3 Lev. 324.

19. But where the defendants plead severally, the jury may sever the damages. S. C. 3 Lev. 324. *in notis.*

20. If trespass be for breaking a house, and entering into a close, against one who pleads not guilty as to one, and demurs as to the other, the jury must find damages severally for the not guilty, and conditionally upon the demurrer. *Leonard v. Stacy*, 6 Mod. 69.

21. If joint damages be assessed for two trespasses, one of which lies not, the plaintiff cannot have judgment. *Hitchcock v. Henry*, 3 Leon. 213.

22. On a demurrer to a justification in trespass, and conditional damages taken, if entire damages be assessed, and any of the trespasses is ill laid, the judgment shall be arrested as to the whole. *Jess v. Mills*, 6 Mod. 14.

23. In trespass against several, where there are several issues or judgments by *non sum informatus* and several damages, plaintiff can take out execution* for [*1434] which of the damages he pleases; and in such case, each of them is liable for the damages which are found against any one of them. *Cobbe v. Sir J. Heydon*, 1 Ro. 30. *Heydon's case*, 11 Co. 5 a.

24. When in trespass against several defendants they plead not guilty, or several pleas, and the jury find for the plaintiff in all, the jurors cannot assess several damages against the defendants; but in trespass against two, if the jury find one guilty at one time and the other at another time, several

damages may be taxed, though if the plaintiff himself confesses that they committed the trespasses severally, the writ shall abate. *Heydon's case*, 11 Co. 5 a. 1 Ro. 30.

25. In trespass against two, where one came and appears, &c., against whom the plaintiff declares *simul cum*, who pleads and is found guilty, damages assessed by the jury, and afterwards the other pleads and is found guilty, the defendant who last pleaded shall be charged with the damages taxed by the former jury, and in such case may have attaint. S. C. 11 Co. 5 a.

26. If trespass be against two or more, and one demur, and another plead to issue, the damages assessed upon the issue shall affect him that demurred, if the demurrer be ruled against him. *Leonard v. Stacy*, 6 Mod. 69.

27. Trespass against two for taking cattle and converting them; one suffers judgment by default, the other justifies by distress for rent due to him who suffered judgment, and to the conversion pleaded the plaintiff's license to sell, which is found for him; the plaintiff now cannot have any benefit of the judgment, for it does not appear he had any cause of action. *Bigge v. Greenfield*, 8 Mod. 218.

28. Trespass against two, one lets judgment go by default, the other justifies under a license, and has a verdict, the judgment shall be arrested as against the other. 2 Ld. Raym. 1372.

29. A verdict for defendant on an immaterial issue in trespass was set aside, and judgment for the plaintiff entered on the defendant's confession of the trespass in his plea. *Jones v. Bodiner*, Com. 379, 380.

30. In trespass the jury gave half a farthing damages, and held good. *Marshall v. Buller*, 2 Ro. 21.

31. In trespass for a forcible entry upon the statute 8 Hen. 6., the plaintiff is entitled to treble damages where *non sum informatus* is pleaded, as well as when he obtains a verdict upon issue joined. Bend. 11.

32. The court will not increase damages given in trespass *vi et armis* if the injury was consequential. *Dodwell v. Burford*, 1 Mod. 24.

33. A *capiatur* should be omitted in the entry of judgment in trespass, for it is wholly taken away by the statute. *Lindsey v. Clarke*, 12 Mod. 104.

34. One defendant in trespass dies before trial; on suggestion after verdict of his death, judgment shall be against the other. *Cas v. Lowther*, 1 Ld. Raym. 601, 717.

(1) *Writ of inquiry.*

On writ of inquiry of damages in trespass, the plaintiff cannot give evidence of consequential damages as in nuisance. *Semb. case of Hampstead Water*, 12 Mod. 519.

(m) *Costs.*

1. If plaintiff plead to the new assignment,

and there be a verdict against him, the plaintiff shall have general costs without a certificate, though the special plea be not traversed, or be traversed and found for defendant. 1 Saund. 300. n. [f].

2. But if he suffer judgment by default to the new assignment, and the plaintiff proceed to trial on the special plea and fail, the defendant will be entitled to the general costs, unless there be a plea of "not guilty" on the record. 1 Saund. 300 a. n. [f].

[See ante, tit. Costs, div. II. (k), Vol. I. p. 383].

(n) Error.

If judgment be given against one trespasser, and a *nolle prosequi* entered against the other, both cannot join in a writ of error. Hob. 70.

VI. RELATIVE TO INDICTMENT FOR TRESPASS.

1. An indictment will not lie for a bare trespass, for the words *vi et armis* [*1435] alone* are not sufficient; but there must be such an actual force as implies a breach of the peace, to make a trespass an indictable offence; and this degree of actual force must appear on the face of the indictment. 6 Mod. 175. n.

2. Damage done by goods thrown down being casually blown about by the wind, not indictable. *Rez v. Gill*, 1 Stra. 190.

3. An indictment for trespass taken before justices of the peace was quashed for want of the words *nec non ad diversas felonias transgressionis et alia malefacta in comitatu predicta audiendum et terminandum assign.* *Rez v. Coxeter*, 11 Mod. 370.

4. An indictment *quare clauum* A B *fregit* held good notwithstanding A had but a lease at will of the land. 4 Leon. 6.

5. If an offence sufficient to maintain the charge be well laid, it is sufficient, though other facts be ill laid. Salk. 385.

6. The word *verberaverunt*, or *vulneraverunt*, is good, without *insultum fecit*, because battery implies an assault. Salk. 384.

7. An indictment for entering a field and carrying away twenty oaks there growing, is good for the trespass, and bad as to the aspersion. *Rez v. Harris*, 11 Mod. 113.

8. But the words "there growing, the goods and chattles, &c." may be rejected as surplusage. S. C. 11 Mod. 121.

9. An indictment for a trespass is good, although some parts of the charge represent the defendant as an accessory, and not as a principal, for the same facts which in felony make a man an accessory, make him a principal in trespass and in treason. *Rez v. Tracy*, 6 Mod. 17. 32.

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I. HOW THE TRIAL SHOULD BE.

1. If a statute create an offence without saying how it shall be tried, the trial of it shall be by jury. *Rez v. Sturney*, 7 Mod. 99.

2. The trial of bastardy in an action for slander shall be *per pais*, and not by the ordinary. *Anon.* Hob. 179.

3. The question whether there has been an usage in a corporation to have certain officers, is proper to be tried by a jury. Say. 37.

4. Customs of London ought to be tried by certificate by mouth of the recorder, and not *per pais*. *Leathersellers' Co. v. Beacon*, T. Jones, 149.

5. Where the issue is matter of spiritual cognizance mixed with a temporal matter, it shall be tried by a jury, and not by the ordinary, as the avoidance of a church by resignation. 2 Dy. 228. pl. 48.

6. The question whether a person was a priest at the time of his admission to a benefice shall be tried by the bishop, and* not by the country. *Hill* [*1436] v. *Boomer*, 2 Show. 53.

7. Duke or not duke, earl or not earl, peer or not peer, &c., shall be tried by record, not by the county; but in the case of a woman who is a duchess, &c., and by marriage, the trial shall be by the county. *Countess of Rutland's case*, 6 Co. 52 b. *Rez v. Knollys*, Holt, 531.

8. The trial of full age in an *estate probanda*, must be by jurors of forty-two years old at least. *Darcy v. Leigh*, Hob. 325.

9. The trial of an issue by six jurors is not good, although alleged to have been used so by custom. *Tredymmock v. Perryman*, Cro. Car. 260.

10. An alien and an Englishman plead not guilty to an information upon a penal law; the trial shall be wholly by English, not *per medietatem lingue*. Mo. 557.

11. An alien being defendant, a *tales de*

circumstantibus is good, no exception being taken, and eleven of the principal appearing. *Goodwin v. Mountenough*, Cro. Eliz. 818. 841.

12. The parties at the trial are demandable first, and on default the plaintiff shall be non-suited, or an inquiry awarded by default against the defendant, though a full jury do not appear. 3 Dy. 265. pl. 1.

13. So in C. B., at the return-day of the *habeas corpus jur.*, though the sheriff do not return the writ. 2 Dy. 214. pl. 45. 3 Dy. 286. pl. 44.

14. Where none of the principal panel appear upon the *habeas corpus* and *distringas*, a *decem tales* shall issue; but if it be awarded upon the *venire*, it is error. Cro. Eliz. 503.

15. On the trial of indictments and informations, neither the prosecutor nor the defendant can pray a *tales* without a warrant from the attorney-general. *Rex v. Banks*, 6 Mod. 246.

16. Trial held good by twelve of twenty-three who only were returned on the *ven. fac.*; but otherwise, if a *tales* had been awarded. *Paolet v. Christmas*, Cro. Eliz. 587.

17. Upon the trial of different issues at the same time, the evidence as to every issue may be given separately. *Kemp v. Mackrill*, Say. 131.

18. Upon a record of *nisi prius* varying in substance from the plea-roll, the trial is merely void. *Whyte v. Ryden*, Cro. Car. 20, 21. 194.

II. WHERE IT SHOULD BE.

1. Transitory matter arising in one county cannot by plea be brought into another county. *Collins v. Sutton*, 1 Lev. 149.

2. Where the action is transitory, it shall be tried where the action is laid. *Richfield v. Udall*, Carter, 192. *Hunt's case*, 3 Lev. 394. 2 Lev. 122. 164.

3. Where as well the contract as the performance of it is wholly made and alleged to be done beyond sea, it is not triable by our law; but if the promise be made in England, it shall be tried. *Dowdale's case*, 6 Co. 47.

4. If the principal cause be within the jurisdiction, and an issue arises which depends on foreign laws, it may be tried in the next county, and the foreign laws given in evidence. *Way v. Yally*, Salk. 651.

5. Where the issue arose in two counties, it was held that two *venires* should issue, and six of one county and six of another should try the issue. Cro. Eliz. 471.; but see 21 Jac. 1. 2 Lev. 122.

6. In ejectment for land in W, in the parish of B, and for tithes in W and X, the lease and ejectment are alleged to be in B; *semb.* the venue shall be out of B, W, and X. *Haynes's case*, 11 Co. 23 a. Moore, 837. 1 Ro. 65. S. C.

7. Where a sale in market was pleaded in bar in trover in one county, and the issue was upon the same sale made by covenant in another county, the trial in the county where

the covenant was made was holden good. *Harding v. Sherman*, Cro. Eliz. 510.

8. In trespass *quare clausum fregit*, the defendant justified under a grant from the queen by letters patent; the plaintiff took issue on the grant; held, the trial shall be where the land lies. *Eden's case*, 6 Co. 15 b.

9. In felony, the trial shall be always by the common law, in the same place where the offence was. *Dowdale's case*, 6 Co. 47 a. and 47 b.

10. Treason committed in Ireland by an Irish peer cannot at common law be tried in England. 3 Dy. 360. pl. 6.

11. An indictment for not repairing a county bridge shall, on [*1437] suggestion that the whole county is interested, be tried in the next adjoining county. *Rex v. Wills*, 6 Mod. 307.

12. When a bar is pleaded in a real or personal action, as a release, &c. in a foreign county, the jury that try it shall assess damages for the profits of the lands in another county, and by that means shall inquire of things local in another county, which originally they could not do. *Dowdale's case*, 6 Co. 47 a. and 47 b.

13. It is no objection after verdict that an action of covenant for not repairing, &c. was brought and tried in a foreign county, that defect being cured by the statute 16 & 17 Car. 2. c. 8. *The Bailiff, &c. of Litchfield v. Slater*, Willes, 431.

14. Since the jury-act, the *venire facies* must be *de corpore comitatus* in the actions excepted by the act for the amendment of the law. 2 Stra. 1085.

15. Trial in a wrong county after verdict, is good by 16 Car. 2. c. 7. *Chess v. Briggs*, 12 Mod. 7.

III. WITHIN WHAT TIME IT SHOULD BE.

1. On an indictment for smuggling, &c., the trial is to be within two terms after commitment. *Rex v. Waller*, 8 Mod. 5.

2. Trial of a prisoner by virtue of a commission of oyer and terminer, without any commission of gaol-delivery, may be the same day of the the inquiry. Cro. Car. 553.

3. Different issues in the same cause may be tried in different terms. *Kemp v. Mackrill*, Say. 130.

4. The defendant in error took the record of *nisi prius* and proceeded to trial at the first assizes after the issue joined; held good, and the court denied a new trial. 2 Saund. 336.

IV. RELATIVE TO TRIALS BY PROVISIO.

1. In error, replevin, prohibition, and *quare impedit* the defendant may carry the cause down to trial without a proviso. 2 Saund. 336. 336 a.

2. There must be a rule before any trial by proviso. *Dobson v. Taylor*, 2 Stra. 1055.

3. Defendant may try the cause by proviso, upon default being made the next

term after issue joined. *Williams v. Jones*, Ca. Prac. C. P. 101.

4. In civil actions, the defendant cannot carry down a cause to trial by proviso until after default in the plaintiff, except in special cases, as in *quare impedit*, in replevin, in prohibition, &c., where the defendant is in some respect in the nature of a plaintiff. *Rex v. Banks*, 6 Mod. 246.

5. There cannot be a trial by proviso in the king's case, because there can be no laches in the king. *Rex v. Banks*, 6 Mod. 247. 2 Ld. Raym. 1083. 2 Salk. 652. S. C.

6. Nor at nisi prius, unless by warrant from the attorney-general. *Rex v. Banks*, 2 Salk. 652.

7. A cause cannot be carried down by proviso until issue is made up. *Owen v. Atkinson*, 7 Mod. 156.

8. By 7 & 8 W. 3. c. 32., when a defendant is entitled to carry down a cause to trial by proviso, he may in the preceding issuable term sue out a new venire by proviso, and prosecute the same by *habens corpus*, or *distingas*, with a *nisi prius*, &c. 6 Mod. 246. n.

9. But since the 14 G. 2. c. 17., which gives a defendant judgment as in cases of non-suit, where a plaintiff does not proceed to trial according to the rules of the court, the trial by proviso has fallen into disuse. 6 Mod. 246. n. 2 Saund. 366 b. 7 Mod. 158. n.

10. Defendant pays costs for not trying by proviso. *Wilkins v. Poole*, 2 Stra. 797.

V. RELATIVE TO TRIALS AT BAR.

1. The master of the crown office, upon a *scire facias* and issue joined thereon, is entitled to a trial at bar. *Anon.* 6 Mod. 123.

2. A trial at bar may be had of a suit in *forma pauperis*. 12 Mod. 318.

3. In indictment and information the trial must be at bar, unless the attorney-general will grant a *nisi prius*. *Rex v. Banks*, 6 Mod. 247.

4. In any case of value or difficulty, a trial at bar may be had of common right. *Lord Sandwich's case*, Salk. 648. Prac. Ca. K. B. 217.

5. A trial at bar will be granted for the importance of the consequences. *Rex v. Foley*, 1 Stra. 52.

[*1438] 6.* A trial at bar was ordered on defendant's affidavit of twenty witnesses, and damages laid at 50,000*l.*, plaintiff having liberty to examine a witness before a judge, and defendant waiving his privilege of parliament. *Ld. Hillsborough v. Jefferys*, 1 Barnes, 320.

7. So, where the whole estate in demand is of value, though against several defendants. *Preston v. Lingden*, 1 Stra. 479.

8. A trial at bar is never denied to the officers of the court or barristers. *Sir S. Astrey's case*, 2 Salk. 651.

9. It is not sufficient for the obtaining of a trial at bar to allege generally in an affi-

davit, that difficulty is expected to arise at the trial of the cause, but the particular difficulty which is expected to arise ought to be pointed out. *Rex v. The Burgesses of Caermarthen*, Say. 79.

10. It is not usual to grant a trial at bar the same term in which the motion is made. *Edwards dem. Edwards v. Earl of Warwick*, Ca. Prac. C. P. 66.

11. No rule for trial at bar in any action before issue joined. *Borough of Christ's Church's case*, 2 Stra. 696.

12. Except in an action of ejectment. *Semb. Anon.* Say. 155.

13. In a capital case, the court will not appoint a trial at bar until the defendant is present. *Rex v. Johnson*, 2 Stra. 826.

14. A trial at bar will not to be granted of a country cause, if many of the witnesses are old or infirm. *Martin v. Sparrow*, Andr. 273.

15. A trial at bar ought not to be granted because the cause is expected to be long, or merely on account of the value of the matter in question. *Rex v. The Burgesses of Caermarthen*, Say. 79.

16. It must be a case both of difficulty and value. *Crofts dem. Dalby v. Wills*, Andr. 271.

17. Where the king is party, a trial at bar may be the last paper day in term. *Rex v. Sir J. Banks*, 2 Salk. 625.

18. But the crown is not entitled to a trial at bar of course where there is a prosecutor. *Rex v. Hales*, 2 Stra. 816.

19. Otherwise where it is his own cause. *Id. ibid.*

20. A cause cannot be tried at bar where the cause of action arises and is laid in London, by reason of their charter. *Anon.* Salk. 644. *Castell v. Bainbridge*, 2 Stra. 856.

VI. RESPECTING NOTICE OF TRIAL.

1. Notice must be given in a trial by proviso. *Rice v. Wilmer*, 11 Mod. 237.

2. Two days' notice is to be given after a *ne recipiatur* at sittings, &c. *Higmore v. Walker*, Salk. 653.

3. Anciently fourteen days' notice of trial was necessary, except where the assizes were held within fourteen days after the term; but now, by the 14 G. 2. c. 17. s. 4., "in causes tried at the sittings at Westminster or in London, where the defendant resides above forty miles from the said cities respectively, there shall be notice given of trial ten days before such intended trial." *Anon.* 6 Mod. 18. 1 Sid. 34.

4. The practice is, if the defendant live within forty miles of London, and the venue is laid either in London or Middlesex, that eight days' notice of trial, exclusive of the day, is to be given. *Anon.* 6 Mod. 18.

5. But if the defendant live above forty miles from London, and the cause is to be tried in London or Middlesex, fourteen

days must be given, pursuant to the ancient practice. *Id.* ibid.

6. And the verdict may be set aside for want of fourteen days' notice in such case. 2 Barnes, 238.

7. Eight days' notice of trial held bad, defendant living in Ireland. *Gorman v. Boyle*, 1 Barnes, 213.

8. On notices of trial, the distance from London is taken by computed miles. *Bates v. Pettipher*, 2 Stra. 954. 1236.

9. The rules of fourteen days' notice of trial shall not be altered upon the defendant's coming to London for a few days. *Whitehead v. Goodyer*, Ca. Prac. C. P. 72.

10. Where the plaintiff ought to give the defendant fourteen days' notice of trial, the defendant ought to give the like notice where he tries the cause by proviso. *Swale v. Leaver*, Ca. Prac. C. P. 124. 1 Barnes, 217. S. C.

11. If a cause has been at issue four terms, there must be a full term's notice of trial either by plaintiff or defendant.*

[*1439] *Ashwin v. Corbill*, 3 Salk. 650. 2 Saund. 336 a. n. [c]. *Anon.* 6 Mod. 18. 146. *Harvey v. Wright*, 10 Mod. 40. *Bower v. Street*, Ca. Prac. C. P. 2 Ca. Prac. C. P. 66. 1 Sid. 34.

12. Except the proceedings have been stopped by injunction. 6 Mod. 146. n. 1 Sid. 92. Salk. 650. note.

13. Or where the delay has been occasioned by the privilege of the defendant. *Sir H. Pory's case*, 1 Sid. 92.

14. But the defendant can try it by proviso after the year without giving a term's notice. *Throgmorton's case*, 1 Sid. 34.

15. The term in which the issue is joined is inclusive; but notice at any time within the year, though countermanded, is a notice within four terms. *Anon.* 6 Mod. 18.

16. The meaning of the rule, that "after a cause has slept four terms after issue joined, there must be a term's notice of trial," is, that there shall be some actual proceeding within the four terms. *Lesauld v. Dyer*, 6 Mod. 58. Salk. 557.

17. The striking of a jury, or any motion in a cause, or an intervening notice of trial, or the like, is a sufficient proceeding, and then only common notice is necessary. *Bower v. Street*, Ca. Prac. C. P. 2. 6 Mod. 58. *Green v. Gausillet*, 1 Stra. 531.

18. But suing out a *venire facias*, tested the last day of the term, is not a proceeding within term as to excuse notice of trial. *Lagier v. Dyer*, 2 Salk. 650.

19. The notice to be given within the four terms, where no proceedings have been had for a year, must be within the last term, *sedente curia*. 6 Mod. 19.

20. Notice at any time during the sitting of the court, and within the last day of the last of the four terms is sufficient. 6 Mod. 58.

21. A term's notice must be given for the assign day. 2 Stra. 1164. Salk. 650. *Buzon v. Pellow*, Ca. Prac. C. P. 66. Ca. Prac. C. P. 2.

22. But held that an old issue notice of trial given before the first day in full term is as sufficient. *Harvey v. Potter*, 1 Stra. 211.

23. A term's notice is so to be understood, that a whole term must intervene between notice and trial. 10 Mod. 40.

24. Notice of trial to defendant's servant, no good notice. *Rex v. Ward*, 12 Mod. 516.

25. But notice to a turnkey is good against a prisoner. *Whitehead v. Barber*, 1 Stra. 243.

26. Notice of trial given to the attorney in the country, held good. *Tushburn v. Havelock*, 2 Barnes, 239. *Sed vide* *Id.* 215.

27. But where given on the issue book it must be to the agent in town. *Tushburn v. Havelock*, 2 Barnes, 239. Ca. Prac. C. P. 120.

28. Notice given upon the issue is good, though without date, &c. *Henbury v. Rose*, 2 Stra. 1337.

29. Notice of trial cannot be twice continued in the same term. *Green v. Giffard*, 2 Stra. 1119.

30. First notice of trial good, but the second bad; continuance good, yet held irregular. *Jacob v. Marsh*, 1 Barnes, 214.

31. Want of notice of trial is waived by making a defence. *Lane v. Tasee*, Holt, 498.

VII. RESPECTING THE PUTTING OFF A TRIAL;—

(a) For what cause allowed.

1. The trial of a cause was put off because the defendant's attorney was so ill as not to be able to attend the trial. *Hayley v. Grant*, Say. 63.

2. In an action for scandalous words, general affidavit of absence of witness held sufficient. *Bud v. Milward*, 1 Barnes, 337.

3. A trial is not to be put off, because a suit is pending in the spiritual court for the same matter. *Salisbury v. Proctor*, 2 Salk. 646. 549.

4. The court refused to give further time for the trial of a feigned issue after the record had (without any good reason appearing for so doing) been withdrawn. *Rex v. Lawson*, Say. 615.

5. If witness goes out of town after notice of trial given, the trial is not to be put off. *Bourne v. Church*, 1 Barnes, 326.

(b) Affidavit for that purpose.

1. Where the plaintiff moves to put off* the trial until production of a deed, it must be sworn that the party cannot safely go to trial without it. *Anon.* C. T. Hardw. 390.

2. An affidavit to put off trial for want of material witnesses should be positive, that they are material witnesses, and not as the defendant believes. *Welbury v. Lister*, Ca. Prac. C. P. 81.

3. An affidavit to put off a trial in the ab-

sence of a material witness, must show that due diligence has been used to obtain such witness. *Gravenor v. Fenwick*, 7 Mod. 120.

4. An affidavit to put off a trial for want of a witness, must be made by the defendant, and not by the attorney. *Price v. Warrell*, Ca. Prac. C. P. 96.

5. An affidavit for putting off a trial for want of a material witness may be made by a third person. *Day v. Samson*, 2 Barnes, 353.

6. On motion to put off a trial, affidavits taken before a vice-consul abroad was suffered to be read. *Corish v. Kennedy*, 2 Barnes, 384.

(c) *Notice.*

Notice of an intention to move on the day of trial to put off a trial, must be previously given to the opposite party, together with copies of the affidavits on which the motion is intended to be grounded. *Edwards v. Vessey*, C. T. Hardw. 128.

(d) *Motion.*

Motion to put off a trial should be made two days before the day of trial. *Roberts v. Downes*, Ca. Prac. C. P. 98.

VIII. RESPECTING THE COUNTERMAND OF NOTICE OF TRIAL.

1. Countermand of a notice of trial is not good on a Sunday. *Deighton v. Dalton*, Ca. Prac. C. P. 15.

2. Countermand may be given either in town or country. *Goodright v. Hoblyn*, Ca. Prac. 120. 1 Barnes, 215.

3. Notice of trial for the assizes may be countermanded in London. *Gerry v. Shelston*, Ca. Prac. C. P. 48.

4. Two days' notice of countermand is in general sufficient. 1 Barnes, 216.

5. But a countermand of notice of trial, given to the agent in town, must be four days before the assizes. *Mendypace v. Humphreys*, T. Hardw. 369.

6. The four days of countermand must exclude the day of giving it. *Whitlock v. Humphreys*, 2 Stra. 849.

7. Where the commission-day of the assizes was on Monday, a countermand on the Saturday before was held regular. *Stafford v. Thompson*, 2 Barnes, 237.

8. After notice is countermanded it cannot be continued at the same time. *Smith v. Hoff*, 1 Barnes, 220.

9. Countermanding notice in a town cause two days, and in a country cause four days before, will save costs. *Whitlock v. Humphreys*, 2 Stra. 849. 1073.

IX. RESPECTING NEW TRIALS;—

(a) *For what cause grantable.*

1. The misdirection of the judge who tries a cause, and his refusing to admit good evidence, are respectively good grounds for a new trial. *Anon.* 6 Mod. 242. *Anon.* Salk. 649. Holt, 704.

2. The court will grant a new trial, if the

judge who tried the cause is dissatisfied with the verdict. *Sir Osborn Rands v. Tripp*, 2 Mod. 200. Say, 1, 2. 264.

3. It is a good ground to grant a new trial, that the judge who tried the cause overruled good or admitted bad evidence, although the other party have remedy by bill of exception. *Rex v. Wells*, 6 Mod. 307. *Anon.* 7 Mod. 53. Holt, 704. *Tomkins v. Hill*, 7 Mod. 64.

4. The court will grant a new trial, if the verdict was obtained by surprise. *Anon.* 2 Show. 155.

5. A new trial was granted after an acquittal on an indictment, because the defendant had not given due notice of trial. *Rex v. Furser*, Say. 90.

6. If a prosecutor remove an indictment found at sessions into the King's Bench, and the defendant obtain a *nisi prius* from the attorney-general, and carry it down to the next sessions by proviso, without leave first obtained from the court, and is thereon acquitted, the court will grant a new trial. *Rex v. Banks*, 11 Mod. 33.

7. A new trial was directed by the Lord* Chancellor, where the [*1441] former verdict had been complained of in a bill before him, the complainant paying the costs of the first trial. *Anon.* 2 Vent. 351, 352.

8. Motion for a new trial, founded on a variance between the issue delivered and the record, was granted, (though the court did not think the variance material), the merits not having been tried; costs to attend the event. *Fitch q. t. v. Vernon*, 2 Barnes, 381. Salk. 644. 648.

9. A new trial is grantable in ejectment, after a trial at *nisi prius*, whether the verdict be for plaintiff or defendant. *Smith dem. Dormer v. Parkhurst*, Andr. 324.

10. New trial granted, as well where damages are less, as where greater than they ought to be. *Sutton v. Andrews*, 2 Barnes, 354. 367.

11. The court will grant a new trial on account of the penal having been improperly returned. *Gree v. Sharp*, 6 Mod. 265.

12. New trial granted where the foreman of the jury (by mistake) gave a verdict for the defendant instead of the plaintiff. *Baker v. Miles*, Ca. Prac. C. P. 166.

13. Finding contrary to the opinion of the judge on the point of law, and not finding a special verdict when the court directs it, are sufficient grounds for a new trial; except where the judge was clearly mistaken in point of law, and also except where it appears upon the record, that it is impossible the defendant should have judgment by reason of his bad plea. *Rex v. Poole*, C. T. Hardw. 23. Say. 2. 35.

14. The jury being treated is ground for a new trial. *Moor v. Vaughan*, Prac. Ca. K. B. 142. Cro. Eliz. 430.

15. It may be granted for misbehaviour of the jury, or if the court think the defendant has been improperly convicted on an indictment. *Salk. 647. n. Reg. v. Helston, 10 Mod. 202, 203.*

16. Where, after the jurors have retired, one of them leaves the room, speaks to the opposite attorney, and, without the consent of the other side, receives a bundle of papers from such attorney, the verdict will be set aside. *Jennings v. Warne, C. T. Hardw. 116.*

17. A new trial, because the foreman had declared the plaintiff should never have a verdict. *Dent v. Hund. of Hodford, Salk. 645.*

18. Or, if the jury cast lots; but their own affidavit will not be received. *Id. ibid. n.*

19. New trial may be granted, though after trial at bar. *Sir C. Musgrave v. Nevenson, 1 Stra. 584.*

20. As where the verdict is against evidence. *Smith dem. Dormer v. Parkhurst, Andr. 323.*

21. Whether a new trial is grantable after a special verdict, *quære. S. C. Andr. 323.*

22. The unavoidable absence of a material witness, or the subsequent discovery of evidence is ground for a new trial. *Anon. 11 Mod. 1. Salk. 273. 674.*

23. Tricks by the adverse party, as imprisoning the opposite party's witness, &c., are grounds for a new trial. *Davis v. Daverill, 11 Mod. 141. Salk. 647. n.*

24. An inferior court may grant a new trial for surprise or irregularity, or set aside a regular interlocutory judgment, to let in a trial upon the merits. *Mayor of Bristol's case, Salk. 650.*

(b) *When a new trial will not be granted.*

1. The court will not grant a new trial, unless the party applying for it can make out a new case. *Mins v. Solebay, 2 Mod. 245.*

2. No new trial to be granted on account of matter which was known before the trial. *Waston v. Sutton, 12 Mod. 584.*

3. Nor upon a mere suggestion that the party was not apprised of a particular evidence. *Richards v. Sims, 9 Mod. 328.*

4. If several persons act as partners and contract debts and an action is brought against several persons as those composing the whole firm, the court will not grant them a new trial on a suggestion, that all those concerned, were not named, or that some were named who were not concerned. *Smith v. Huggins, 7 Mod. 407.*

5. A new trial is never granted for want of evidence whereof the party was apprised, and which he might have* had [*1442] at the trial. *Anon. 6 Mod. 222. 1b. 22. 2 Stra. 691.*

6. But if it be proved that endeavours

were used to procure the witnesses, and that they were prevented by some unforeseen accident from attending, the absence of such witnesses, if material, may be a good cause to grant a new trial. *Warren v. Furr, 6 Mod. 22.*

7. The court will not grant a new trial in battery on account of the absence of one witness, if the party could have had another to the same fact. *Cockcroft v. Smith, 11 Mod. 52.*

8. A new trial ought not to be granted upon the account of a mistake made by a witness in giving his evidence. *Say. 28.*

9. A witness having declared that he had received a guinea to conceal the truth, is no ground for the granting a new trial. *George v. Peirce, 7 Mod. 31.*

10. A letter written by the father of a plaintiff to each particular juryman requesting his attendance on the trial, and professing that he will take it as a great obligation to himself, &c., is not a ground for granting a new trial, if the defendant had sufficient notice of such a letter having been written to enable him to move for a trial at bar. *Herbert v. Shaw, 11 Mod. 111. 118.*

11. The court will not grant a new trial when the verdict does substantial justice. 1 Mod. 2. 2 Salk. 644. 648. n.

12. In trespass for cutting trees, verdict for defendant against evidence, yet because the plaintiff had benefit by the cutting, new trial denied. *Starr v. Wade, Salk. 647.*

13. No new trial against the equity of the cause. *Deerly v. Duchess of Massarine, Salk. 644. 646.*

14. Nor for absence of counsel. *Smith v. Page, Salk. 645.*

15. Surprise is not necessarily, but may be, a ground for a new trial; no new trial on account of a counsel having declined to call evidence, or having omitted to prove the illegality of a policy, or on affidavit of perjury being committed; *secus*, in a cause particularly circumstanced. *Watson v. Tutton, Salk. 273. Wils v. Polchampton, Salk. 647. and note (a).*

16. Nor for the mistake of counsel, though the cause was lost for want of their insisting upon a material point of law. 10 Mod. 202, 203.

17. But it seems where the party has no other remedy, a new trial ought to be granted; unless where the point is not only not insisted upon, but expressly waived by the counsel. *Id. ibid.*

18. Nor for a mistake in point of law, or want of notice after a defence made. *Deerly v. Duchess of Massarine, 2 Salk. 646. 1 Ld. Raym. 147. S. C.*

19. Nor for defect of preparation, or any omission of the party. *Ford v. Tilly, 2 Salk. 653. Farsal. 156, 157. S. C. Salk. 273. 647.*

20. Formerly the court would never grant

a new trial after a trial at bar. *Gay v. Cross*, 7 Mod. 37.

21. New trial not to be granted after trial at bar, unless on misbehaviour of jury. *Rex v. Melling*, 12 Mod. 128.

22. Merely finding against evidence is not sufficient. *S. C. Holt*, 535, 536.

23. New trial after trial at bar refused in ejectment, because not conclusive. *Argent v. Sir M. Darrell*, Salk. 648. *vide* 650.

24. After a special verdict in ejectment upon a trial at bar, a new trial was denied where the evidence was doubtful only. *Smith v. Parkhurst*, Andr. 315.

25. The court of Chancery will not grant a new trial after two trials at bar, although the verdicts were contrary to each other, unless such new trial appears necessary to the justice of the case, from new evidence, which could not be had on the former trials. *Montgomery v. Attorney-General*, 9 Mod. 388.

26. New trial denied in ejectment, though the verdict was given against the direction of the court, in a matter of law. *King v. Forster*, T. Jones, 225.

27. No new trial in general after two concurring verdicts. *Anon.* 11 Mod. 1.

28. After a second trial, it is not fit that a new trial should be granted, merely because the judge who tried the cause is dissatisfied with the verdict. *Anon.* 6 Mod. 22.

29. The court will not in general grant a new trial after a view. *Anon.* 11 Mod. 1.

30. It is no ground for a new [*1443] trial that the postea is partly destroyed. *Fowher v. Ekins*, 11 Mod. 206.

31. Jury after they had gone from the bar, sent for an act of common council given in evidence, yet new trial denied. *King v. Burdett*, Salk. 645.

32. A new trial ought not to be granted upon the account of an after-thought of the jurors. *Rex v. Simons*, Say. 35.

33. The court will not grant a new trial in an action of *scan. mag.*, on the ground of excessive damages. *Lord Townsend v. Dr. Hughes*, 1 Mod. 232. 2 Mod. 150.

34. Nor in actions for personal torts, on the grounds of excessive damages, except they appear to have been given from passion, partiality, or prejudice. 1 Mod. 1. *notis.* Salk. 649. n.

35. As to actions for adultery, see Salk. 649. *nota.*

36. New trial denied, (though judge's certificate that damages £50 were excessive,) it appearing that plaintiff had been imprisoned and tried for felony. *Anon.* 1 Barnes, 318.

37. A new trial for excessive damages, and the same damages being given on a third trial, denied. *Clark v. Udall*, 2 Salk. 649.

38. A new trial cannot be had a second time for excessive damages. *Chambers v. Robinson*, 2 Stra. 692.

39. No new trial for smallness of damages. *Barker v. Sir W. Dixie*, 2 Stra. 1051.

40. Unless there is some trick, &c. *Anon.* Salk. 647.

41. A new trial is rarely granted in hard actions. *Sparks v. Spicer*, Salk. 648.

42. As in case for negligently keeping fire, actions for words, &c. *Smith v. Frampton*, 2 Salk. 644. *Sparks v. Spicer*, Salk. 548. *Anon.* Ib. 653.

43. No new trial *qui tam* after verdict for defendant. *Seymour q. t. v. Day*, 2 Stra. 899.

44. New trial never granted in actions on a penal statute, where verdict is found for defendant. *Fitch q. t. v. Munn*, 2 Barnes, 384. Salk. 646. *Mattison v. Allanson*, 2 Stra. 1238.

45. No new trial after verdict for defendants on a feigned issue connected with an indictment, or for a verdict against evidence in an action for malicious prosecution; *secus*, for improper rejection of evidence in a penal action. *Rex v. Bew*, Salk. 646, and *note*.

46. A new trial will not be granted on an acquittal in criminal or capital cases, but on conviction a new trial may be granted for cause. *Rex v. Read*, 1 Lev. 9. 124. *Rex v. Bear*, 2 Salk. 646. *Rex v. Davis*, 1 Show. 336.

47. Though the acquittal be found against evidence, unless obtained by fraud or surprise. *Rex v. Davis*, 12 Mod. 8, 9.

48. A new trial will not be granted after verdict for the defendants in an information in the nature of *quo warranto*. *Rex v. Bennet*, 1 Stra. 101. Say. 102.

49. Where a verdict is given for the king in an information for perjury, the court cannot grant a new trial without the consent of the king's counsel. *Read v. Dawson*, 1 Sid. 49.

50. A person suing in *forma pauperis* cannot have a new trial. *Anon.* 1 Mod. 268, 269.

51. A new trial will be granted to the defendant, but not usually to the plaintiff. *Argent v. Sir M. Darrell*, Salk. 648. n. *Vide* 650.

52. No new trial where one of the defendants is rightly acquitted. 2 Stra. 814.

53. Where one is found guilty on assault and battery, and the rest acquitted, new trial cannot be had without consent. *Bond v. Spark*, 12 Mod. 275.

54. In trespass against three, the plaintiff had a verdict, but it was against evidence as to one of them; yet no new trial could be had. *Sir C. Berrington's case*, 3 Salk. 363.

55. No new trial if there is a bill of exceptions depending, or in a writ of right; the judge's certificate is conclusive. *Smith v. Brampton*, Salk. 644. 648.

56. Inferior courts cannot in general grant a new trial. *Broske v. Ewers*, 1 Stra. 113. The case of the *Mayor, &c., of Bristol*, Salk. 201. 650. *Tomkins v. Hill*, Holt, 704.

57. The judge of an inferior court cannot grant a new trial after a *scire facias* against the bail. 3 Salk. 363.

[*1444] (c)* *Of the motion for a new trial.*

1. No motion for a new trial after motion in arrest of judgment. *Tubervil v. Stamp*, 2 Salk. 647.

2. A new trial is never granted in another term after signing the judgment. *Rez v. Pollard*, 8 Mod. 264, 265.

3. Information in nature of a *quo warranto*, verdict for the defendant; no new trial to be granted after four years' acquiescence. *Rez v. Bell*, 2 Stra. 995.

4. Defendant convicted of forgery must appear personally when he moves for a new trial. *Rez v. Gibson*, 2 Stra. 698. 2 Barnard. K. B. 412.

5. After a conviction for a misdemeanor, the defendant cannot move for a new trial without being personally present in court. *Rez v. Gibson*, 7 Mod. 205.

6. No new trial can be moved for on the crown side after the signing an interlocutory judgment. *Rez v. Armstrong*, 2 Stra. 1102.

7. On a motion for a new trial, the judge who heard the cause, though removed, may repeat the evidence. 7 Mod. 47.

X. RESPECTING THE JUDGE'S CERTIFICATE.

1. A judge since displaced may certify what his opinion was at the trial. *Wood v. Mayor, &c., of London*. Holt, 397.

2. The certificate of the judge reporting the matter of fact as appearing before him at the trial is conclusive, nor can any affidavit be received against it, for that would be to try the matter again upon affidavit. *Rez v. Poole*, Ca. T. Hardw. 23.

XI. RESPECTING MIS-TRIALS.

1. Insufficient trials are not remedied by any statute. *Baynham v. Brook*, 5 Co. 36 b.

2. A trial in a wrong county is aided by statute. *Leeds v. Bower*, 1 Stra. 418.

3. A mis-trial is now aided by the statute of 16 & 17 Car. 2. c. 8. *Craft v. Winter*, T. Raym. 181.

TROVER.

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I. NATURE OF THE ACTION OF TROVER, AS DISTINGUISHED FROM OTHER ACTIONS.

1. An action of trover and conversion supposes a wrong done. *Manby v. Scott*, Orl. Bridg. 262.

2. It is the peculiar remedy where the taking is lawful, or at least excusable. 2 Saund. 47 A.

3. Trespass and trover are different actions in their very nature. 3 Mod. 2. T. Raym. 472.

4. For trover will sometimes lie where trespass *vi et armis* will not; as, if a man have my goods by delivery to keep for me, and I afterwards demand them, and he refuses to deliver them, I may have an action of trover, but not trespass *vi et armis*, because here was no tortious taking. *Put v. Rawdorne*, T. Raym. 472.

5. But sometimes the case may be such, that either the one or the other will lie; as where there is a tortious taking* of goods and detaining them, the [*1445] party may have either trover or trespass, and in such case judgment in one action is a bar in the other. *Id. ibid.*

6. The rule is then wherever the same evidence will maintain both these actions, there the recovery and judgment in one may be pleaded in bar against the other; otherwise not. *Id. ibid.*

7. A party cannot turn assumpsit into trover by stating a conversion of money had and received to his use. 2 Saund. 118. n. [c].

8. The plaintiff must have an absolute or special property in the goods sought to be recovered, and that at the time the goods are converted. 2 Saund. 47 a. 379.

9. There must be a right of possession in the plaintiff, though actual possession is unnecessary; but possession alone, or with an assertion of title, will maintain the action against a wrong doer. 2 Saund. 47 a, b, c.

II. WHEN TROVER LIES.

1. Wherever trespass for taking goods will lie, there trover will also lie; but not *e converso*. 2 Saund. 47 o. 47 p.

2. Trover lies upon a demand and denial, but trespass does not. 3 Mod. 2.

3. An action of trover lies here for a conversion in Ireland; for the plaintiff may lay the conversion here, and prove it was done in Ireland; but this is otherwise in local actions. *Waltrond v. Van Moses*, 8 Mod. 322.

4. It lies against a party to the conversion, though another actually converts the property; as against the original plaintiff after a seizure by the sheriff. 2 Saund. 47 m.

5. Upon a temporary bailment for a particular purpose, trover lies upon it after the purpose is answered. 2 Saund. 47 c. n. [g].

6. If an apprentice be pressed, and earn prize-money or wages, for which he receives seaman's tickets, the master may bring trover to recover these tickets from any person into whose hands they may have been passed; for the possession of the apprentice is the possession of the master, who has the right of property. *Barber v. Dennis*, 6 Mod. 69. 2 Saund. 47 i.

7. Trover lies against a corporation. 1 Saund. 340. n. [a]. 2 Saund. 47 m. n. [z].

8. The conversion need not be authorized by an order under seal. *Semb.* 2 Saund. 47 m. n. [z].

9. But if it be necessary, such order will be presumed after verdict. 1 Saund. 340. n. [a].

10. It lies against a custom-house officer for seizing and carrying away goods for non-payment of duty, if they are not liable to pay it. *Chapman v. Lamb*, 2 Stra. 943. 2 Barnard. K. B. 168.

11. Trover lies for a billiard-table, ports, sticks and balls. Cited in *Seaman v. Barnes*, T. Raym. 2.

12. It lies for a bond and for letters patent. *Pickering v. Appleby*, Com. 355.

13. The finder of a jewel may maintain trover. *Armoury v. Delamire*, 1 Stra. 505.

14. It will lie for a borrower to recover the thing borrowed. 2 Saund. 47 c.

15. Trover will lie for money delivered by the plaintiff to the defendant to keep, though not in bags. *Davies v. Dyrs*, Aleyn, 91. Cro. EL 819.

16. It lies for a greyhound; and there are four kinds of dogs which the law regards; a mastiff, a hound, (which comprehends a greyhound,) a spaniel, and a tumbler. *Ireland v. Higgins*, Cro. EL 525. Ow. 93. S. C. Cro. Jac. 463. 262. 1 Saund. 84. n. (2).

17. It lies to recover a parrot or a monkey, or any reclaimed animal. 1 Saund. 84. n. (2), and n. [b].

18. It was formerly held to lie for a negro, (as being merchandize,) but not now. 2 Lev. 201. *Smith v. Brown*, 2 Salk. 666.

19. Trover lies to recover flotsam wrongfully taken after it comes to land. *Lady Wyndham's case*, 2 Mod. 294.

20. It lies for a lessee for life of a house for its timbers. 2 Saund. 47 b.

21. Trover lies for trees planted in boxes in a garden. *Olive v. Vernon*, 6 Mod. 170.

22. Trover and conversion lies of a ship. *March*, 110, pl. 188.

23. It lies by a surviving part-owner of a ship for the whole ship. *Dockwray v. Dickenson*, Comb. 366.

24.* Yet it does not lie where a [*1446] ship is lost by neglect of the master; but if he had sold it before the storm, trover lies, though he was appointed by the part-owner. *Dockwray v. Dickenson*, Comb. 367.

25. A goldsmith has lottery-tickets of A and B, and delivers A's tickets to B as his own, A may have trover against B. *Ford v. Hopkins*, 1 Salk. 283.

26. Trover lies by an executor, as to recover money taken out of the testator's room after his death. *Clark v. Dealey*, 6 Mod. 151. 1 Saund. 217. *Anon.* Comb. 304. 451. S. P.

27. But not against an executor for a conversion by his testator. 1 Saund. 207 a.

28. If a servant purchase goods for his master, which are afterwards converted by another, the master may have trover. 2 Saund. 47 i.

29. A carrier may have the action. 2 Saund. 47. b.

30. So, a factor, consignee, pawnee, or trustee. 2 Saund. 47 b.

31. Trover lies against a carrier for negligence, as for losing a box, &c. *Anon.* Salk. 655.

32. But not for an actual wrong, as if he breaks it open to take the goods, or sells it; therefore denial is no evidence of a conversion, if the thing appears to be lost by negligence; *contra*, if that does not appear, or if he had it in his custody, when he refused to deliver it. *Id.* ibid.

33. If on the part of a buyer of goods sent by a carrier any thing remains unperformed, the action will lie against him by the vendor to recover the goods back. 2 Saund. 47 l. n. [w].

34. It lies for goods tortiously taken, as well as detinue or replevin, for the property remains in him at his election. *Bishop v. Viscountess Montague*, Cro. Eliz. 824.

35. Trover will lie for goods taken under a wrongful distress, but not for goods irregularly sold under a distress. 2 Saund. 47 p. n. [b].

36. It lies for goods on a contract for them, and a tender of the money. *Anon.* Comb. 381.

37. It will lie for a person whose goods the sheriff has wrongfully seized in execution against the original plaintiff. 2 Saund. 47 m.

38. If a person get possession of the goods of a feme sole, and convert them after her marriage, the husband may either sue alone or jointly with his wife; but the declaration must not conclude to the damage of both. 2 Saund. 47 h, i.

39. If a woman convert goods before her marriage, the action lies against the husband and wife. 2 Saund. 47 l.

40. So, if the trover be by the feme, and the conversion by both, the action must be against both. 1 Leon. 312.

41. But it seems in such case, the husband may be sued alone. 2 Saund. 47 l.

42. If the conversion be by a wife without her husband, the action lies against both, though the conversion must be alleged to be to the use of the husband only. 2 Saund. 47 l.

43. A sheriff may maintain trover for goods

taken from him which he had levied in execution. *Wilbraham v. Snow*, 1 Lev. 282. 2 Saund. 47 S. C.

44. It will lie for the assignees of a bankrupt, if a sheriff take the bankrupt's goods in execution after an act of bankruptcy, (though before a commission issued,) against the original plaintiff, without joining the officer. 2 Saund. 47 m. *Rush v. Baker*, 2 Stra. 396. *Cooper v. Chitty*, 1 Keny. 395.

III. WHEN TROVER DOES NOT LIE.

1. In trover and conversion of 25*l.*, it was alleged that the defendant sold his master's corn, and converted the money to his own use; judgment for the plaintiff was reversed in error, and held that trover lies not for money found, unless in a bag or chest. *Holiday v. Wrot*, Cro. Eliz. 638. 661. 746. 841. 870.

2. In trover against an hackney coachman, it was held that goods delivered to his servant shall not charge the master, for the party does not pay the master for it; otherwise if the master be paid for it, or agree for it. *Middleton v. Fowler*, Skin. 625.

3. Trover does not lie against one who finds goods, which are destroyed by negligence whilst in his possession, but an action on the case for not safely keeping them. 1 Ro. 130.

4. If any thing is to be done [*1447] on the part of the vendor to complete the matter, trover does not lie by the buyer. 2 Saund. 47 k. n. [w].

5. Removing good, whereby they are lost, though a trespass, will not maintain trover. *Bushel v. Miller*, 1 Stra. 128.

6. It will not lie for a lessor of a furnished house to recover the furniture taken in execution during the lease. 2 Saund. 47 b.

7. It will not lie for landlord to recover goods he has taken under a distress. 2 Saund. 47. n. [c].

8. Trover does not lie for a lost bank note against one who paid a consideration for it. *Anon.* 1 Ld. Raym. 738.

9. It will not lie for fixtures. 2 Saund. 259. b. n. [e].

10. Trover will not lie to recover goods from a person who has been convicted on an indictment for stealing them feloniously. *Luttrell's case*, 6 Mod. 77.

11. Trover lies for an annuity ticket. *Devalier v. Herring*, 9 Mod. 44, 45.

12. It will not lie for timber by tenant in tail on the determination of an estate for life without impeachment of waste. 2 Saund. 47 c.

13. It was formerly held that trover would not lie for a bond, because trespass lay if the finder cancelled it; and if he received the money, and refused to deliver it, an action of acccept lay; but the contrary has been since held. *Watson v. Smith*, Cro. Eliz. 723. Cro. Car. 262. *Upchard v. Tutam*, Cro. Jac. 737. 1 Com. 355.

14. Trover will not lie for a ship after a sentence in the admiralty. *Beak v. Thywell*, 3 Mod. 194.

15. So, the sentence of a foreign court of admiralty, decreeing a ship to be lawful prize, is conclusive, and therefore, though erroneous, the owner cannot recover the ship back in an action of trover. *Hughes v. Cornelius*, 2 Show. 232.

16. It lies not for negligently keeping twenty barrels of butter; for the finder is not compellable to keep it safely; so with apparel for a horse; but if he use it, it is conversion; or if he purposely mis-use it. *Mulgrave v. Ogden*, Cro. Eliz. 219.

17. Trover does not lie against the sheriff for goods seized on an extent against another person. *Rez v. Woodward*, 1 Ld. Raym. 736.

18. One joint-tenant, tenant in common, or parcener, cannot bring it against his companion for a thing still in his possession; *secus*, if the thing be destroyed. 2 Saund. 47 h. 1 Salk. 290.

19. Such joint-tenant can bring trover against a stranger. *Brown v. Hedges*, 1 Salk. 290.

20. Trover does not lie against husband and wife upon trover of the wife during coverture, without an actual conversion by her. Palm. 343. *Mitchell's case*, 2 Ro. 457.

21. It does not lie against husband and wife for goods delivered to the wife, knowing her to be covert, nor against an infant, knowing him to be an infant. 1 Sid. 129.

IV. RELATIVE TO CONVERSION.

1. The conversion is the gist of the action. 3 Salk. 366. *Draper v. Fulke*, Yelv. 165, 166.

2. If a person intrusted with the goods of another puts them into a third person's hands, it is a conversion. 2 Saund. 47 g.

3. Making use of or mis-using a thing found or delivered is a conversion. *Ibid.*

4. Taking part and spoiling the rest is a conversion of the whole. *Richardson v. Atkinson*, 1 Stra. 576.

5. Taking and carrying away the property is a conversion, without a demand and refusal. 2 Saund. 47 g.

6. It makes no difference that the property was taken by legal process; as in the case of an assignee of a bankrupt, who may be sued by the bankrupt. 2 Saund. 47 g. n. [q].

7. What meddling with the effects of a bankrupt is a conversion, see *Parker et al v. Godin*, 2 Stra. 813.

8. It is as much a conversion in A to sell the goods of B for the benefit of C, as it would have been in case A had sold the goods for the benefit of himself. *Perkins v. Smith*, Bay. 41.

9. It is equally a conversion to sell goods of A which were delivered to the seller by a person not having a lawful authority to

deliver them, as it is to take the goods of it and sell them. *Id. ibid.*

10.* If a captain of a ship re-
[*1448] fuse to deliver to a sailor his clothes, &c., it is a conversion. *Anon.* 12 Mod. 344.

11. Though an innkeeper may detain a horse for one night's meal, yet he cannot sell it, and pay himself; if he do, it is a conversion. 8 Mod. 172.

12. An executor having an action of trover in right of the testator, compounds it by articles for payment of so much at a future day; this is a conversion, and assets in his hands before payment. *Norden v. Levit*, 2 Lev. 189.

13. A demand of goods by, and a refusal to restore them to, the right owner, is not merely an evidence but an actual conversion of them. *Baldwin v. Cole*, 6 Mod. 212. *Holt*, 707. S. C.

14. If A recover in replevin a parcel of sheep, and B as the servant, and by the command of A, take them, with the assistance of the sheriff's officer, and put them into his master's grounds, a demand and refusal by B to redeliver them to their true owner is not a conversion, although the judgment in replevin be wrongly given. *Mins v. Solebay*, 2 Mod. 242.

15. If a horse be delivered to an innkeeper, his refusing to redeliver him to the owner is not a conversion, unless it appear that the bailee had no lien upon him, or that the owner tendered the full amount of his keeping. *Anon.* 2 Show. 162. *Brook v. Miller*, 2 Show. 179. S. P.

16. A trespass merely, and detainer, makes no conversion. *Agar v. Lisle*, *Hob.* 187. *Bushel v. Milles*, 1 Stra. 128.

17. An unreasonable detainer does not make a conversion, though it may serve to prove one. *Agar v. Lisle*, *Hob.* 187.

18. Goods taken in the owner's lifetime and used after his decease, are converted in his lifetime. *Crossier v. Ogleby*, 1 Stra. 60.

19. The conversion, if it has once taken place, cannot be cured. 2 Saund. 47 g. n. [g].

V. BAIL.

1. Formerly it was necessary, in all cases, that special bail should be filed in an action of trover and conversion. *Semb. Bangley v. Titcombe*, 6 Mod. 14. 2 Stra. 1192. 1 Wils. 23. 355. *Say*. 53. *Cowp.* 529.

2. But by a late rule of court it is made discretionary with the judge to grant or refuse it upon a special affidavit of all the circumstances. *R. H.* 48 G. 3. *Tidd*, 8th ed. 171, and note (e).

VI. VENUE.

Trover is a transitory action. *Anon.* 11 Mod. 181.

VII. DECLARATION.

1. In trover by assignees of a bankrupt,

if they have never had actual possession, they may declare either on the possession of the bankrupt, or their own constructive possession; it is best to insert a count in each form, and it will be no misjoinder. 2 Saund. 47 n. n. [a].

2. A count on the possession of one bankrupt, and another on the possession of the other, is a misjoinder. 2 Saund. 47 e. n. [a].

3. In trover against baron and feme, the conversion must be to the baron's use only; if it be "to their own use" it is bad, but cured by verdict. *Berry v. Newys*, *Cro. Jac.* 661. 2 Saund. 47 l. m. n. [g].

4. If an action is against husband and wife for goods converted by the wife before marriage, the declaration must state the conversion to her own use, (unless the goods be in existence, and the husband refuse to deliver them up.) 2 Saund. 47 l.; but see n. [z].

5. In trover by an executor, the declaration may state the testator's possession, without alleging his own, if the goods were taken and converted after the testator's death, and before the executor obtained possession. 2 Saund. 47 n.

6. Or he may declare on his own possession; and then he need not name himself executor. 2 Saund. 47 n. *Lat.* 320.

7. The place and time of the conversion must be alleged. *Stranham's case*, *Cro. Eliz.* 97, 98. *Huxer v. Gapan*, 8 Mod. 177.

8. Trover supposed to be 3d May, and conversion 1st May, yet good. *Adams v. Goose*, *Cro. Jac.* 97. 428.

9. The declaration was general as of Michaelmas term, and the conversion was* laid on a day cer- [*1449] tain in that term, and yet held good. *Sween v. Hulbert*, 3 Salk. 9.

10. Greater certainty in describing the goods was formerly necessary than at present. 2 Saund. 74.

11. Trover for the planks of a granary is good after verdict, without saying how many; so of books in a study. *Martin v. Flower*, 1 Sid. 98.

12. Trover *de uno pari vittarum, Anglice* a suit of knots, is certain enough. *Parkhurst v. Sheerton*, *Skin.* 142.

13. Trover *de decem ponderibus, Anglice* weights, is good, because damages only are to be recovered; but in detinue, where the thing itself is to be recovered, it would have been ill. *Hook v. Galloway*, 12 Mod. 3.

14. So for twelve thecis *de spirit*, with a dash, and fifty gallons "*aqua callida*," *Anglice* hot water, is good. *Blainfield v. March*, 7 Mod. 142.

15. Trover *de sex catulis et sex catellis et de una amphora saporis*, held good after verdict. *Chambers v. Warkhouse*, 3 Lev. 336.

16. Trover for ten pair of curtains and

valons is, after verdict, sufficiently certain. *Taylor v. Wells*, 1 Mod. 46. 2 Saund. 74.

17. Trover for "old iron," without saying what quantity, held good after verdict. *Talbot v. Spear*, Willes, 70.

18. Trover for a rick of hay, is good after verdict. *Wood v. Davies* 1 Mod. 290.

19. Trover will lie for a bond by the name of *bona et catalla*; viz.; *do uno scripto obligatorio*. *Cook v. Bower*, 4 Mod. 158. Salk. 654.

20. In trover for a bond, after verdict, the court will intend that the bond was given to the plaintiff. *Arnold v. Jefferson*, 1 Ld. Raym. 276.

21. Trover lies for plate generally; so for two hundred and sixty *pecis argenti*. *Campbell v. Saint John*, Salk. 219.

22. So, for *ducent ponderibus medicamentorum*, (*Anglice* drugs). S. C. Comb. 306.

23. Trover for ten loads of peas and beans is good. 1 Sid. 445.

24. So, *de duobus struibz feni*. 1 Lev. 301.

25. Or *de quadam parcella fli*. *Jenny v. Norris*, 1 Lev. 303.

26. That he converted ten *capas et cistas*, *Anglice* chests and coffers, held good, for they are all one; but otherwise if distinct things. *Draycot v. Piat*, Cro. Eliz. 819.

27. A "piece of tepee" held well in trover. *Radley v. Rudge*, 2 Stra. 738.

28. But a declaration in trover for "seven pieces of linen cloth," is bad, for a piece is not description of a known quantity, and therefore it should have added the number of yards they contained. *Hawes v. Randal*, 2 Show. 433. *Contra*, *Graves v. Drake*, Sty. 199. Id. 102.

29. Trover for two pair of pothooks and divers other things, and also for hangers, held bad after verdict. *Seaman v. Barnes*, T. Raym. 2.

30. "Divers goods and chattels" is too general, and bad after verdict. 2 Saund. 379. n. (13).

31. But trover *pro diversis aliis bonis* has been held good. *Procter v. Burdet*, 3 Mod. 70.

32. Trover *de duobus garbis*, *Anglice* sheaves of corn, is void. Cited 4 Mod. 321.

33. In trover for a hawk, plaintiff must, in his declaration, show that it was reclaimed. *Fines v. Spencer*, 3 Dy. 306. pl. 66.

34. The value of the respective articles must be stated. Cro. Jac. 130.

35. The declaration should state the plaintiff's possession, as of his own proper goods, and that they came into defendant's hands by finding; but the omission of these words is cured by verdict. 2 Saund. 47 m.

[See also *ante*, tit. CERTAINTY, div. II. (h). Vol. I. p. 261.]

VIII. PLEAS.

1. If one joint-tenant, &c. bring trover against a stranger, he must plead the joint-

tenancy in abatement, for he cannot otherwise take advantage of it; but the plaintiff shall recover only the value of his share. 2 Saund. 47 h.

2. In trover against baron and feme, and the conversion by the feme only, they plead *non sent inde culpabilis*; the baron not being charged with any tort, the issue ought to be *quod ipse non est inde culpabilis*, and a replender was* [*1450] awarded, although after verdict. *Cox v. Crepnel*, Cro. Eliz. 883.

3. A sheriff's bailiff may justify for executing a *fiery facias*. 1 Leon. 144.

4. If a plaintiff bring trespass where the question is only upon the wrongful taking, and not upon the right of property, a judgment for the defendant cannot be pleaded in bar to trover for the property. *Putt v. Royster*, 2 Mod. 319. 3 Mod. 1. T. Raym. 472. Skin. 49. 58.

5. But wherever the property is determined in action of trespass, an action of trover will not lie for the same goods. *Putt v. Royster*, 2 Mod. 320. T. Raym. 472. Poll. 634. 3 Mod. 1. 2 Show. 211. S. C. *Seachmore v. Toplady*, 1 Show. 146. Comb. 376.

6. Where there is a tortious taking of goods, and detaining them, the party may have either trover or trespass; in such case judgment in one action is a bar in the other. S. C. T. Raym. 472.

7. Wherever the same evidence will maintain both the actions, there the recovery and judgment in one may be pleaded in bar against the other; otherwise not. Id. *ibid*.

8. It is a good plea in trover to say that damages were recovered against another person for the same goods, and the defendant in execution, though the money is not paid. *Brown v. Weston*, 3 Mod. 86.

9. Trover for a ship may be brought either by the general or special owner, and judgment obtained by one is a bar to an action by the other. 2 Saund. 47 e.

10. Outlawry is a good bar in this action. 3 Leon. 205.

11. A release cannot be given in evidence, but must be pleaded. *Kingston v. Read*, Comb. 473.

12. A release is the only thing which can be pleaded specially in an action of trover. *Semb.* Say. 16.

13. It is not issuable whether defendant sold the goods. 1 And. 20. Cro. Jac. 165.

14. In trover for goods, a plea of the custom of London is bad, as it amounts to the general issue. 1 Ro. 397.

15. Defendant in trover cannot justify the detaining goods for money laid out upon them without authority, but it may be deducted in damages. *Lane v. Cotton*, 1 Stra. 651.

16. The plaintiff's title ought to be answered expressly. *Priestley v. White*, Yelv. 174.

17. A special plea in trover ought to con-

ness a conversion. *Hartford v. Jones*, 2 Salk. 654.

18. If the defendant do not confess a conversion, his traverse is ill, for his plea should be not guilty, and he should give the matter in evidence. *Acue v. Sanderson*, Cro. Eliz. 434. *Des v. Bacon*, Cro. Eliz. 435.

19. In a special justification in trover, the place of conversion may be traversed; but where a justification is general, the county is not traversable at this day. 4 Leon. 4.

20. Where it is laid in one county and a justification in another, the other county must be traversed. *Thomson v. Clerk*, Cro. Eliz. 504.

21. Plea of detainer for salvage in trover, is bad on general demurrer. *Hartford v. Jones*, 1 Ld. Raym. 393.

22. Trover is within the saving clause of the statute of limitations. 2 Saund. 121.

IX. RELATIVE TO BRINGING THE PROPERTY INTO COURT.

1. In trover for a ring, it was moved to bring it into court but denied. *Huxer v. Gapan*, 8 Mod. 176, 177.

2. In trover for a horse bridle and saddle, motion to bring the bridle and saddle into court was denied. *Wilcock's case*, Salk. 597.

3. A rule was made in one case, under the particular circumstances of the case to show cause why, upon bringing a book into court for the conversion of which an action of trover was brought, the proceedings in the action should not be stayed: but in another case the court refused to make a rule of the like kind. *Catling v. Bowling*, Say. 81. 120.

4. In trover for money leave has been sometimes given to bring it into court, and sometimes denied. *Anon.* Comb. 45. *Anon.* 1 Stra. 142.

5. In trover and actions for damages, no leave will be given to bring the thing taken into court. *Huxer v. Gapan*, 8 Mod. 176.

[*1451] X. EVIDENCE.

1. If the declaration be on the testator's possession, the executor is not bound on the general issue to prove himself executor. 2 Saund. 47 n.

2. To maintain trover, property must be proved in the plaintiff, and a conversion by the defendant. *Mires v. Solebay*, 2 Mod. 243. *Anon.* Holt, 296. *Anon.* 12 Mod. 344.

3. Non-delivery of goods upon demand is evidence of a conversion. *Eason v. Newman*, Cro. Eliz. 495.

4. If the goods came into defendant's hands by finding or delivery, there must be a demand and a refusal to constitute a conversion. 2 Saund. 47 e.

5. An actual taking is good evidence to prove conversion without demand. *Bruen v. Roe*, 1 Sid. 264.

6. In trover, the refusal to deliver a bag

of money is good evidence of conversion, unless the contrary is shown. *Isack v. Clarke*, 1 Ro. 132.

7. A demand and refusal are only evidence of a conversion, but not an actual conversion. 2 Saund. 47 e. 12 Mod. 344. Holt, 296. *Heylin v. Hastings*, Com. 55.

8. It is no evidence of a conversion, where it is apparent that defendant has made no conversion. 2 Saund. 47 e.

9. As in the case of a carrier or wharfinger, where the goods have been lost or stolen; but otherwise, where he breaks open a box, or delivers it to a wrong person. 2 Saund. 47 e, f.

10. So, if a person has a lien, or claims a lien on goods, a demand and refusal to deliver them is not evidence of a conversion. *Anon.* 2 Show. 161. 2 Saund. 47 f.

11. In trover for a horse, if the innkeeper seize for several nights, it is evidence of conversion. *Jones v. Thurloe*, 8 Mod. 172, 173.

12. An assertion by a carrier that he has delivered goods to the consignee, is not evidence of conversion. 2 Saund. 47 f. n. [h.]

13. An assertion by the finder of goods, that he knows not whether the demander be the right owner, and therefore refuses to deliver them, is not evidence of a conversion. 2 Saund. 47 f.

14. But a refusal to look for goods which were in his hands, is evidence of conversion. 12 Mod. 344.

15. An assertion of the right of another over property, is, upon demand and refusal, evidence of a conversion. 2 Saund. 47 g.

16. If a refusal be not absolute, it is not evidence of a conversion, nor if at the time of the refusal the defendant had it not in his power to deliver the goods. 1 Saund. 47 f. n. [m.]

17. Unreasonable detainer is good evidence to prove a conversion in trover. *Agar v. Lisle*, Hob. 187.

18. In trover by an administrator, if it be not upon the possession of the intestate, the defendant cannot give in evidence under not guilty a will and executor; *secus*, if it be upon the possession of the administrator. 2 Saund. 47 n.

19. In trover for a ship, upon evidence it appeared that the plaintiff had but a sixteenth part of it; yet it was held good; but the interest of the others may be given in evidence in mitigation of damages. *Dockwray v. Dickenson*, Skin. 640.

20. A declaration of a trover in Middlesex, and proof of one in Ireland, is good. *Brown v. Hedges*, Salk. 290.

21. A joint conversion must be proved in order that the several defendants may be found guilty. 2 Saund. 47 l. n. [x.] 117 a. n. [e.]

XI. VERDICT AND JUDGMENT.

1. The defendant may be found guilty as

to part, and not guilty as to the rest which is ill laid in the declaration. *Baldwin v. Cole*, Holt, 708.

2. Where one defendant pleads not guilty, and the other a release, if it be found for the release, the plaintiff shall not have judgment against the other. *Kiffin's case*, Comb. 310.

3. In trover against two, one only cannot be found guilty. *Id. ibid.*

4. Trover against ten, declaration on a conversion by nine, and judgment against ten, is ill; for the conversion is the gist of the action. *Fuller v. Smith*, 12 Mod. 101.

5. A special verdict in trover must expressly find the conversion. *Mires v. Solobay*, 2 Mod. 245.

[*1452] XII.* DAMAGES.

1. If a sheriff bring trover for goods taken out of his possession after seizure on a *feri facias*, he can only recover the value of the goods, and not, as he may in trespass, damages for the tortious taking. *Wilbraham v. Snow*, 1 Mod. 130.

2. If the action is for several things, the damage may be released as to some, and taken severally as to the rest. 2 Saund. 379 a.

XIII. COSTS.

1. If an administrator or executor bring an action of trover for a conversion in his own time, and fails, he shall pay costs. *Blackway v. Belton*, 2 Show. 342. 2 Saund. 47 n.

2. In an action by an executor for goods taken and converted after testator's death, the executor will be liable to costs if he fail, though he declare on testator's possession. 2 Saund. 47 n.

3. But if the trover and conversion were in testator's life-time, and he could declare as executor only, he is not liable to costs. 2 Saund. 47 n.

XIV. EFFECT OF DEATH OF THE PARTIES.

1. In trover brought by two, if after verdict one die, judgment shall be arrested. *Capel v. Saltonstall*, 3 Mod. 949.

2. In trover by five, before verdict one of them died, and they proceeded to trial, and verdict for the plaintiffs; then the plaintiffs suggest that one of them is dead, and pray judgment for the rest, and had it; and on error brought, and assigned that the party died before verdict, and so the verdict was given for a dead person, judgment was reversed. *Wedgewood v. Bayly*, T. Raym. 463. 2 Show. 178. Skin. 39.

3. And though in the said case the plaintiffs were joint-tenants, and had a capacity of having the whole survive, yet in truth every one had but a moiety, and so they were not at the time of the action entitled to so much as they are after the death of one of the plaintiffs. S. C. T. Raym. 463.

XV. EFFECT OF A RECOVERY IN TROVER.

1. By judgment in trover against defendant, the goods became defendant's property. *Adams v. Broughton*, Andr. 19. 2 Stra. 1078. S. C.

2. After a recovery of goods in trover, you may indict for felony for taking the same goods, but not *vice versa*. Holt, 345.

TRUST AND TRUSTEE.

1. What a trust is now, is the same as a use was in former times. *Smith v. Wheeler*, 1 Vent. 130.

2. If a term of years be assigned to A for the use of B, this shall be a trust for B, and not an use executed. *Saunders v. Stevens*, Com. 971.

3. A purchase by a father in the name of a son was decreed to be a trust for that son. *Redington v. Redington*, 3 Ridgw. 106.

4. Where a man buys land in another's name, and pays the money, it will be a trust for him who pays the money, though there be no deed declaring the trust. *Anon.* 2 Vent. 361.

5. Bond conditioned for the payment of so much money to A, A assigning over to the obligor such a judgment against B; if the money be paid, and no judgment assigned, A becomes a trustee in equity for the judgment. *Turner v. Godwin*, 10 Mod. 223.

6. A person is deemed a trustee, if he takes an inheritance after notice of articles to settle the estate. *Skyrme v. Meyrick*, Com. 700.

7. If a father purchase an estate in the name of a younger son, and the eldest disclaims a trust on his part, unless a creditor interpose, it is an advancement for the son in whose name it was made. *Redington v. Redington*, 3 Ridgw. 76.

8. Where the father and son join in a purchase, it shall be intended for the advancement of the son, and that he is not a trustee. *Anon.* 3 Salk. 367. pl. 1.

9. Possession for many years under a deed declaratory of a beneficial interest, in which a covenant to convey the * legal estate is inserted, will not raise [*1453] a presumption that such estate has been conveyed to the possessors, nor entitle them to bring an ejectment. *Goodright, Lessee of Sir Richard Grosvenor bart. v. Swynmer*, 1 Keny. 385.

10. If trustees refuse to accept a trust according to the will of the donor, the court will appoint other trustees to perform it. *Maggeridge v. Grey*, Nels. 43, 43.

11. A trust will be executed in Chancery according to the parties' meaning. *René's case*, 2 Vent. 363, 364.

12. A court of equity may order a *feme covert* who is an infant, being heir or trustee, to levy a fine. *Anon.* Com. 615.

13. A recovery suffered of a trust estate is well enough, and bars the remainders. *Sir J. Robinson v. Comyns*, C. T. Talb. 164—167.

14. A trustee of goods may maintain trover for them against a stranger. 2 Saund. 47 b.

15. The statute of limitations extends not to a trust. *Skyrme v. Meyrick*, Com. 709.

16. Where one purchases with notice of a trust, he is liable to its performance, though he paid a valuable consideration. *Croft v. Powell*, Com. 609.

17. Where a trust is to raise money out of the yearly profits, in such case the lands cannot be sold to raise the money, unless it was to be paid on a certain day before it could be received out of the profits. *Anon.* 3 Salk. 367, pl. 2.

18. A *cestui que trust* claiming compensation for a breach of trust against the representative of the trustee, can only come in as a simple contract creditor. 3 Ridgw. 1.

19. Whatever a trustee does to prevent the intention of his testator is a breach of trust, and ought to be set aside. *Attorney-General v. Young*, Com. 423.

20. Where there is tenant for life, remainder to trustees to support contingent remainders, remainder to the first and other sons of the marriage, remainder to the heirs of the body of the husband, if after any probability of issue to take, the trustees convey to the husband, and this be for the good of the family, it is said to be no breach of the trust. *Lady Viscountess Stafford v. Llewellyn*, Skin. 78.

21. A trustee declares under hand and seal that he has received trust money; this turns that demand into a specialty, which had been otherwise a debt by simple contract only. *Gifford v. Manley*, C. T. Talb. 109, 110.

22. Trustees having power to appoint agents are not answerable for their insolvency, if solvent at the time of the appointment; *aliter*, if they had no such power. *Anon.* 12 Mod. 560.

23. If a trustee is empowered to put money out to interest, he is accountable for interest, though he should let it lie by him, and make none. *Brown v. Litton*, 10 Mod. 21.

24. If an estate is devised to trustees to be sold, yet the trustees are not obliged to sell it, notwithstanding the positive directions of the testator, as long as *cestui que trust* is satisfied without it. *Roper v. Radcliffe*, 10 Mod. 235, 237.

25. Trustees are not answerable in equity for each other's acts. *Anon.* 12 Mod. 560.

26. Trustees are only answerable for what they respectively receive. *Rez v. Bray*, Park. 172.

27. But if two trustees give receipts, they shall be both charged, though they did not actually receive the money. *Griep v. Springer*, Nels. 111.

28. A trustee buying in debts for less than is due shall not be allowed for the whole; *aliter*, of one purchasing in his own right. *Anon.* Salk. 154.

29. If *cestuy que trust* be indebted to the king, he shall have execution of the trust. *Attorney-General v. Sands*, Nels. 132.

30. But the trust of an inheritance is not forfeited for felony. *Attorney-General v. Sands*, Nels. 132.

31. The trust of a lease in gross shall be forfeited for felony, but not that of a lease to attend the inheritance; for that goes to the heir, and not to the executor. S. C. Nels. 133, 134.

32. If feoffee in trust commits treason, &c. the land is lost. Jenk. 190, 219.

33. If the trustee of a term commits treason, in strictness of law, the king shall have it; but usually he grants it to *cestuy que trust* upon petition. *Scounden v. Hawley*, Comb. 172.

34.* If a trustee has conveyed [*1454] lands before execution sued, though he was seised in trust for the defendant at the time of the judgment, the lands cannot be taken in execution. *Hunt v. Coles*, Comb. 226.

35. Where A enters as trustee to B, to receive his rents, and afterwards B enters, he is tenant at will to A, and not disseisor. *Geary v. Bearcroft*, Orl. Bridg. 487.

36. Trustees do not pay costs. *Anon.* 12 Mod. 560.

UMPIRE.

Where a submission is to arbitrators, and if they cannot make any award, then to an umpire, and the award and umpirage are limited to the same day, if the umpire make an umpirage, the plaintiff ought to show in his declaration why the arbitrators could not make an award. *Coppin v. Hurnard*, 2 Saund. 130, 132.

UNCORE PRIST.

An obligee covenants that if the obligor shall pay certain money at such a place and day, the bond shall be void; the obligor may plead a tender, and need not say uncore prist. Mo. 36.

[See ante, tit. TENDER, div. V. (b.) pl. 16. et seq. Vol. II. p. 1374.]

UNDER-SHERIFF.

1. The sheriff may grant the office of under-sheriff at will. *Norton v. Simmes*, Hob. 13.

2. An under-sheriff may be made by parol. Jenk. 69.

3. The under-sheriff is but the sheriff's deputy. Hob. 13.

4. He has power to do all that the sheriff can transfer. Ib.

5. All ministerial acts done by the under-sheriff are of the same authority as if done by the sheriff himself. *Kilton v. Fagg*, 10 Mod. 288.

6. If a statute appoints an act to be done by the sheriff, and prescribes no particular manner for the doing it, that makes it necessary to be a personal act, it may be performed by the under-sheriff, though he be not mentioned in the statute. *S. C.* 10 Mod. 290.

7. Though the sheriff do make an under-sheriff, yet in cases of re-decision and waste he must exercise it himself. *Norton v. Simmes*, Hob. 13.

8. The under-sheriff must act in the high-sheriff's name. *Anon.* Holt, 221.

9. An under-sheriff ought not to act as an attorney while he is under-sheriff. *Anon.* 6 Mod. 191.

10. The under-sheriff cannot be restrained in any part of his power by the sheriff, nor restrain himself by covenants. *Norton v. Simmes*, Hob. 13. 155.

11. If the sheriff appoint him at will, he can remove him. *Norton v. Simmes*, *S. C.* Hob. 13.

12. Though he grant it irrevocably, yet he may revoke it. *Id.* *ibid.*

13. He need not make an under-sheriff, but may exercise the office himself. *Id.* *ibid.*

14. An action lies against an under-sheriff for money levied on a *feri facias*. *Speake v. Richards*, 2 Show. 281.

15. And it is not necessary that the writ should be returned. *Cockran v. Welbye*, 2 Show. 79.

16. Case lies against an under-sheriff for proceeding after a *habeas corpus* delivered. 3 Leon. 99.

17. Case lies against an under-sheriff for undervaluing goods taken under a *fi. fa.* *Sayre's case*, Cro. Jac. 426.

18. The sheriff may be fined or amerced, and shall answer damages to the party for the misdemeanour of the under-sheriff. *Lat.* 187.

UNION.

Two bishoprics, W and L, were lawfully united and consolidated in the reign of H. 3., but the chapters remained several; the bishop alienated lands of the see of L, with confirmation of the chapter of L; the union was not extant; resolved, as the usage had been after the said union, that the several deans and chapters have severally made confirmations, it shall be intended that the union was made specially in such manner that the estates shall be severally confirmed as before the union. *Case of Bishop and Dean's Leases*, 12 Co. 71.

[*1455] UNITY* OF POSSESSION.

1. Unity of possession extinguishes rents

and commons and all matters of charges or interest in other men's lands. *Peers v. Lucy*, 4 Mod. 364, 365.

2. It extinguishes a prescriptive right of way. 1 Saund. 323. n. [f].

3. But not things of necessity, or collateral things, as a watercourse, or warren, or way of necessity. *Palm.* 445. 1 Saund. 323 a.

4. Nor matters of easement, such as light and air. *Peers v. Lucy*, 4 Mod. 364.

UNIVERSITY.

1. The vice-chancellor of Cambridge may claim consuance of the plea where any member of the university is defendant by virtue of a charter granted by queen Elizabeth. *Case of University of Cambridge*, 10 Mod. 126.

2. This charter, being confirmed by act of parliament, gives power to proceed *secundum legem et consuetudinem universitatis*. 10 Mod. 126.

3. The charter of the university of Cambridge does not extend to sue there for the penalty of an act of parliament; but such suits ought to be in the king's courts, for a recovery there is not pleadable in bar here. *University of Cambridge v. Price*, *Skin.* 665.

4. When an attorney is plaintiff, the university is not entitled to consuance of the cause. *Semb.* *Willes*, 233. 240, 241.

5. The university of Cambridge moved for a *supersedeas* to a prohibition, or for a consultation; but ruled that they ought to declare and plead their privilege, and when it was pleaded, they would take notice of it upon a motion; and rule was given for them to declare. *Skin.* 665.

6. When either of the universities claims consuance of a cause, it must be claimed before imparlance. *Willes v. Trakern*, *Willes*, 233. 10 Mod. 129.

7. And this, notwithstanding the exclusive words of the charter. *Case of the University of Cambridge*, 10 Mod. 129, 130.

8. Universities were saved by statute from the statutes of dissolutions. *Jenk.* 206.

USE AND OCCUPATION.

1. An action for use and occupation will lie against one who occupies premises under an agreement not amounting to a lease. 1 Saund. 7.

2. No action is maintainable for use and occupation on account of rent due, after acceptance of possession by landlord, where there has been no actual occupation. 1 Saund. 236 c. n. [m]. 276 a. n. [a].

3. It is not necessary to allege expressly in the declaration in an action for the use and occupation of land, that the land is the land of the plaintiff. *Lewis v. Wallis*, *Say.* 14.

4. In debt for use and occupation, plaintiff need not state any of the particulars of the

demise; but if stated, they must be proved as laid. 1 Saund. 203. n. [c].

5. In debt on a parol lease, if it be at will, an occupation must be stated. 1 Saund. 203.

6. A tenant cannot plead *nil habuit in tenementis* to an action for use and occupation brought by his landlord; he cannot impeach his landlord's title. *Lewis v. Wallis*, Say. 13.

7. In *assumpsit* for use and occupation, the plaintiff may recover what he shall prove due, without a precise sum having been agreed upon. 2 Saund. 122.

USES.

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I. OF THE CREATION OF USES, AND OF THE CONSTRUCTION OF CONVEYANCES OF USES.

1. A conveyance by way of use shall be construed according to the intention of the parties. *Leigh v. Bruce*, Carth. 343. 12 Mod. 101. S.C.

2. In the creation of uses, as well as in wills, the intention of the parties is chiefly to be regarded. *Shelly's case*, 1 Co. 93 b.

3. Conveyances to uses must be governed by the rules of the common law. *Davis v. Speed*, 4 Mod. 155.

4. An use cannot arise out of a possibility, or out of an use. Ori. Bridg. 382.

5. The king, or an abbot, or an alien, cannot be seised to an use. 1 Ro. 332. 385.

6. A feoffment was made to the use of the feoffor and his wife that should be after marriage, and the heir of their bodies; after marriage, the new use shall arise, if there be no intervenient act to destroy it. *Woodliff v. Deary*, Cro. Eliz. 439.

7. A feoffment with warranty is sufficient to raise a use. *Reynell v. Peacock*, 2 Ro. 105.

8. A conveys to the use of his wife for life, remainder to the use of B and C, and their heirs, during the life of A, and then to the use of the heirs male of his body, remainder to the heirs of his body; here "heirs of his body" are words of purchase. *Tipping v. Corine*, Comb. 312, 313.

9. The words "use" and "trusts" are synonymous terms. *Shaw v. Weigh*, Fort. 63.

10. Uses are not favoured in law. 2 Mod. 210.

11. An use limited to one and his heirs, but to the use of another for life or years, shall be said to have the estate larger than the use, or that it shall remain in the feoffor. *Baker v. Searle*, Cro. Eliz. 407.

12. If a reversioner bargain and sell the lands leased, and then release his interest in the reversion, such release shall be intended to be to the use of the releasee and his heirs, although no consideration is expressed for the release, nor any express uses limited therein. *Shortridge v. Lamplugh*, 7 Mod. 72.

13. Covenant and agreement between mother and son, and in the end of the deed he says, "I do give and grant my lands to my mother and her heirs; this raises a use to her." *Coltman v. Senhouse*, 2 Lev. 225.

14. If a letter of attorney is in a deed or a covenant to make livery, nothing passes by way of use. *Harrison v. Austin*, 3 Mod. 237.

15. The words "*sub confidentia*" do not make a condition, but only a use. 2 Ro. 68.

16. If there be a covenant to stand seised to the use of A for life, with remainder to B in fee, and A refuse, the covenantor shall enjoy it till the death of A by way of springing use. *Southcot v. Stowell*, 2 Mod. 209.

17. An use is limited to A for life, then to B in tail after the death of A and C; this is contingent; but if it appear by another deed that C had an estate for life, the use in tail is not contingent but vested. *Weall v. Lower*, Poll. 66.

18. A deed of a husband and wife, that all agreements relating to such lands shall cease, will not revoke a former deed leading the uses of a future fine, unless there be a variance. *Jones v. Morley*, 1 Ld. Raym. 289.

19. If a tenant in tail covenants to stand seised to the use of himself, with remainders over, and afterwards suffers a recovery to other uses, the uses on the recovery are good. *Macbell v. Clerk*, Com. 119.

20. A fine enuring as a release by way of *mitter le droit*, or a surrender of a particular estate, cannot be to an use. *Cromwell's case*, 2 Co. 69 b.

21. An use was limited to executors until they shall have laid 300l. toward performance of his will; this is to be intended until they may, &c. Mo. 556.

22.* Upon feoffment to the use of the will of the feoffor, the [*1457] fee remains in the feoffor. 1 And. 245, 246.

23. If a lease and release be pleaded to A and his heirs, and no consideration appears, nor said to whose use, it shall be intended to the use of the releasee and his heirs. Salk. 678.

24. Land granted to B (without the words "his heirs,") to the use of C for life, this use determines by the death of B; and the statute 27 Hen. 8. does not give to C the same estate in the land as he had in the use. 2 And. 130, 131.

25. A recovery was suffered to the intent that the recoverors should make estates; they are seised to their own use till the estates are made. Mo. 103.

26. A feoffment to lessees for years to another use, does not extinguish the term. Mo. 196.

27. A being lessee of lands of the chancellor of St. Paul's, for the life of himself and his two sons B and C, grants all his estate therein to trustees to the use of himself for life, and after his decease to the use of Rebecca his wife, for her life, and after her decease to the use of his son B and his heirs; the whole estate of A is vested in himself by the first limitation, and by the third limitation a use is executed in B and his heirs, by way of springing use. *Pinker v. Littell*, Orl. Bridg. 373.

28. Every person may declare uses according to his estate in the land, for the use follows the ownership of the land; and if the husband declares one use, and the wife another, they are both void; for the wife, though she has the estate, yet is not *sui juris*, but under the power of her husband; and the husband, though he is *sui juris*, has no estate in the land. *Beckwith's case*, 2 Co. 56 b.

29. In declaring uses of the wife's estate, there can be no estate for life to the husband by implication. *Davies v. Speed*, Holt, 730, 731.

30. A use limited to one in remainder not born, is good; otherwise of an estate in possession. Mo. 430.

31. A use limited to J S, and such wife as he shall after marry, is a good use. 2 Leon. 15.

32. Uses limited upon recovery, which is good by estoppel, shall bind the recoveror and his heirs, and all claiming under him. Cro. Car. 389.

33. Joint-tenants may each declare different uses of their respective shares. *Beckwith's case*, 2 Co. 56 b.

34. If one for money bargain and sell land to J S in fee, no other use can be limited upon this, for the money is the consideration which fixes the use in the bargainee. 1 And. 37. 313. 335. 2 And. 81. 136. 199.

35. When uses are limited to persons in *esse*, and to persons not in *esse*, the uses limited to those persons that can take shall take; and when the other persons come to be in *esse*, they shall take. *Richardson v. Chilcot*, Carter, 201.

36. A use cannot be limited to any but by a good name of purchase. 2 Leon. 18.

37. Feoffment to such uses as the feoffor shall appoint by will; the use vests in the feoffor till declaration made according to the power; after declaration, the estates limited shall take effect by force of the feoffment; the will is but declaratory. *Clerc's case*, 6

Co. 71 b. Cro. Eliz. 877. Cro. Jac. 31. Mo. 476.

II. OF THE QUALITIES AND INCIDENTS OF A USE.

1. A settlement by the heir on the part of the mother to the use of himself in fee, shall be to the old use. *Abbott v. Burton*, Com. 160.

2. Uses are forfeitable for treason or felony. Jenk. Cent. 219.

3. An use cannot be raised out of an use. 1 Leon. 7. 148.

4. It may be made to commence upon a contingency. 2 Leon. 16.

5. A corporation cannot be feoffees to use. 2 Leon. 122.

6. There may be *possessio fratris* of a use. Plow. 58.

7. The use is the same in state and quality with the land. *Camden v. Clarke*, Hob. 31.

8. Two may have land to the use of one of them. *Wimbish v. Thilbois*, Plow. 44.

9. Where one has an estate solely in the land or thing out of which the use issues, he cannot have any use therein. Id. ibid.

10.* An estate of freehold cannot at common law be granted [*1458] ed in futuro, but it may by way of use. *Coltman v. Senhouse*, Poll. 531.

11. An use cannot be larger than the estate out of which it is limited. *Tinker v. Lidcot*, Carter, 46.

III. OF DEEDS DECLARING USES.

1. Uses will not arise by parol. *Owen v. Saunders*, 1 Ld. Raym. 160.

2. A deed is necessary to raise them. Jenk. 230.

3. But where a conveyance to uses enures by way of transmutation of possession, the uses may be either declared or revoked without deed. *Jones v. Morley*, Salk. 677.

4. The use of a fine or recovery may be declared by a subsequent deed. 1 Vent. 368. 2 And. 126. 127. 259. 260. 261.

5. A deed subsequent to a fine estops the consoror and his heirs, but not a stranger. *Jones v. Morley*, 1 Ld. Raym. 290.

6. Upon a bargain and sale for years, an use will pass without enrolment of the deed. Poph. 38.

7. No averment is allowed against a use expressed in a deed. 1 And. 313. 2 And. 198. 199.

8. The uses of a deed precedent to a fine cannot be controverted by parol evidence, unless there be a variance in the description of the fine. 1 Ld. Raym. 155. 289.

9. Notwithstanding a variance between the deed and the fine, yet the fine is by construction of law to the uses of the deed, if nothing appears to the contrary. *Jones v. Morley*, 1 Ld. Raym. 289.

10. Infancy or coverture cannot be alleged against a deed which leads the uses of the fine. *Id. ibid.*

IV. OF THE CONSIDERATION FOR A USE.

1. There are two considerations upon which a use may be raised; first, valuable; second, natural. *Sir G. Reynell v. Peacock*, 2 Ro. 105.

2. The reservation of a pepper-corn is a good consideration to raise a use to make a tenant to the *precipe*. *Barker v. Keate*, 2 Mod. 249. 1 Mod. 262.

3. Nature is a good consideration to raise an use. *Plow*. 309.

4. The father, in consideration of affection, gave lands to his son, and livery was indorsed on the deed, but not made; and adjudged an use did arise to the son; and a difference taken where the father by feoffment gives to a stranger to the use of his son, there no use arises, but when the conveyance is to the party himself, there the use will arise. *Foster v. Foster*, T. Raym. 49.

5. Future consideration will raise an use, as a marriage to be had. 1 Sid. 83.

6. There are only three ways of raising an use; 1st, By transferring the possession by act executed; 2nd, Upon covenant on consideration; 3rd, Upon bargain and sale. 2 Ro. 68.

7. An agreement between the parties, though it do not operate as a deed, will be sufficient to appoint an use. *Jones v. Morley*, 4 Mod. 264.

8. An use cannot be raised without deed. 1 Sid. 27. 82.

9. On a bargain and sale, the use would arise on payment of the money, by parol without deed. *Jones v. Morley*, 12 Mod. 162.

10. But if it be in consideration of blood, it would not arise by parol without deed, for that is no consideration to compel the execution, but must arise by deed. 12 Mod. 162.

11. If one seised on the part of the mother make a feoffment without consideration, the use results as before. *Beckwith's case*, 2 Co. 56 b.

12. Use raised by covenant, without consideration, can be declared to other uses. 2 And. 69. 76, 77.

13. A *nudum pactum* will not raise an use. *Garnish v. Wentworth*, Carter, 141.

14. An use cannot be raised upon a covenant without consideration. 1 And. 26.

15. Consideration of natural affection will not raise an use to a bastard. *Gerrarde q. t. v. Worsley*, 3 Dy. 374 a. pl. 17.

16. The consideration of paying debts with the profits of the land, is not good to raise an use. *Mo*. 194.

17. No use can arise out of an use or out of a way or common newly created. *Tinker v. Lidcot*, Carter, 46.

18* There cannot be an use of a thing which is not in esse. Cro. [*1459] Jac. 190.

19. A parol promise, in consideration of a son's marriage, that he shall have the land after the father's death, will not raise an use to the son. 3 Dy. 296. pl. 22.

20. A bare covenant in writing, without consideration, will not raise an use. *Collard v. Collard*, Poph. 50.

21. An use shall not be raised by covenant to stand seised, &c., when the parties intended it to another purpose. *Foster v. Foster*, T. Raym. 43, 44, 45.

22. Consideration of affection cannot raise a power to appoint for the benefit of a stranger. *Goodtitle v. Petto*, 2 Stra. 935.

23. A covenant by one that he will suffer land of £20 annual value to descend and remain to his daughter, does not raise any use. *Mo*. 120.

24. One may be *cestuy que use* by a devise without any consideration. *Hartop's case*, 1 Leon. 254.

25. A subject covenanted to stand seised to the use of the king in consideration that he was his sovereign; this is no consideration to raise an use. *Mo*. 195.

26. An use limited without consideration is void, and returns again. *Camden v. Clerke*, Hob. 31.

27. The consideration of money to be paid is good, though never paid. 1 Leon. 25.

28. An use cannot be raised by a covenant without a consideration, but may by a fine. 1 Leon. 136.

29. Husband and wife covenant to levy a fine of the wife's lands to the use of the heirs of the husband on the wife begotten; the limitation is void. *Davis v. Speed*, 12 Mod. 38, 39. Salk. 675. S. C.

V. OF COVENANTS TO STAND SEISED.

1. If a man seised in fee give and grant, bargain and sell, alien, enfeoff, and confirm, certain lands to his daughter in consideration of blood and marriage, he thereby raises an use by way of covenant to stand seised. *Scudamore v. Crossing*, 1 Mod. 176. Com. 128.

2. Bargain and sale to the son in consideration of affection, and for his portion and preferment, with warranty; the deed is inrolled; no money being paid, it operates as a covenant to stand seised. *Crossing v. Scudamore*, 2 Lev. 9.

3. If a man covenant with B, that if he do not marry he will stand seised to the use of B and his heirs, and B dies and the covenant or do not marry, the use arises as well to the heir of B, as to B himself if he had been living, and he shall have the land in nature of a descent. *Southcot v. Stowell*, 2 Mod. 209.

4. One gives and grants his lands to his cousin and his heirs, *habendum* to him and his heirs after the donor's death; this is a good covenant to stand seised immediately in the premises, and the *habendum* is void.

Osman v. Sheaf, 3 Lev. 370. Ib. 126. 337. 5 B. & C. 709.

5. Feoffment with letter of attorney to make livery, and none is made, operates as a covenant to stand seised. *Walker v. Hall*, 2 Lev. 213.

6. Covenant to stand seised to the use of a brother, without expressing natural love, &c., is good to raise an use. 1 Ro. 68.

7. That *cestuy que use* is the heir *ex parte paterna*, is a sufficient consideration to stand seised to is use of land so descending. *Vavasor's case*, 3 Dy. 308. pl. 72.

8. Though no intent appear in the deed that an estate shall pass by covenant to stand seised to uses, yet it may pass that way if no intent appear plainly to pass it at common law. *Collman v. Serhousse*, Poll. 532, 533.

9. A covenant to stand seised to the use of the heirs of his body, omitting himself, is good. 2 Lev. 75.

10. To stand seised in such uses and no others, does not exclude uses by implication. 2 Lev. 76.

11. A man cannot covenant to stand seised of land which he shall afterwards purchase. *Mo.* 342.

12. A covenant to stand seised with a general power to make leases, without expressing the consideration or the persons, is void. *Chute v. —*, 1 Lev. 30.

13. A covenant that the heir shall stand seised is void. *Kebbet v. Lee*, Hob. 313.

14. A covenant to stand seised to the use, not of his blood, is void. *Whaley v. Tunkard*, 2 Lev. 54.

15.* A father covenants that [*1460] the son, or some other person, shall stand seised to the uses, this is void; and a covenant to levy a fine before Michaelmas to uses, &c., and that he and every person shall be seised to those uses, if no fine is levied, no use shall arise upon the covenant; for if it should, it would disable from levying the fine. *Barrington v. Crane*, 3 Lev. 306.

16. A covenants that his feoffees shall stand seised; if there are no feoffees, there are no uses. *Cro. Eliz.* 15.

17. A covenant to stand seised to the use of the son's executors is void; but not if it be to the use of the son and his executors. 1 Sid. 262.

18. A covenant, in consideration of natural love and affection, to stand seised to the use of the wife for life, with power for her to limit over the estate to such person as she should appoint, is a void limitation. *Goodtitle v. Pettoe*, W. Kely. 107.

19. On a covenant to stand seised for love and affection, one named in the deed may aver himself a relation. *Goodtitle v. Pettoe*, 2 Stra. 934.

20. In a covenant to stand seised to uses, there must be a consideration, or the limitation is void. *Goodtitle v. Pettoe*, W. Kely. 107.

21. A covenant to stand seised to uses is avoided by a recovery. 7 Mod. 18—28.

VI. OF THE STATUTE OF USES.

1. An use before the statute 27 H. 8. c. 10. was a mere trust, cognizable only in equity. *Roper v. Radcliffe*, 9 Mod. 186.

2. This statute is properly to give the possession to him who had not the possession, but the use only; viz., the possession, which he wanted before, to the use which he had before, in such manner as he has the use. *Dixon v. Harrison*, Vaugh. 42.

3. It was never the intent of the statute to give the possession to fictitious conusees in order to a form of conveyance; but the statute brings the new uses, raised out of a feigned possession in the conusees, to the real possession, which operates according to their intent to change their estate. *Id. ibid.*

4. If before the statute of uses *cestuy que use* levied fine, and five years passed, feoffees could not enter. *Fulcombe v. Leke*, 1 And. 303.

5. The principal use of this statute, especially upon fines levied, is not to bring together a possession and an use, but to introduce a general form of conveyance, by which the conuors in the fine may execute their purposes at pleasure by transferring to strangers, enlarging or diminishing their estates, without observing the strictness of law for the possession of the conusee. *Dixon v. Harrison*, Vaugh. 50.

6. The statute transfers a rent-charge to *cestuy que use*. *Crawley's case*, *Cro. Eliz.* 721.

7. This statute vests the possession of a term according to the use, as well as a freehold. 2 Leon. 6, 7. See also 15. 258.

8. Upon a covenant in consideration of natural love and affection to be seised of lands to the use of himself for life, remainder to the son in tail, and to the intent that his son should have the rent during the life of his father, and the son dies, his executors can bring debt for it within the statute 27 Hen. 8. W. Jo. 179.

9. An use cannot arise where there is not a sufficient estate in possession. *Dixon v. Harrison*, Vaugh. 49.

10. A recovery had against him who dis-seises tenant for life, destroys remainder in fee. *Anon.* 1 And. 38.

11. There was no dower of uses before the statute. 2 Saund. 46.

12. Before the statute Hen. 8. c. 10. of uses, a man might either have retained the possession, and have departed with the use, or he might have departed with the possession and have retained the use, or he might have departed with them both together. 1 Mod. 176.

13. Contingent uses in *esse* are executed till they come in *esse*; but a possibility of seisin or *acintilla juris*, remains in the trustees to serve such uses when they arise; and

if the possession is disturbed, they may re-enter to revest the uses; and this possibility of seisin may be released or destroyed, and the contingent uses will be thereby defeated. *Chudleigh's case*, 1 Co. 120 a.

14. An use was limited to a [*1461] man and woman, and* the heirs of their bodies, before the statute of uses, who afterwards intermarry; then the statute passes; still they have several moieties, and if the husband alien, the wife at his death can only claim a moiety, though the issue may have *formedon* for the whole. 2 Dy. 149. pl. 82.

15. Uses in *esse* are executed immediately by the statute. *Chudleigh's case*, 1 Co. 120 a.

16. Possession is transferred by the statute to such uses which are in being, and not to a possibility of an use. 4 Mod. 155.

17. If A being seised in fee, make a jointure on his wife for life, and die without issue, and the lands descend to his brother and heir, who grants a rent-charge of so much *per annum* to trustees for the use of the widow, in lieu of her dower, this rent-charge is executed by the statute of uses. *Cook v. Herle*, 2 Mod. 138.

18. The statute does not extend to copyholds, nor to leases for years which are in existence at the time of the assignment to the use. 2 Saund. 11 c.

19. Nor to cases where the party seised to the use, and the *cestui que use*, is the same person. 2 Saund. 11 c. n. [r.]

20. No uses shall be executed by 27 H. 8. c. 10. which are limited contrary to the common law. *Colton v. Senhouse*, 2 Show. 13.

21. By the statute of 27 H. 8., the use and possession came instantly together. *Dixon v. Harrison*, Vaugh. 50.

22. Whatever was, or would have been a trust at common law, is, since the statute, an use executed. *Broughton v. Langley*, Salk. 679.

23. A mere trust is not within the statute 27 H. 8. of uses. 2 And. 93.

24. The statute of uses executes no possession but where there was an use before at common law. *Thorington v. Stratton*, Plow. 303.

25. An use upon use is not executed. 2 Saund. 11 c. b.

26. The use is not executed where something is to be done by the trustees, which makes it necessary for them to have the legal estate. 2 Saund. 11 b, c, d.

27. A lease for years assigned to an use is not executed by the statute. 3 Dy. 369. pl. 50.

28. Before that statute, *cestui que use* could not do any thing upon the land but by command of feoffees, for he had neither *jus in re*, nor *ad rem*. 1 And. 320. 831.

29. And the wife of *cestui que use*, was not dowable, nor could there be any tenancy by courtesy, wardship, &c. 1 And. 321.

30. This statute destroys the use, and converts it into an estate and actual possession. 1 And. 324, 325.

31. *Cestui que use* before the statute of uses levied a fine to a stranger in fee, who granted it to the king; the feoffee to the use after the statute has no interest, so cannot sue a petition of right to the king to revive the use. 1 Dy. 88. pl. 109.

VII. OF THE DESTRUCTION AND DETERMINATION OF USES.

1. Uses can be determined by deed, and new ones created. Mo. 681.

2. An old use may be revoked, and a new use raised at the same time. Vaugh. 42.

3. When the estate is determined, the use is determined also. W. Jo. 253.

4. A contingent use is destroyed by a feoffment. *Dillon v. Fraine*, Poph. 72. Cro. Eliz. 630.

5. A future use is not destroyed by a feoffment. Cro. Eliz. 689.

6. Feoffment to J S for life, to the use of J D for his life; the use is gone by the death of J S, for the use depends upon the estate of the feoffees. 1 And. 325.

7. The bargainee covenants, that if the bargainor pays a certain sum at such a day, he will stand seised to his use; the use will not be altered by a tender and refusal without payment; otherwise upon a feoffment. Mo. 35.

8. Feoffment to the use of his first son before issue; feoffor and feoffee enfeoff one in fee; the uses are destroyed. 2 Leon. 178.

9. Uses in contingency are barred by a release of the feoffees. *Dillon v. Fraine*, Poph. 83.

10. Land is given to two, *habendum* to them for their lives, to the use of A for* his life; if the two les- [*1462] sees die, the use to A is determined. 2 Dy. 186. pl. 1.

11. A future use will be destroyed by the attainder of the present possessor. Mo. 368.

12. A use to the husband for life, remainder the wife for life, remainder to all the issues female of their bodies, and they have issue a daughter; the remainder is attached, but shall be divested by the birth of another daughter afterwards. *Mathews v. Temple*, Comb. 467.

13. Use to the father for life, remainder to such person as shall be his eldest son at the time of his death, and the heirs male of his body, remainder to the brother, &c.; the father makes a feoffment, upon which the brother releases; the eldest son is barred, although he be born at the time. Mo. 545.

14. A makes a feoffment in 8 H. 7., to the intent of performing his will; afterwards by indenture he declares his will to be, that the feoffees shall stand seised to the payment of his debts, and afterwards conveys back

IV. WHEN AND HOW IT MAY BE TAKEN ADVANTAGE OF BY PLEADING.

1. If it appears by the plaintiff's showing in his declaration, that the contract is usurious and cannot be otherwise, [* 1465] judgment* shall be against the plaintiff; but it shall not be intended. *Yeoman v. Burstow*, Lutw. [102].

2. The statute against usury is expounded strictly with respect to brokers. 1 Vent. 38.

3. Bail to the action may plead usurious contract. *Anon.* 12 Mod. 493.

4. The statute is not pleadable to a bottomry bond. *Sayer v. Clean*, 1 Lev. 54.

5. *Non assumptis*, and an usurious contract, cannot be pleaded jointly. *Bernard v. Fitzhouse*, 11 Mod. 359.

6. Usury cannot be pleaded to *scire facias* on a judgment. *Bush v. Gower*, 2 Stra. 1043.

7. But it may be got at by motion to vacate the judgment. *Id.* *Ibid.*

8. It may be given in evidence on *non assumptis*. *Lord Bernard v. Saul*, 1 Stra. 498.

9. Usury cannot be taken advantage of on *non est factum*, but must be specially pleaded to a bond or specialty. *Hob. 72.* 1 Saund. 295 a.

10. Although it appears by the words of the condition that the bond is usurious, yet no advantage can be taken if the statute is not pleaded. *Geang v. Swaine*, Lutw. [167].

11. The statute need not be recited in the plea. 1 Saund. 295 b.

12. In pleading the statute of usury, it must be set forth what agreement was made, and what sum was taken more than 5l. in the hundred. *Hinton v. Roffey*, 3 Mod. 35.

13. Merely stating that it was corruptly agreed to pay more than legal interest is bad. *S. C.* 2 Show. 330.

14. The day on which the money is averred to have been advanced is material. 1 Saund. 295 a n. [d].

V. REPLICATION TO SUCH PLEA.

1. The contract and not the receipt is material and issuable. *Mo.* 574.

2. The intention is issuable. *Jenk.* 88.

3. A replication to a plea should deny the fact without a formal traverse, and conclude to the country. 1 Saund 103 c.

4. Defendant pleaded the statute of usury, that it agreed, &c., without saying "corruptly;" the replication concluded with a traverse, *absque hoc* that it was corruptly agreed; held that the replication made the plea good. *Rogers v. Jackson*, *Mo.* 464.

VI. INDICTMENTS AND INFORMATIONS FOR USURY.

1. An indictment lies not barely for a corrupt agreement. *Res v. Upton*, 2 Stra. 816.

2. No indictment lies on the statute of usury. *Res v. Dye*, 11 Mod. 174.

3. Nor does it lie merely for taking the

money without any corrupt agreement. *Lancaster's case*, 1 Leon. 208, 209.

4. The jurisdiction of the sessions of the peace does not extend to usury. *Gilb.* 103. 138. *Res v. Smith*, 2 Salk. 680. *contra. Res v. Bakestraw*, 3 Salk. 188.

5. In an information upon that statute, *tam pro domino rege quam pro seipso*, although the attorney-general enters a *non vult prosecute*, that is no bar to the informer; and so if the informer be nonsuited, that is no bar to the king. *Streetton v. Tayler*, *Cro. Eliz.* 138.

6. An information for usury commenced by *subpœna* in C. B., and concluded *contra formam statuti*, without saying what statute, and defendant appeared by attorney, *ex gratia*, and pleaded not guilty, yet, on the verdict found against him, judgment was ordered to be entered accordingly. 3 Dy. 346. pl. 9.

7. On an information for usury, if the verdict find the corrupt agreement, but say nothing as to the loan, it is bad. *Loveday's case*, 8 Co. 65 b.

8. One in execution of a judgment for usury is not bailable. *Anon.* 3 Salk. 58.

VII. EVIDENCE.

1. A party to the contract was held not to be a good witness to prove repayment. 1 Stra. 633. *Shank q. t. v. Payne*, *T. Raym.* 191.

2. But on an information upon the statute of usury, he who borrows the money was held to be a good witness after he had paid it, though not before. *Long's case*, *T. Raym.* 191.

3. But the borrower is not ad- [* 1466] mitted a* competent witness in all cases. *Semb.* 1 Saund. 295 a. *Smith q. t. v. Prager*, 7 T. R. 60. 4 Burr. 2251.

VAGRANT.

1. Before a hawker or pedlar can be deemed a vagrant, he must be wandering abroad and out of his own parish. *Anon.* 11 Mod. 3.

2. A person must be idle as well as disorderly to be committed for a vagrant. *Res v. Miller*, 2 Stra. 1103.

3. A child of two years old cannot be a vagrant. *Res v. Inhabitants of King's Langley*, 1 Stra. 631.

4. One justice cannot by 12 Ann. c. 23. send a vagrant to the place of his settlement. *Inhabitants of Bamber v. The Inhabitants of Hamington*, 2 Ld. Raym. 1360.

5. Justices have power to commit to hard labour idle and disorderly persons. *Freeman's case*, 2 Stra. 882.

6. A vagrant as such is not indictable. 6 Mod. 240. 3 Salk. 208.

7. A constable's vagrant rate can only be made upon one parish, unless it be a town.

Rex v. Inhabitants of Broughton in Kent, 1 Ld. Raym. 426.

8. Money ought to be raised quarterly; but a previous presentment of the grand jury is not necessary. *Rex v. Justices of the Peace of Middlesex*, 2 Stra. 1028.

VARIANCE.

I. RESPECTING VARIANCES IN THE STATEMENT OF NAMES;—

(a) *What are material*, p. 1466.

(b) *What are not*, p. 1466.

II. RESPECTING OTHER VARIANCES IN PLEADING;—

(a) *What are material*, p. 1467.

(b) *What are not material*, p. 1469.

III. HOW A VARIANCE MAY BE TAKEN ADVANTAGE OF, p. 1471.

IV. HOW CURED, p. 1471.

I. [RESPECTING VARIANCES IN THE STATEMENT OF NAMES;—

(a) *What are material*.

1. A slight variance is fatal in the name of a corporation. *Turvil v. Aynsworth*, 2 Stra. 787.

2. In the description of a record, a slight variance in the name will be material, though they be *idem sonantia*. *Aleberry v. Walby*, 1 Stra. 231.

3. On *nul tiel* record, "Curphey" was the name in the recognizance, but the judgment was against "Scurfee;" held a material variance. *Egleton v. Newman*, Ca. Prac. C. P. 82. 1 Barnes, 333. S. C.

4. In debt on a judgment, the defendant in the issue delivered was named "Eusterce," and in the record "Curtess;" held to be a material variance. *Watkinson v. Sayer*, Ca. Prac. C. P. 45.

(b) *What are not*.

1. "Segrave" and "Seagrave" held to be no variance upon *nul tiel* record. *Williams v. Ogle*, 2 Stra. 689.

2. "John John Shorter" in declaration, and "John Shorter" in issue, immaterial. *Shorter v. Hebbutt*, 1 Barnes, 335.

3. Where the omission or addition of a letter does not change the word, so as to make it another word, the variance is not material; thus a variance of "Jacob" instead of "Jacob" between a bond and the declaration, is not material. *Aboab's case*, 1 Mod. 107. *Fettyplace's case*, 1 Mod. 15 *notis*.

4. If a person of the name of "Hill" be returned in the panel annexed to the *venire*, and he is named "Kell" in the *habeas corpus*, the variance is immaterial. 7 Mod. 252.

5. Where defendant is named "Joseph" in the writ, and "Joseph" in the count, it was held an immaterial variance, though assigned for causes of demurrer. *Godfrey v. Duberry*, Andr. 75.

6. "Okeham" instead of "Oakham" is no variance. *Oakham v. Whittlesea*, 11 Mod. 171.

7. A variance not in the substance of their name will not vitiate a lease made by a corporation; thus a lease by the "dean* and chapter of the [*1467] cathedral church of the holy and undivided trinity of Carlisle," under the name of "dean of the cathedral church of the holy trinity in C, and the whole chapter of the church aforesaid," is a good lease. 3 Dye. 278. pl. 1.

8. A writ of error of a plea "*in*sr. G. et Jacobum Waller," and the record returned is "*capit* Jac. Waller," held no variance. *Green v. Waller*, 2 Ld. Raym. 894.

9. A variance in the christian name of an earl is immaterial. *Ingoldsby v. Martin*, 1 Stra. 316.

10. Addition of "citizen London draper," the same in substance with "citizen draper London." 1 And. 276, 277.

11. In the writ and count in covenant, it was called "A B assignee of C," in error; afterwards, he was called "A B" only; it is the whole name, and the want of that addition is immaterial. 3 Dy. 356. pl. 41.

12. So, where in the issue it was "plaintiff was indebted to plaintiff," in the record "defendant was indebted," &c., and the other places being right. *Johns v. Smith*, 1 Barnes, 335.

13. Attaint by "J S" knight, where the writ in the general action was "J S of D," is an immaterial variance. 1 Dy. 25. pl. 161.

14. A *quare impedit* names a church "*ecclesia de Staunton*," the declaration calls it "Staunton, *alias* Staunton Fitzherbert;" no variance. 1 Ld. Raym. 530.

II. RESPECTING OTHER VARIANCES IN PLEADING;—

(a) *What are material*.

1. If a writ of trespass be for entering into two closes, and the declaration state a trespass in one close and one toft, the variance is fatal. *Skidmore v. Boucher*, 2 Show. 93.

2. If the writ supposes the trespass to be in the time of king James, and the count in the time of king Charles, it is material. Lutw. [569].

3. *Assumpsit* to deliver good merchantable wheat; evidence of a contract to deliver good second sort wheat, is a variance. *Anon*. 1 Ld. Raym. 735.

4. Where the plaintiff declared upon a contract with the defendant, for the repairing his house, and particularly for enlarging one room therein, and the breach assigned was, that he had repaired it ill, and the evidence was, that the defendant had been employed by an insurance office to make good the damage occasioned by fire for a certain sum, and that the plaintiff agreed with him likewise to make alterations in the room;

held, that as the plaintiff had not declared upon any general custom to repair, &c. in a workmanlike manner, such variance from the contract laid, and that proved, was fatal. *Witherington v. Buckland*, C. T. Hardw. 309.

5. Case upon a demise of a house for seven years, in which the defendant negligently kept his fire; upon *non demisit modo et forma*, the jury found the demise, excepting that part called the new house; now, by this exception the lessee was tenant at will of the new house, and so it was not demised to him for seven years; for this variance the defendant had judgment. *Cudlip v. Rundle*, Carth. 203, 204.

6. So, where an *assumpsit* was laid for money laid out and expended, and the evidence was of a promise to pay it out of the first profits. *Tissard v. Warcup*, 2 Mod. 280.

7. In debt, where the quantity of the duty depends on the deed, a variance is fatal, and cannot be helped by *remittitur*; otherwise, where the matter is extrinsic, and does not depend on the deed. *Incleiden v. Crips*, 2 Salk. 658.

8. Omitting a part of an award that is good is a material variance. *Forcland v. Hornigold*, 1 Raym 715.

9. A bond was for payment of money of West Jersey, the declaration for money of England. *Boss v. Firmen*, 1 Ld. Raym. 697.

10. In an action on the 2 W. & M. c. 5. for rescuing a distress, if the declaration state a lease "for a year, and so from year to year," and the lease produced in evidence be "for a year, and so from year to year as long as both parties please," the variance is fatal. *Dod v. Monger*, 6 Mod. 215.

11. In an action for waste, the declaration laid that trees were cut; the evidence was, that they were stubbed; the variance is fatal. 2 Saund. 238.

12.^a Where the plaintiff declared for words of felony spoken of himself as confederate with another, and the declaration went on to state that the defendant said "I will hang him," and the words proved were "I will hang them both," held a fatal variance. *Nelson v. Sir W. Dixie*, bart. C. T. Hardw. 305.

13. In trover for partnership effects, allegation that the goods were in possession of two partners (bankrupts,) whose assignees the plaintiffs were, evidence that some of the goods belonged to one partner exclusively, this is fatal. 2 Saund. 47 n. n. [a].

14. A variance between the true title of a statute, and the title as set forth in pleading, is ill. *Mill v. Wilkins*, Holt, 682, 663.

15. So, where the custom of a manor was pleaded to be, that the widow of every copyholder shall enjoy the estate, *pro termino vite*, but the evidence that it is *pro viduitate destitute tantum*. 2 Dy. 192. pl. 23.

16. So, where in a *scire facias* upon a re-

cognizance, the condition is set out to be that the defendant shall give notice of trial *prosecutori et ejus clerico*, an oyer it is *aut ejus*. *Reg. v. Ever*, 2 Ld. Raym. 757. 7 Mod. 9. 3 Salk. 369. S. C.

17. In a debt on a recognizance in the common pleas, if the declaration state it as taken before Sir George Treby *et sociis suis*, and it appears to have been taken before another judge at chambers, and by him delivered to the court, the variance is fatal. *Chetley v. Wood*, 6 Mod. 43. 2 Salk. 659. S. C.

18. Plea that "Longhope" is ancient demesne, and proof that "Hope" is ancient demesne, is a variance, although both be the same village. *Holdage v. Hodges*, 1 Lev. 106.

19. If a man pleads a release of all actions, and upon oyer it appears to have exceptions, it is bad. Palm. 411.

20. In an action on an indorsed note, in the issue it was "he the said indorsed," and in record "he the said A indorsed," the verdict was set aside. *Wreathcock v. Bingham*, 1 Barnes, 334.

21. If in an action of account an issue be joined on *plene computavit*, and the *jurata* and *distringas* be "*de placito debiti*," it is a fatal variance. 2 Show. 395.

22. If a juror be called "Berryman" in the *distringas*, and "Ferryman," in panel, the variance is fatal. *Rex v. Johnson*, 2 Show. 2.

23. In a prohibition, a variance between the surmise and declaration makes all ill. Cro. Eliz. 136.

24. If to a libel of tithes, the defendants, plead that they were inhabitants of such a parish, by way of excuse, and also suggest the same for a prohibition, and afterwards in a declaration in prohibition state that they were occupiers of certain lands, &c., the variance is fatal. *Harroes's case*, 7 Mod. 114.

25. A *recordare* to remove a plaint which is in *curia nostra*, where it was in *curia Marie regine*, is rendered ineffectual by the mistake. Mo. 30.

26. If an action be brought against several men, and a *nolle prosequi* be entered as to one, and a writ of inquiry awarded against the rest, which recites that the plaintiff did by bill implead, (naming those only against whom the inquiry was awarded, and leaving out him who got the *nolle prosequi*.) this is a variance, for it ought to have been brought against them all. *Dashwood v. Cooper*, 2 Mod. 284.

27. So, where a record was stated to be taken before nine commissioners, but one was removed, and it was taken before eight only. *Worsahelm v. Manuscriptors of Berks*, 12 Mod. 609.

28. Where on a writ of error on a judgment in a *scire facias* on a recognizance against the bail, it was *adjudicatione caeca*

tionis iudicii, instead of *recognitionis*, it is ill. 3 Salk. 369.

29. A writ of error was on a judgment in *curia nostra*, viz. Jac. 2., when all the proceedings were in the reign of Car. 2., this is an incurable variance. Carth. 152. 158.

30. A writ of error was of a record *per billam*, the record returned was *per breve de privilegio*, and therefore quashed, *Derby v. Anely*, 2 Salk. 660.

31. If on a judgment in Wales, the plaintiff on a writ of error, state it to be "at a great sessions of our lord the king, holden before A and B, justices of our lady the queen," the judgment is erroneous. *Lewis v. Jones*, 6 Mod. 138.

[*1469] 32. Judgment against the inhabitants of part of three parishes, and a writ of error of a judgment against the inhabitants of the three parishes, was quashed. *Rex v. Inhabitants of All Saints in Derby*, 2 Stra. 1110.

33. An indictment setting forth the tenor of a libel, had "not" instead of "nor;" the variance was held fatal, though it did not alter the sense. *Reg v. Drake*, Holt, 347 to 352. 2 Salk. 660 S. C. 11 Mod. 78. S. C.

34. "Barness" for "Barnass," and "orentati" for "orentali," are fatal variances between an indictment for perjury and the record, after trial. *Rex v. Carter*, 6 Mod. 168.

35. If an indictment for perjury in reciting the record of the trial, state a fact as happening between A and C, and it appears from the record produced in evidence that the fact happened between A and B only, the variance is fatal. *Rex v. Carter*, 6 Mod. 168.

(b) *What are not material.*

1. That shall not be variance which may be helped by any construction the rules of language will admit of. *Cook v. Hamilton*, 10 Mod. 368.

2. If a declaration for a malicious arrest state that the charge in the warrant was that "he intended to rob," and on the production of the warrant the charge appears to be, that "he intended to rob, as he believes," the variance is immaterial. *Muriel v. Tracey*, 6 Mod. 170.

3. In an action for a malicious prosecution, if the indictment be recited "according to the substance following," a variance of "*valoris*," instead of "*valentis*," is immaterial; but if the recital had been in *hac verba*, the variance would be fatal. *Johnson v. Browning*, 6 Mod. 216.

4. In an action of false imprisonment, it is not a material variance, though the writ allege an imprisonment generally, and the declaration state it to be until he has paid 5*l*. *Higginson v. Martin*, 2 Mod. 196.

5. In trespass for assault, battery, and wounding the plaintiff, the plaintiff declares, and saith that *quendam equum* upon which

the plaintiff rode *percussit*, ita *quod cecidit*, &c.; this is no variance, for that the alleging of the striking of the horse was only an inducement to the battery of himself. March, 98. pl. 107.

6. The declaration alleged* that he was possessed of a waistcoat, and that he lost *bona et catalla præd.*, and that defendant converted *bona et catalla præd.*, if advantage can be taken of this variance on a general demurrer. Lutw. [650.]

7. If the declaration be upon a bond made *ultimo Augusti*, and upon oyer it appears to be dated 19th *Augusti*, this is not variance from the count, so to arrest the judgment after verdict. *Thorp v. Taylor*, Hob. 249.

8. So, a bond to A in 40*l*., *solvend.* to his attorney, declared on as payable to A, is no variance. *Roberts v. Harnage*, 2 Salk. 659.

9. So, in debt on bond to perform an award, an omission in the replication of a void part of the award is no variance; *aliter* if the omission be of any part not void. *Foreland v. Marygold*, 1 Salk. 72.

10. A second lease which recited a former one under a false date being pleaded, and the true date alleged in the pleading, is good on *non demisit modo et forma*, and the variance immaterial. 2 Dy. 116. pl. 70.

11. A writ of formedon demands twenty messuages *inter alia*, and the count is that a fine was levied *de tenement. præd. inter alia per nomen* of sixteen messuages; it is not a variance. Lutw. [412.]

12. On a declaration for a heriot, and 12*s*. rent, a verdict finding the heriot and 3*s*. rent, is not a fatal variance. *Wilcox v. Skipwith*, 2 Mod. 5.

13. So, in replevin of cattle taken for a heriot, if the avowant say that the heriot was due upon every alienation, without notice, and the jury find it due with or without notice, the variance is immaterial. Id. *ibid*.

14. The plaintiff declares on a lease for years, if the lessor should so long live and continue parson of the church; the verdict finds the lease if the lessor should so long live, omitting the other words "and continue parson," still it is no variance. Mo. 834.

15. Declaration in *trover de equis*, and the evidence is of geldings, no variance*. *Gravelly v. Ford*, 2 Ld. [*1470] Raym. 1209.

16. In an action on a bail-bond, if the writ be in *placito transgressionis ac etiam billæ*, and the bond be to appear in a plea of trespass only, the variance is immaterial. *Grosvenor v. Soame*, 6 Mod. 122.

17. If a declaration in covenant against an executor state notice to have been given to the executor, and on oyer of the deed it appeared that the covenant was conditional "so as the plaintiff gave notice in writing to the testator," without saying "or to his executors or administrators," yet the vari-

ance is not material. *Harwood v. Hilliard*, 2 Mod. 268.

18. In declaring for words spoken, a variance in omission or addition is not material, if the words proved are actionable; but otherwise if the tenor of the words be set out. *Reg. v. Drake*, 2 Salk. 661.

19. A variance between an indictment and a statute, stating the *venire* as causing to come "twelve honest and lawful men, &c.," instead of "twelve free and lawful men," is immaterial, 2 Show. 144.

20. "Lincoln's fields," instead of "Lincoln's-inn-fields," held not fatal in an information against the manager of the playhouse there situated, *Anon.* 7 Mod. 17.

21. So, in waste, if the plaintiff declares that the defendant cut down twenty oaks, and he replies *non succidit viginti quercus præd. nec earum aliquam*, a verdict finding that he cut down ten oaks is good. *Wilcox v. Shipwoth*, 2 Mod. 6.

22. A *mittimus* to "justices of our county palatine of Lancaster," declared on the poستا to an information *quo warranto* as directed to "justices at Lancaster," is not a fatal variance. *Rex v. Pritchard*, 7 Mod. 232.

23. *Scire facias* to have execution of a judgment obtained in "the court of Oliver, late protector of England, and the dominions and territories thereto belonging; and in reciting the judgment, it was said to be obtained before "Oliver, late protector of England, and the dominions, &c.," leaving out "territories," and held to be good in substance, for the judicature is still the same. *Panton v. Earl of Bath*, 3 Mod. 227.

24. A *capias* is pleaded returnable *coram domino rege apud Westmonasterium*; on *nul tiel record*, the writ produced is *ubicunque*, &c.; it is no failure. *Roberts v. Pine*, 1 Ld. Raym. 702.

25. Record described in the writ of error was of a trespass committed by thirty-one persons; the record returned was of a trespass by thirty-two, and held no variance. 10 Mod. 368, 369.

26. If on error on a judgment *pro debito et damnis* a release be pleaded reciting the judgment to be *pro debito et damnis ultra missis et custagiis*, the variance is not material. *Davenant v. Rafter*, 6 Mod. 236.

27. Consanguinity of the sheriff to defendant given as cause of challenge, and afterwards stated to be to his wife, is an immaterial variance. 1 Dy. 37. pl. 46.

28. Upon *nul tiel record*, the variance objected was, that on the continuance-roll the year of our Lord and "George the Second, the now king," were in words at length, and in the record of the proceedings continuing the replication, &c., the year was in figures, but also interlined in words, and that which related to the king was "George now king," omitting "the Second;" the

figures held not to be variance, but surplage, and so likewise "the Second." *Fisher v. Sowerby*, C. T. Hardw. 131.

29. If the record of *nisi prius* agrees with the declaration delivered, a variation in the issue delivered is not material. *Shipley v. Marsh*, 2 Stra. 1131.

30. The appearance of the parties being entered on the plea roll, but an *essoin* for the defendant on the same day, and a nonsuit for default of the plaintiff's appearance entered on the *essoin*-roll, the plaintiff may proceed to judgment, for the record of appearance by the plea roll confounds the *essoin*. 2 Dy. 223. pl. 27.

31. A verdict will not be set aside for a variance between the issue and the declaration, containing counts upon a promissory note and for money lent, as to the time laid in the count for the money lent; *after* if the variance had been in the date of the note. *Wright v. Crust*, C. T. Hardw. 252.

32. "*Scire possit*" instead of *posterit*" is an immaterial vari- [*1471]
ance. 2 Show. 180.

III. HOW A VARIANCE MAY BE TAKEN ADVANTAGE OF.

1. A variance between the writ and count must be pleaded in abatement, and is no cause of demurrer. Andr. 75.

2. A variance between the writ and count is not pleadable without prayingoyer of the writ; and asoyer will not now be granted, no advantage can be taken of the variance. *Bragg v. Digby*, 2 Salk. 658. Ib. note.

3. If a *scire facias* recite a recognizance incorrectly, advantage may be taken of the variance withoutoyer of the writ. *Rex v. Ewer*, 7 Mod. 9.

4. When the original writ is removed, be it before or after in *nullo est erratum* is pleaded, and a material variance appears between the writ and the declaration, the judgment shall be reversed. *Bishop v. Harcourt*, 5 Co. 37 a. 1 Leon. 210. Cro. Eliz. 210, 211. Anders. 240. S. C.

5. Judgment is obtained in debt on bond in Michaelmas term; a *scire facias* is brought thereon against the terre-tenants returned; and, on *nul tiel record* pleaded, judgment is given for the plaintiff, and an *elegit* sued out; an ejectment is brought upon the *elegit*, and it is found by special verdict that the *scire facias* recited a judgment of Trinity term; this, if discovered on the trial of the issue of *nul tiel record*, must have prevailed as a failure of record; but the fact having been judicially tried and ascertained, the terre-tenants returned are estopped by the award of execution on the judgment in the *scire facias* from taking advantage of this variance, and so are the terre-tenants not returned, if they do not show a title paramount to the judgment in the *scire facias*. *Trevivan v. Lawrence*, 6 Mod. 256.

6. In an information of perjury tried at the assizes, it was resolved by the court that the jury there cannot have consance of any variance between the record and the information, but the judge there ought to determine it; and because the jury had found it specially, it was ordered that a *venire de novo* ought to issue. *Rex v. Sykes*, T. Raym. 202.

IV. How CURED.

1. A variance between the plaint and the declaration in an inferior court is helped by verdict. *Sayer v. Curtis*, C. T. Hardw. 367. *Hale v. Clare*, 6 Mod. 150. S. P.

2. A variance in trespass on the case is cured by verdict. *Lewis v. Jones*, 11 Mod. 68.

3. A variance between the writ and the declaration is aided by the statute of jeofails; but formerly was matter of error. *Howard v. Richardson*, 2 Show. 304. 1 Ro. 432. 3 Mod. 136.

4. A variance of the sum in a judgment is not cured by a *remittit*. *Coy v. Hymas*, 2 Stra. 1171.

5. A variance between the *scire facias* and judgment is not amendable, though the writ is not faulty in *se*. *Vasator v. Baile*, Salk. 52.

6. A variance in the name of a juror in the *ven. fac.*, and in the *postea*, cannot be amended. *Sommer's case*, Prac. Ca. K. B. 218. 222.

7. If a writ of error be brought on a judgment in ejectment, and, on neglect to assign error, the defendant bring a *scire facias quare executionem non*, and recite the judgment to be of two messages when it was only of one message, the variance cannot be amended after "*nul tiel record*" pleaded. *Buxom v. Hoskins*, 6 Mod. 263.

VENDITIONI EXPONAS.

[See *ante*, tit. EXECUTION, div. IX. pl. 9. 11. &c. Vol. I. p. 651., &c.]

VENDOR AND PURCHASER.

1. If a man go to a merchant, and by false insinuations and account of himself prevail with the merchant to sell him goods upon credit, yet the property continues in the vendor, although the vendee obtain possession. *Anon.* 6 Mod. 114.

2. But if goods are obtained [1472] by false pretences,* and procured without notice of fraud, and on the offender being convicted of the cheat, the original owner get possession of his goods again, the pawnbroker may maintain trover against him to recover them back. 6 Mod. 114. n.

3. If goods are sold on conditions to be performed at the time of the delivery, and the goods are delivered, but the conditions

not performed, the vendor may have trover to get the goods again. 2 Saund. 47 l. n. [v].

4. If a vendor sell goods by sample to be delivered to the vendee within a month, and take earnest, and within a month send them to the premises, and when part are unloaded the rest are distrained for toll, the delivery is complete, so as to entitle the vendee to bring trespass for the seizure. *Blakey v. Dimadale*, 6 Mod. 162. n.

5. The draft of a third person given by a vendee to a vendor in payment will not discharge the debt if the drawee is not to be found, and the holder use due but ineffectual diligence to get it paid. *Popley v. Ashley*, 6 Mod. 147.

6. If a bargain be made and earnest given, without any express agreement that payment is to be made at a certain time, the money must be paid before the goods are removed. *Langford v. Tyler*, 6 Mod. 162.

7. After earnest given, the vendor cannot sell to another; but if the vendee do not come and take the goods, the vendor ought to request him to pay; and if he do not come in a convenient time, the agreement is dissolved, and the vendor may sell. *Langford v. Tyler*, 6 Mod. 162.

8. If the vendor sends goods by a carrier, the delivery to him vests the property in the purchaser, and he must stand to any loss. 2 Saund. 47 c. k.

9. But the vendor must, in delivering them to the carrier, do every thing necessary to entitle the purchaser to an action against the carrier; and must therefore pay the insurance, if the carrier gives notice he will not be liable for above 5*l.* without it. *Semb.* 2 Saund. 47 k. n. [u].

[See also *ante*, tit. SALE, Vol. II. p. 1224.]

VENIRE FACIAS.

1. A general award of it, without saying to the sheriff of what county, is good. *Andr.* 23.

2. Where there are two sheriffs, and one is challenged, the *venire* shall be directed to the other sheriff. *Rex v. Warringham*, 1 Show. 329.

3. A *venire facias* in an action brought in an inferior court, directed to the serjeant at mace, is good, although it do not style him "officer of the court," if the same man and same officer be said to be so in the preceding part of the record. *Plory v. Bluett*, 2 Show. 180.

4. *Probos et legales homines* in a *venire* are of the same import as *liberos et legales homines*. *Attorney-General v. Blood*, T. Raym. 417.

5. So, though it states the jury to be honest men of 20*l.* a year, instead of free men of 4*l.* a year, according to 27 Eliz. c. 6., it is good. *Rex v. Curtis*, 2 Show. 144. T. Raym. 407. S. C.

6. A venire facias out of an inferior court must be returnable at a day certain. *Luxon v. Corbin*, 2 Show. 466. 1 Mod. 81. S. P.

7. A venire facias for the trial of a cause at the assizes should not be returnable on a day certain, but generally at the next assizes. *Rex v. Sergeant and others*, 1 Mod. 81.

8. The venire on indictments removed into the King's Bench by *certiorari*, must be returnable on a common day. *Rex v. Tutchin*, 6 Mod. 268.

9. Where no return is indorsed on the venire facias, a judgment given for the plaintiff may be reversed by writ of error. *Smith v. Hill*, 13 Co. 71.

10. If the venire is made returnable upon a day certain, when it ought to have been made returnable upon one of the common return-days, it is a discontinuance, and not helped by statute, where the king is party. *Rex v. Bishop of Meath*, 10 Mod. 310.

11. A venire returnable three days after the term, and a *distingas* awarded thereupon, and the jury taken, is ill. *The Earl of Worcester v. Paddon*, Cro. Eliz. 605.

12. Where one was sworn upon a jury who had not been returned by the sheriff, it was held to be good ground of error, [*1473] and not aided by any statute. *Fines v. North*, W. Jo. 302.

13. If it bear teste after the judgment, it is as no venire facias, and so aided, and the teste thereof is not amendable, but the return is. *Carew v. Merler*, Cro. Eliz. 820.

14. A venire well awarded upon the roll, although otherwise returnable, may be amended. Cro. Eliz. 572.

15. Venire facias de vicineto does not exclude the place itself. 2 Ro. 44.

16. A venire facias de vicineto de D et S, where it ought to have been from S only, is error. *Acton v. Barnard*, Cro. Eliz. 600—620.

17. Where the *venue* came out of A only, when it should have come out of A, B, and C, the trial was held to be insufficient; and the judgment given for the plaintiff was reversed upon error. *Baynham v. Brook*, 5 Co. 36 b.

18. On an action upon a statute of hue and cry, the venire was awarded *de corpore eo com, alias quam de hundred de Exminster*; and held to be well, the statute not being a penal law. *Boyd q. t. v. Hundred of Exminster*, Ca. Prac. C. P. 38.

19. A venire facias *de corpore comitatus* is now sufficient. *Merrick v. Hundred of Osulton*, C. T. Hardw. 409.

20. The venire facias must agree with the roll; otherwise, if no writ at all, for that is aided by the statute. *Sir W. Hungerford v. Veisy*, Cro. Eliz. 433.

21. Custom and prescription for a warren within a manor was pleaded, and venire facias was awarded from the town, and not from the manor, and held to be a mis-trial,

and new venire awarded. *Rex v. Talbot*, W. Jo. 320.

22. A ven. fac. bore date before the action brought, and yet a trial thereupon was held good. Cro. Car. 38. 90, 91.

23. A venire awarded from more vills than ought to be is ill; but the place where the taking is, is necessary. *Acton v. Batham*, Cro. Eliz. 631.

24. But one venire to try two issues held good. Cro. Eliz. 866.

25. In assault and battery, if there are several defendants who plead severally, and one makes default, and a writ of inquiry is awarded on the roll, but not issued, the jury who try the first issue shall assess damages against all. *Heydon's case*, 11 Co. 5 a.

26. In debt upon an obligation conditioned to pay money at the house of one Yarrow, in Wood-street Magna London, the defendant pleads that he paid the money at the said house in Wood-street, but names no parish; on that a venire issues to the parish of St. Michael, Wood-street, and found for the plaintiff and judgment; the defendant brings error, and assigns for error that the parish of St. Michael is not named in any part of the record; but held good, being after verdict. *Braham v. Ashinal*, T. Raym. 67.

27. The words of the statute of 21 Jac. c. 13, by reason the *viens* is sued out of more places or of fewer places than it ought to be, so as one place be right named, are to be intended when some of the places are named in the record; and therefore if an action be laid in D, and a venire facias issues *de corpore comitatus*, there, although the venue be awarded to places, yet it is not good, because the body of the county was not named before in the record. *Id. ibid.*

28. Where a thing is laid in a city in *alte wards* of the same name, and the venire is from the city only, it shall be well and intended there be no more wards in the same city. Cro. Eliz. 282.

29. In debt on the statute against gaming, the venire, though awarded *de corpore comitatus*, was held sufficient. *French q. t. v. Wiltshire*, Andr. 99.

30. A venire facias *de civitate* good for trial in cities, where no parish or ward is alleged. *Philips v. Turner*, Cro. Eliz. 807.

31. A man bought debt upon a bond conditioned to pay so much in the house of the plaintiffs in Lincoln; the defendant pleaded payment at Lincoln aforesaid, upon which they were at issue, and venire facias was *de vicinet. civitatis* Lincoln, and found for the plaintiff; and it was moved that this was a mistrial; for that the venire ought to have been of the body of the county of Lincoln, and not of the city; but resolved to be good. March, 124. 204.

32. If an assault be made in one county, and continue in another, the venire shall be from both. Mo. 538.

33. Where an usurious contract is pleaded in a foreign county, the issue shall* [*1474] be tried where the usury is alleged. 1 Leon. 149.

34. The venire facias (in an action on stat. 7 & 8 W. 3. c. 7., which gives an action for a false return of members of parliament,) may be *de corpore comitatus*, that being a remedial act. *Middleton v. Wyns*, bart., in error. Willes, 599. n.

35. And since, by stat. 24 G. 2. c. 18. s. 3., the venire may be *de corpore comitatus* in all actions or informations on penal statutes. Willes, 599. n.

36. A payment pleaded *apud domum mansionalem rectoris de Much-Hadham*, and a venire facias awarded *vicineto de Much-Hadham*, held good. Cro. Eliz. 804.

37. It must be from both counties, upon 1 & 2 Phillips, and Mary. *Gybbin's case*, Cro. Eliz. 646.

38. If on the venire facias but twenty-three be returned, and twelve appear and give a verdict, it is remedied by stat. 18 Eliz. *Tirrel v. Gardiner*, 5 Co. 37. a.

39. Where in an action for words the party justifies them in another place than supposed in the court, the venire shall come from the place of justification, or from the place where the words were supposed to be spoken. *Ford v. Brooke*, Cro. Eliz. 261.

40. By 4 & 5 Ann. c. 16. every venire facias shall be awarded from the body of the county in which the action is brought. 1 Mod. 199. *notis*.

41. By 16 & 17 Car. 2. c. 8., if the venire facias be awarded from any place of the county in which the action is laid, it is sufficient. 1 Mod. 199.

42. A venire awarded to the coroner for consanguinity, and a tales returned by the sheriff, held erroneous, and not aided by 32 H. 8. or 18 Eliz., and so judgment reversed. *Morgan v. Wye*, Cro. Eliz. 574. 586.

43. Where a venire facias was awarded to the coroner, where it ought to have been awarded to the sheriff, it was held not to be remedied by any of the statutes. *Baynham v. Brook*, 5 Co. 26. b.

44. If a sheriff die, and his successor be challengeable, a suggestion may be entered, and the venire directed to the coroner. *Rex v. Smith*, 2 Show. 288.

45. If a sheriff, being co-defendant, return the venire, it is a cause of challenge, though he did not plead until after the award of the writ. *Rex v. Smith*, 2 Show. 288.

46. It should not be awarded to the coroner before the sheriff has made default. 1 Ro. 364.

47. A venire *de medietate lingue* ought not to issue but at the prayer of the alien defendant, and not so if a peer be party. *Heyward v. Lyppson*, Cro. Eliz. 869.

48. A venire facias *de medietate lingue quorum quilibet habet 4l.*, held good, because

of the form. *Goodwin v. Mountenaugh*, Cro. Eliz. 841.

49. An information sets forth that at Gravesend, in the county of Kent, upon such a day, and in such a vessel then and there riding, such a person seized 206l. 4s. in gold from certain persons unknown, then and there passing or upon their passage in a certain ship from Ratcliff, in the county of Middlesex, to parts beyond the seas; upon issue joined between the protector and him that claimed property, that no such gold was found, a venire facias was awarded from Ratcliff, and held to be mis-awarded. *The Protector v. Wyche*, Hard. 16, 17, 18.

50. On an indictment in Middlesex, the venue may be made returnable *de die in diem*. *Rex v. Tracey*, 6 Mod. 179.

51. A was indicted for murder, and the murder was alleged to have been committed in the city of Westminster, in the county of Middlesex, in a certain street called King-street, in the parish of M., in the same county; to try the issue, the jury was returned *de vicineto* of the city of Westminster; held that the trial was insufficient, and a new venire facias was awarded. *Arundel's case*, 6 Co. 14. a. Moor, 594. Goldsb. 133. S. C.

52. On an information against a county for not repairing a bridge, the attorney-general may try the cause in any adjacent county, and award the venire either to the body of that county, or to the vicinity of any particular place therein. *Rex v. Wells*, 6 Mod. 191.

53. At a trial at the *nisi prius*, the plaintiff changed the venire facias and panels, and had a jury the defendant knew not of; and held that the defendant could not be aided if the first venire was not filed.* *Murch v. Londs*, T. Raym. 79. 1 [*1475] 1 Keb. 561. 667.

54. And a difference was taken where the first venire was not filed, there he cannot be aided, because the defendant may have resort to the sheriff, and have a view of the panel to be prepared for his challenges; but if the first venire was filed, then the defendant shall have a new trial. *Id. ibid.*

55. The court will not order the plaintiff to file a venire facias. *Anon.* 3 Mod. 246.

56. If a venire be by mistake put to a wrong record, the court will *ex officio* order it to be set right. *Rex v. Fleet Warden*, 6 Mod. 18.

57. If the venire facias be good and well returned, the *distingas* may be amended by the sheriff. 2 Ro. 111.

58. If a venire facias bear teste the day of the return, it is amendable; if it be returnable or hear tested upon a Sunday or day which is not a day in court, it is aided by the statute. Mo. 599.

59. If it differ from the roll, it may be amended, though after verdict. *Ford v. Rider*, Cro. Eliz. 768.

60. On leave to amend a venire after error brought, the plaintiff in the original action is not to pay costs. *Wilkinson v. Meyer*, 8 Mod. 234.

61. The plea does not now influence the award of the venire. 2 Saund. 5 d.

VENIRE DE NOVO.

[See VERDICT.]

1. A new venire shall be awarded when the entry to the first is *vicecomes non misit breve*. 10 Mod. 310.

2. A venire de novo shall issue if a jury find assets, without finding to what amount. *Staple v. Haydon*, 6 Mod. 3.

3. When a jury returned by force of any *venire facias* to try an issue has given a verdict, which is accepted and recorded by the court, be it perfect or imperfect, the jurors are discharged thereof for ever, and shall never be called back in the same cause to try the same issue; but if the verdict be so imperfect, that judgment cannot be given upon it, then the court shall award a *venire facias de novo*. *Loveday's case*, 8 Co. 65 b. *Cro. Jac.* 210. *Jenk.* 283. S. C. 1 Show. 359.

4. A new venire may be awarded in any case. 1 Ro. 231.

5. And principally if the venire be mis-awarded. 1 Ro. 267.

6. But not if the first be quashed for favour in the under-sheriff. 1 Ro. 272.

7. A new venire could not be awarded till statute 7 & 8 W. 3. 2 Saund. 254.

8. If a venire de novo be granted on an indictment after a mis-trial, the defendant must enter into a new recognizance. *Res v. Tracy*, 6 Mod. 179.

VENUE.

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I. WHEN THE VENUE IS LOCAL.

1. At common law, all actions were laid in the proper county, that the jury might be *de vicineto*. *Duke of Norfolk v. Alderton*, 2 Salk. 688.

2. The venue in ejectment must be where

the land lies. *Anon.* 6 Mod. 222. *Gree v. Sharp*, Ib. 265. S. P.

3.* It is a general rule that all actions founded on privity of estate are local. 1 Saund. 238. n. (1).

4. If privity of contract be gone by making an assignment, and only a privity in law remain, the action must be brought in the county where the land lies. 3 Mod. 337.

5. Debt by assignee of the reversion against lessee is local. 1 Saund. 241 d.

6. So, debt by lessor against assignee of the term. *Barker v. Damer*, Carth. 183. 1 Saund. 241 d.

7. So, debt by assignee of reversion against assignee of the term is local. 1 Saund. 241 d.

8. Covenant by lessor against assignee of the term, is local; or by assignee of term against lessor; or by assignee of reversion against assignee of term. 1 Saund. 241 d. *Barker v. Damer*, 3 Mod. 337. Carth. 183. S. C.

9. So, actions by assignee of the term, against assignee of the reversion, are local. 1 Saund. 241 d.

10. All actions by and against assignee of lessee are local. 1 Saund. 240 a. n. [o].

11. In dower, on the issue of infancy, the venue must be laid where the land lies. *Anon.* 2 Show. 163.

12. The venue, in trespass to land, is local. 1 Saund. 300 c.

13. Seizing a house in the East Indies is not triable here. *Shelling v. Farmer*, 1 Stra. 646.

14. An indictment for persuading a servant to purloin his master's goods, must lay a venue in the place where the persuasion was used. *Res v. Daniel*, 6 Mod. 101.

II. WHEN IT IS NOT LOCAL.

1. In transitory actions, the venue may be laid in Middlesex, though the party live at Chester. 1 Mod. 121.

2. Actions are maintainable here for causes arising beyond the seas. *Dutch West India Company v. Jacob*, 1 Stra. 614.

3. If a statute require a thing to be done in England, the venue may be laid in any county in the kingdom. *Anon.* 2 Show. 147.

4. The assignment of a bail-bond may be laid in another county than where the arrest was. *Gregson v. Heather*, 2 Ld. Raym. 1455.

5. The venue in trespass for taking goods is transitory. 1 Saund. 300 c.

6. An action against a constable is not confined to the proper county where he does not act in the execution of his office. *Anon.* 1 Stra. 446.

7. B brought an action on the case in the county of N, for maliciously causing him to be outlawed in London, upon process sued out of a court at Westminster, and causing him to be imprisoned in N upon a *capias utlagatum* directed to the sheriff of that county, but issued at Westminster; and upon demurrer it was adjudged that the action was well

brought in the county of N. *Bulwer's case*, 7 Co. 1 a. 49. last ed.

8. In an action against a coroner for falsely returning *non est inventus* to a *capias ad faciendum* issued out of the King's Bench, directed to the chancellor of the dutchy of Lancaster, the venue may be laid either in Middlesex where the writ issued, or in Lancashire where it was neglected to be executed; for where two matters, both of which are material, are done in two counties, the action may be brought in either. *Naylor v. Sharpless and others*, 2 Mod. 23. 1 Mod. 198. S. C. *Atkins v. Tankard*, 2 Show. 314.

9. Debt for rent may be laid where the deed was made, or the land lies. *Patterson v. Scott*, 2 Stra. 776.

10. Debt or covenant by lessor against lessee is transitory. 1 Saund. 241 c. 276. n. [b].

11. Covenant by lessee against lessor is transitory. 1 Saund. 241 c.

12. Covenant by assignee of the reversion against lessee, or by lessee against assignee of the reversion, is transitory. Ibid.

13. Debt or covenant by lessor against executor or lessee for rent accrued in testator's time, is transitory. 1 Saund. 241 c. n. [f].

14. So, debt (in the *detinet*) for rent as executor in his own time, transitory. Ibid.

III. WHEN A VENUE IS NECESSARY TO BE ALLEGED IN PLEADING.

1. A venue must be laid in a [*1477] declaration* in prohibition. *Angle v. Brown*, 2 Show. 145.

2. A consideration executory is traversable, therefore a venue must be laid. *Taxton v. Mills*, 2 Salk. 22.

3. If a feoffment be pleaded in satisfaction of a bond, the acceptance must be laid in the county where the feoffment was made. *Williams v. Farrow*, 6 Mod. 82.

4. A release of errors pleaded without a venue is ill, and amounts to a confession of errors. *Carleton v. Mortagh*, 2 Ld. Raym. 1005.

5. *Assumpsit*, in consideration he would consent, and not hinder, &c.: plea, that he consented and has not hindered is ill, without saying where he consented; for the consideration was not only negatively, he would not hinder, but positively, he would consent. *Chapman v. Fothergill*, 2 Lev. 227.

6. An executor pleads a judgment for 500*l.*; plaintiff replies that only 100*l.* is due on them, and that the defendant has assets beyond the 100*l.*, but says not where; it is ill. *Knighton v. Morton*, 3 Lev. 311.

VI. WHEN NOT.

1. Matters touching the person may be pleaded without a venue, as privilege of attorney or alience in abatement. *Seaven v. Garrett*, 2 Ld. Raym. 1173. 1243. Salk. 545. S. C.

2. In debt on bond, if the defendant plead in disability that the plaintiff received the

order of knighthood, and thereupon ought to sue by that addition, it is not necessary to lay a venue where he was dubbed a knight; for every thing that concerns the condition of the person shall be tried where the action is brought. *Lett v. Mills*, 6 Mod. 106.

3. Where the plaintiff declares that the defendant was appointed to be post-master of Oxon, in the county of Oxon, and avers that he continued post-master for such a time, a venue is not necessary to be laid where he continued post-master. *Lord Arlington v. Merricke*, 2 Saund. 414.

4. On a *scire facias* by baron and feme upon a judgment recovered by the feme *dum sola*, the plaintiffs need not allege their marriage with a venue. *Blake v. Dodemead*, 2 Stra. 775. 2 Ld. Raym. 1504. S. C.

5. Want of a venue of a fact that is only laid in aggravation of damages is immaterial. *Davis v. Stannion*, 2 Ld. Raym. 1042.

V. HOW IT SHOULD BE LAID.

1. In all cases where the action is founded on two things done in several counties, and both are material or traversable, and the one without the other does not maintain the action, the plaintiff may bring his action in which county he will. *Bulwer's case*, 7 Co. 1 a. 49. last ed. *Anon.* 6 Mod. 182. *Anon.* Prac. Ca. K. B. 255.

2. The venue in an indictment for a conspiracy, &c. must be where the conspiracy was, and not where the result of it was put in execution. *Reg. v. Best*, 1 Salk. 174.

3. A venue may be laid in a forest, although it extends to several villa, "as in the forest of Dean, in the county aforesaid." *Anon.* 2 Show. 147.

4. If a bond bear date at any place abroad, the place must be stated in the declaration, with a viz. in such a place in England. *Robert v. Harnage*, 6 Mod. 228.

5. In civil cases, the place only may be alleged in the declaration without the county, or the county merely without any place. 1 Saund. 308 a. Ib. n. [a]. *Spencer v. Milward*, 1 Barnes, 342.

6. If a declaration in *assumpsit* in an inferior court state the promise to have been made at the town and in the county of Southampton, a venue laid in the town of Southampton, without stating it to be in the county, is good. *Plory v. Bluet*, 2 Show. 180.

7. In ejectment, demise of a messuage in *et super accipitatem de Hampstead Hill*, is good. *Parker v. Harris*, 4 Mod. 76.

8. Declaration that the defendant *ex malitia, sua apud S in com. N procuravit informationem perjuri exhiberi* against the plaintiff, *apud W in com. M*, is a good laying of the venue in S. *Phillip v. Kebison*, 1 Ld. Raym. 105.

9. Venue laid at Leek, without saying in the county aforesaid, held good. *Spencer v. Milward*, 1 Barnes, 342.

10.* In transitory actions a venue is never laid in the parish, except in London. *Powel* q. t. v. *Weekes*, 2 Show. 247.

11. Norfolk in the margin, venue laid at Norwich, held good; for the county in the margin will help, but not hurt. *House v. Haleswood*, 1 Barnes, 345, 346, 347.

12. It is necessary to show in what county a vill lies. *Rex v. Griepie*, 1 Ld. Raym. 258.

13. In indictments and captions, it is enough to allege the *locus in quo* to be in the county aforesaid; but to mention the place only, without adding "in the county aforesaid," is not. 1 Saund. 308 a.

14. A release cannot be pleaded as made in another county, unless it be dated there. *Errington v. Thompson*, 1 Ld. Raym. 184.

15. The defendant is bound to follow plaintiff, unless his justification is local. 1 Saund. 84 a. n. (1). 2 Saund. 5 b.

16. When the justification is local, the place laid in declaration must be traversed. 1 Saund. 85.

VI. WANT OF VENUE, OR WRONG VENUE, HOW TAKEN ADVANTAGE OF, AND HOW AIDED.

1. The venue for the gist of the action shall be intended in the proper county. *Rex Griepie*, 1 Ld. Raym. 258.

2. The county being in the margin will supply the want of it in the declaration. *Shelley v. Wright*, Com. 563.

3. Want of proper venue is no good cause of challenge to the array. *Rex v. Warden of the Fleet*, Holt, 134.

4. Want of a venue is aided by pleading over. *Purflow v. Bailey*, 2 Ld. Raym. 1040.

5. The want of a venue in the declaration is cured where the defendant confesses the fact. *Pope v. St. Leger*, Holt, 551.

6. Want of venue in a replication is ill upon a general demurrer. *Ellis v. Ellis*, 1 Ld. Raym. 344.

7. The want of venue, or an ill venue, is aided after verdict by the statute 16 & 17 Car. 2. c. 8. *Skinner v. Ganton*, 1 Saund. 229. 241 d. 247. n. (3). 2 Saund. 5 d. 2 Ld. Raym. 1214.

8. Where an issue is local, and not tried in the right place, this is cured by the statute of jeofails. *Lady Caverly v. Sir J. Levins*, Carth. 448.

9. If a release be pleaded, but no venue laid, it cannot be amended after demurrer and joinder entered on the roll. *Anon.* 6 Mod. 84.

VII. RESPECTING CHANGING THE VENUE;—

(a) When the venue can be changed.

1. The venue (in the Common Pleas) may be changed in all actions in their nature transitory, except in case of privilege, specialty, promissory note, or bill of exchange. *Jeremias v. Ridley*, 2 Barnes, 389. *Bradley v. Adey*, 2 Ib. 390.

2. The practice of changing venue in transitory actions began in King James the First's time. *Salk.* 670.

3. The venue may be changed in an action upon a policy of insurance, unless the policy be a deed. *Say.* 7.

4. The venue may be changed in actions on notes in K. B., otherwise in C. B. *Hallcroft v. Colliest*, Andr. 65. 2 Barnes, 390. *Say.* 1.

5. The changing a venue is *ex gratia caria*, and not *ex debito justitiae*. *Thompson v. Scroggs*, 2 Show. 177.

6. The venue may be changed in an action *qui tam*. *Dovey* q. t. v. *Powel*, C. T. Hardw. 165.

7. The venue may be changed though the plaintiff be an attorney, if he sue by *capias*. *Welland v. Fumecall*, Ca. Prac. C. P. 132.

8. The venue in an action against an attorney need not be laid in Middlesex. *Cooper v. Mills*, 1 Barnes, 344.

9. In transitory actions, if an attorney be defendant, he may change the venue to Middlesex. *Holliday v. Burgess*, Andr. 381. *Wigley v. Morgan*, C. T. Hardw. 285. *Str.* 1049. *S. C.* *Seaman v. Ling*, 2 Salk. 668.

10. So, of a counsel. *Holliday v. Burgess*, Andr. 381. 2 Salk. 668.

11. The venue may be changed from Middlesex on the usual affidavit where a serjeant is plaintiff, if he sues by original, or otherwise than by writ of privilege. *Gudler v. Matthews*, Ca. Prac. C. P. 145. 1 Barnes, 346. *S. C.*

12.* The court will change the venue in an action of conspiracy, if it appear that the plaintiff's interest with the sheriffs of the county in which it is laid is so powerful that an impartial trial is not likely to be had. *Earl of Shaftesbury v. Graham*, 2 Show. 198.

13. The court will change the venue in an indictment for not repairing a county bridge, on a suggestion that the whole county is interested. *Rex v. Mills*, 6 Mod. 307.

14. That the cause cannot be impartially tried in the proper county, is a good cause for changing the venue. *Salk.* 669. n. 1 Vent. 365.

15. The venue was changed from London to Middlesex on the application of the plaintiff, because one of his witnesses was a Jew, and all the sittings in London were on a Saturday. 2 Mod. 272.

16. If a defendant remove a cause from an inferior court, and the plaintiff declare in the court above, the venue may be changed, on the ground that assizes were not held when the action was brought. *Brown's case*, 1 Mod. 118.

17. Upon an affidavit, that if the words were spoken it was at Lancaster, as the court could not order a trial there, the venue was changed to the next county. *Anon.* 12 Mod. 313.

18. In covenant on a lease dated at York, of lands in Berwick, and issue joined on a breach assigned in Berwick, the plaintiff, on a suggestion that Berwick is in Scotland, may change the venue to the next adjoining English county. *Jackson v. Mayor of Berwick*, 1 Mod. 36, 37.

19. An action on the case for forging a will being brought in Middlesex, where the land comprised in it lay in Suffolk, the venue on motion was changed to Suffolk. *French v. Kent*, T. Raym. 33.

20. The venue may be changed in an action for an escape. *Prac. Ca. K. B.* 252. 255. *Wright v. Martin*, Style 107.

21. The venue was allowed to be changed from Middlesex to Monmouthshire, in an action against the late sheriff, but the jury process was to be returned by the coroners, the under-sheriff having been under-sheriff to defendant. *Davies v. Perry*, Barnes, Supp. 60.

22. Venue may be changed from a county to London, though not from a county to any other city or town, though a county of itself. *Biddolph v. Browne*, Ca. Prac. C. P. 41. *Bickley v. Mackerell*, 1 Barnes, 341.

(b) *When not.*

1. The venue will not be changed in Common Pleas in an action on a bill or promissory note. *Weir v. Colclough*, Ca. Prac. C. P. 119. 1 Barnes, 341. S. C. Ib. 345. 349. *Mangir v. Hinds*, Ib. 351. *Anon.* 11 Mod. 52. Ib. 52. n.

2. The venue is never to be changed in case of specialties. *Hollcroft v. Golewest*, Andr. 66. *Robin's case*, 11 Mod. 360. *Bradley v. Adey*, 2 Barnes, 390.

3. The venue is not changeable in an action of covenant. *Taylor v. Becket*, Prac. Ca. K. B. 189. 1 Lev. 307. S. C. *Anon.* 12 Mod. 648.

4. Nor in debt. *Anon.* 12 Mod. 579. *Duplessis v. Jennings*, 2 Stra. 878.

5. The venue cannot be changed in an information. *Rex v. Barton*, Say. 147. 2 Stra. 911. S. C.

6. The venue will not be changed in an action on a penal statute. *Anon.* 1 Sid. 287.

7. In action of debt on statute of usury, the venue was refused to be altered. *Winne v. —*, Prac. Ca. K. B. 253. 255.

8. An action for escape is out of the rule for changing the venue. *Anon.* 12 Mod. 204.

9. So, in case for false return, it cannot be changed without consent of the plaintiff. *Rex v. Mayor of Oxford*, Salk. 669.

10. Nor in *scire facias* upon judgment in ejectment. *Foeter v. Burden*, 11 Mod. 263.

11. Nor in *scandalum magnatum*. *Count of Handford v. Nedham*, 1 Lev. 56. *Lord Griffin v. Bugby*, Ca. Prac. C. P. 132. 1 Barnes, 343. S. C. *Duke of Norfolk v. Alderton*, 2 Salk. 668. 12 Mod. 131. S. C. *Marquis of Dorchester's case*, 2 Mod. 216. *Duke of Buckingham v. Rutland*, 2 Show. 303.

12. Unless upon a special affidavit of extraordinary cause. *Bishop of Bath v. * Bridges*, 12 Mod. 401. 2 [*1480] Show. 303. 12 Mod. 121. *Richmond v. Duke of Castelera*, 11 Mod. 234.

13. As if justice cannot probably be had by reason of the great influence of the parties in the place where the action is laid. *Lord Shaftesbury's case*, 2 Mod. 217. *notis.*

14. The venue will not be changed into a county palatine. *Herbert v. Shaw*, Ca. Prac. C. P. 129. 2 Stra. 807. *Richardson v. Walker*, 2 Barnes, 386.

15. Nor to a city. *Lane v. Newman*, Ca. Prac. C. P. 82. *Gardiner v. Forbes*, Ca. Prac. C. P. 36. *Cole v. Young*, 1 Barnes, 336. 343. *Anon.* 11 Mod. 288.

16. The venue cannot be changed from an English to a Welsh county. *Watkins v. Hybert*, Say. 48.

17. If a cause arise in Wales, the venue cannot be changed from one English county to another. *Moore v. Fernyhough*, 2 Stra. 1258.

18. The venue will not be changed so as to lose an assize. *Howarth v. Willett*, 2 Stra. 1180.

19. Nor into a county where the assizes are held but once a year. *Crastell v. Cocker*, Ca. Prac. C. P. 129.

20. The venue was refused to be changed from London into Kent, upon an affidavit that the cause of action accrued within the city of Canterbury. *Davis v. Gordon*, 2 Barnes, 387.

21. Motion in Hilary term on the usual affidavit to change the venue from Middlesex to Westmoreland, refused on account of delay, or to Yorkshire with consent. *Dale v. Stevenson*, C. T. Hardw. 210.

22. The venue refused to be changed from one county to another, where it was sworn that the cause of action arose in a third. *Bristo v. Tito*, C. T. Hardw. 135.

23. It will not be changed into a third county without consent. *Southouse v. Boak*, 2 Stra. 1216.

24. Where evidence necessary to support the action arises in two counties, the plaintiff may lay it in either, and the venue will not be changed. *Anon.* 2 Salk. 669. *Swaine's case*, 1 Sid. 405.

25. In *assumpsit*, if the declaration be delivered of Easter term, the court will not in Trinity term change the venue from Staffordshire to London upon the common affidavit, without an additional affidavit of the time when the declaration was delivered. *Crocket's case*, 6 Mod. 175.

26. When the venue is local, it cannot be changed by consent. *Kightly v. Bulky*, 2 Sid. 339.

27. A barrister plaintiff may lay his venue in Middlesex in transitory actions, and the court will not change it on the usual affidavits. *Wingfield's case*, 1 Mod. 64. *Thomp-*

son v. Sir William Scroggs, 2 Show. 177. *Burroughs v. Willis*, 2 Stra. 622. 2 Show. 242. S. P.

22. The clerk of the assize may lay his action in Middlesex and the venue shall not be changed. *Knight v. Barnaby*, 2 Ld. Raym. 1253. 2 Salk. 670, 671. S. C.

29. The venue cannot be changed upon the common affidavit in a cause wherein an attorney of this court is plaintiff. *Pilking-ton v. Hamlin*, Say. 153. 180.

30. An attorney's privilege does not extend to change the venue where he is defendant. *Mills v. Johnson*, Prac. Ca. C. P. 134.

31. Attorney not suing by attachment, or not declaring in person, has no privilege to change the venue. *Dent v. Lambert*, 1 Barnes, 338. *Welland v. Frument*, Ib. 339.

32. But if he sues as attorney, he may lay his action in Middlesex, even in assault, or where he pleases. *Dent v. Lambert*, 1 Barnes, 339. 352. *Holliday v. Burgess*, Andr. 361.

33. The privilege only extends to keep the venue in Middlesex in the case of a plaintiff, and that privilege continues, though both parties are attorneys in the county where the cause of action arose. Salk. 668 note.

34. A barrister or attorney joined with another, has no privilege to change the venue. *Townsend's case*, 8 Mod. 316. *Townsend v. Druppa*, 1 Stra. 610.

(c) *Of the motion for that purpose.*

1. The king may change the venue before appearance; but in the case of a subject, the venue cannot be changed till appearance entered. 1 Mod. 2.

2. The venue may be changed after an order for time to plead. *Rowley* [*1481] v. *Allen*, Willes, 318. Reg. Mich. 16 G. 2. *Ford v. Garner*, Say. 207. *Dennis v. Fletcher*, 2 Barnes, 387. *Contra, Ball v. Young*, Ca. Prac. C. P. 126. 1 Barnes, 337, 338. 342. 348.

3. But not where the defendant is under terms to plead issuably, and take short notice of trial at the first sittings in London or Middlesex. Willes, 318. n. (b.)

4. Formerly, it was never granted after rules for pleading were out. Salk. 668.

5. The motion to change may be made after time to perfect bail. *Newly v. Burton*, 1 Barnes, 344.

6. If the defendant has eight days in the term the declaration is delivered, he cannot move to change the venue the next term. *Asplin v. Gray*, 1 Stra. 211. Anon. Salk. 668.

7. The venue may be changed, though the motion for rule to show cause was not made till the last day of the last term, declaration being delivered so late, that defendant could not apply sooner. *Hayward v. Wells*, 2 Barnes, 387.

8. It may be changed after order for impleurment. *Blackstock v. Payne*, 1 Barnes, 350. Anon. Ca. Prac. C. P. 159.

9. The motion to change the venue must be made before trial. *Coslar v. Standen*, Ca. Prac. C. P. 112. *Carter v. Dormer*, Ca. Prac. C. P. 33.

10. But the venue may be changed after plea, where application was made before. *Lucas v. Rudd*, Ca. Prac. C. P. 136.

11. The venue was changed a second time by motion to amend the declaration. *Dogley v. Daniel*, W. Kely. 69.

12. The venue may be changed by an amendment after the defendant has pleaded. *Savery v. Serle*, Say. 150. 294.

13. The motion to discharge the rule for changing must be made before replication. *Dickinson v. Fisher*, 2 Stra. 858.

(d) *Of the affidavit to support or oppose the motion.*

1. The affidavit to change the venue must be, that the cause of action, &c., if any, &c., did arise, and not the promises in the declaration, &c., were made. *Cole v. Young*, 1 Barnes, 336.

2. The affidavit of one of several defendants is sufficient. *Box v. Read*, 1 Barnes, 343. Ca. Prac. C. P. 133. S. C.

3. It must be positive, and not as he believes. *Belshaw v. Porter*, 1 Barnes, 338.

4. On the motion, affidavit must be made of the time of the delivery of the declaration. Salk. 667. 670.

5. Affidavit, that if the words were spoken as in the declaration, they were spoken, &c., held bad; the words should be mentioned. *Castle v. Boucher*, 1 Barnes, 340.

6. Affidavit to hinder change of venue must be to give evidence of the matter in issue, where the action is laid. 12 Mod. 372.

7. The plaintiff must undertake to give material evidence where the action is laid; what is a compliance with the undertaking, see Salk. 699. note.

8. The delivery of a writ is material evidence, within the meaning of an undertaking to give material evidence, entered into upon the discharging of a rule to show cause why the venue should not be changed. *Griffith v. Walker*, Say. 56.

VERDICT.

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I. WHEN A SPECIAL VERDICT MAY BE FOUND.

1. In all pleas, as well of the crown as in common pleas, *viz.* actions real, personal, and mixed, and upon all issues joined, either between the king and the party, or between party and party, the jury may find the special matter, which is pertinent, and tends only to the issue joined; and upon the law of such matter they may pray the opinion of the court. *Dowman's case*, 9 Co. 7 b.

2. A special verdict may be found upon a special issue, though it was formerly otherwise. *Hob.* 203. 237. 2 Dy. 114. pl. 61. *Id.* 118. pl. 77. 3 Dy. 283. pl. 34. *Plow.* 93 a.

II. RELATIVE TO THE FORM AND CONSTRUCTION OF VERDICTS IN GENERAL.

1. The legal verdict of the jury is finding for the plaintiff on the defendant, and what they answer, if asked concerning some particular fact, is no part of their verdict. *Bushell's case*, *Vaugh.* 150.

2. If the jury, in a special verdict, find the issue, all that they find afterwards is surplusage. *Tontine v. Croker*, 2 *Ld. Raym.* 865.

3. When the verdict finds the fact, but concludes upon it contrary to law, the court shall reject the conclusion. *Needler v. The Bishop of Winchester*, *Hob.* 222.

4. A court roll being found by the jury in *hec verba* in a special verdict, a recital in that court roll is not part of the finding of the jury. *Skelton v. Bide*, *Orl. Bridg.* 401.

5. A verdict may be taken upon any part of the declaration to which the evidence is applicable. *Salk.* 135.

6. Where there are several issues, a general verdict ought not to be found, but a separate verdict upon each issue. *Rex v. Cocke-rell*, *Andr.* 262.

7. So, if some of the issues are immaterial. *Id. ibid.*

8. If there are several counts, and the verdict general, some damages must be intended to have been given on each count. 1 *Saund.* 246.

9. When the place is material, the jury cannot find the point in issue in any other place. *Dowdale's case*, 6 Co. 47 a.

10. Otherwise, where the place is named only for conformity and from necessity. *Id. ibid.*

11. On every general issue, the jury ought to find all local things in any other county which are material in law for the matters in question. *Id. ibid.*

12. A special verdict, finding nothing as

to one of the offences, is an acquittal of that offence. *Rex v. Heyes*, 2 *Str.* 845.

13. Whatsoever is found on a verdict, whereupon the court can give any judgment, must be positively found, not ambiguously. *Hitchins v. Bassett*, 1 *Show.* 539.

14. A verdict need not be so precise as a plea. *Chester v. Wellan*, 2 *Saund.* 97. *Wills v. Jermin*, *Cro. Eliz.* 167. *Plummer v. Whicohot*, *T. Jones*, 28. 61.

15. An act gave jurisdiction to the crown to name such commissioners as be natural born subjects; a special verdict need not find that the commissioners appointed were natural born subjects; but, if necessary, a finding that the crown appointed *secundum formam statuti predicti* is sufficient. *Caudrey v. Atton*, 5 Co. 1 a.

16. Where it was found in a special verdict, that such an one came to the town of M, to the usual place of holding the court of the manor, it was held it should be intended that the town is within the manor; for in special verdicts the law does not require such precise form as it requires in pleading. *Earl of Shrewsbury's case*, 9 Co. 46. b. *Yelv.* 208. 4 *Leon.* 245. 2 *Brownl.* 330. *S. C.*

17. The court will make any intendment that can be fairly made to support a verdict, rather than that it should be void. *Muston v. Yateman*, 10 *Mod.* 301. *Say.* 164. 168. *Orl. Bridg.* 558. *Thomasin v. Mackworth*, *Carter*, 80. 94. *Hemmings v. Brabason*, *Orl. Bridg.* 3.

18. Where words may be taken in a doubtful sense, they shall be taken in that which will support the verdict, &c. *Burges v. Bracher*, 8 *Mod.* 240.

19.* The court, in a special [*1483] verdict, will never doubt but of that only whereof the jurors have conceived a doubt. *Goodall's case*, 5 Co. 95. b. *Goldb.* 176. *Cro. Eliz.* 383. *Poph.* 99. *Jenk.* 261.

20. The jury having found, in a special verdict, that J. S. was the deputy of the grantee of an office, it shall be intended, that the deputy was made by deed as he ought to be. *Earl of Shrewsbury's case*, 9 Co. 46. b.

21. If the jury undertake to collect the contents of a deed, and also find the deed in *hec verba*, the court will regard the deed only. 2 *Saund.* 97 c. n. (3).

22. The jury find that the dean and chapter received the rent, it must be by law as by warrant of attorney, necessities must be supposed. *Dean and Chapter of Westminster's case*, *Carter*, 16.

23. And objection made to a verdict, that it was repugnant, in first finding that a plaint was entered of record in these words, 17 November, and then in finding that the entry of record was made 19th November, was disallowed; for it must be taken, that

the plaintiff was entered of record before the arrest. *Mackalley's case*, 9 Co. 65 b.

24. A recital in an indenture found by a verdict is evidence of the fact so recited. *Hemmings v. Brabason*, Ori. Bridg. 558.

25. The court will not intend that a thing which is not alleged in the declaration was proved, because there was no necessity of proving such thing. *Rex v. Alderton*, Say. 282.

26. Where in *quo warranto* for acting as mayor, it is found, that he was elected by A B, acting as mayor, &c., it is to be intended that A B was lawful mayor, especially as his right was not controverted. *Rex v. Castle*, Andr. 119. 172.

27. So, where in *quo warranto*, for acting as a burgess, the jury find a nomination only, and not a swearing and election, the defendant cannot have judgment. *Rex v. Lisle*, Andr. 173. 174.

III. WHEN A VERDICT IS GOOD.

1. A verdict as general as the plea is good, and not void for uncertainty. *Taylor v. Willes*, Cro. Car. 219.

2. Where the jury find the substance, though they vary in the circumstance, yet it is good. March, 9. pl. 25.

3. A jury may find matter of record, notwithstanding the old books. *Needler v. Bishop of Winchester*, Hob. 227.

4. Upon an indictment of murder, the jury may find that he killed him in his own defence. Plow. 101.

5. Where in *quo warranto* it appears that John P was mayor, and afterwards it is stated that defendant was sworn before "the said James P," this is well enough. *Rex v. Castle*, Andr. 123.

6. A verdict finds damages 20*l*. (to be paid in such a commodity, if by law it may be), it is a good verdict for the damages found, and void for the residue. Cro. Car. 219.

7. A jury may give a verdict upon their own knowledge. *Rex v. Perkins*, Holt, 404.

8. A negative need not be found in a special verdict, except where it is necessary to show that a person or thing does not come within a particular exception. *The Mayor, &c. of Nottingham v. Lambert*, Willes, 117.

9. A special verdict finds that executors received rent reserved to the testator *his heirs and assigns*, and so *issint assets*; it was held that the *so* was void, and the heir entitled. 3 Dy. 362. pl. 15.

10. The issue being upon a custom to demise copyhold land in fee-simple, tail, or for life, the jury find the custom to demise in fee, or for life, but not in tail; still it is good. Mo. 359.

11. Where the declaration in ejectment is for all the land, there may be a verdict for a part. 1 Sid. 229. *Contra*, Yelv. 114.

12. So, on a declaration for a trespass in

one acre, a verdict found in half the acre is good. *Winkworth v. Man*, Yelv. 114.

13. On an indictment for a riot and an assault, a verdict finding the defendant guilty of the assault, and acquitting of the riot, is good. *Rex v. Hennings*, 2 Show. 93.

14. Indictment of trespass, forging, and publishing a libel; defendant is found guilty of the trespass and forgery, saying nothing to the publication, yet it is good; for it is implied in the word trespass, and is the same thing in substance' [*1484] though not in words. *Rex v. Newton*, 2 Lev. 111.

15. Where a person has power to lease, reserving the most accustomable rent for twenty years before, a verdict finding a lease rendering the customary rent, is sufficient. *Heydon's case*, 3 Co. 9 a.

16. In an action on the case, if a verdict be for 400*l*., judgment for 300*l*. is good, although no *eat sine die* be entered. *Holton v. Croft*, 2 Show. 93.

17. A verdict, for the finding of which the jurors voted, is good. *Lawrence v. Beswell*, Say. 100.

18. A verdict, for the finding of which there was sufficient evidence, is good, although improper evidence was admitted. *Maxwell v. Sharp*, Say. 190.

19. A verdict is good, though jurors eat, so as it be not at the expence of him for whom the verdict is given. 1 And. 183, 184.

20. If the jury eat and drink at their own costs by the leave of the court, it does not make the verdict void. Mo. 33.

21. Verdict finding the issue precisely for the plaintiff or defendant, and new matter contrary to it, is good according to the issue, and void for the surplusage found. Cro. Car. 130, 131. 198. 212. *Staple v. Heydon*, 6 Mod. 4. 3 Leon. 112. *Hinks v. Clerk*, 2 Lev. 253. 3 Dy. 106. pl. 20.

22. A verdict which finds matter in substance for the plaintiff, though it vary from the issue in an immaterial point, is good. 1 And. 258.

23. On an issue that the freemen and inhabitants of ancient messuages have by custom a right of common *modo et forma*, and also that the freemen had a right of common for an additional number, is good, for the latter finding shall be rejected as surplusage. *Hinks v. Clarke*, 2 Show. 78.

24. In case, and *non-assumpsit* pleaded, if the jury find "*non assumpsit*, nevertheless if A swear true, as we think he does, then we find that he did assume," and refer it to the court; this is a perfect verdict, and the last part void, because not expressly found. 3 Dy. 372. pl. 7.

25. If the title of a verdict contains more than is found by the verdict, it is but surplusage, and shall not hurt the verdict. *Greene v. Cole*, 2 Saund. 255.

26. On an indictment at the assizes, and

not guilty pleaded, removed into B. R., where issue was joined by Sir T. F. coronator, &c., the verdict that the defendant was guilty *modo et forma prout præd.* Sir T. F. *versus eum queritur* adjudged good, and *modo et forma*, &c. mere surplusage. *Res v. Urym*, 2 Saund. 308.

27. Where in trespass plaintiff declares that defendant beat and imprisoned him for a long time, *scilicet* for twenty-five weeks then next (which extends beyond the bringing the action), and he gets a verdict in which entire damages are given, this is well enough, what comes under the *scilicet* being to be rejected; otherwise, if it had not been under a *scilicet*. *Webb v. Turner*, Andr. 250.

28. The jury may find a deed or a will, the contents thereof being proved by witnesses; but if they will collect the contents of the deed, and by the same verdict find the deed in *hæc verba*, the court is not to adjudge upon their collection, but the deed itself. *Rowe v. Huntington*, Vaugh. 77.

29. If the jury find the matter of fact at large, and further conclude against law, the verdict finding the matter of fact is good, and the conclusion void. Plow. 114. 2 Dy. 106. pl. 26.

30. If the counterpart of an ancient deed be admitted in evidence, a special verdict finding the original deed, and concluding "*prout* by the counterpart it did appear," is good. *Anon.* 6 Mod. 225.

31. If the jury find the issue for the plaintiff, and find other matter not put in issue, though it destroys the plaintiff's title, yet he shall have judgment. 1 Leon. 66, 67, 68. 3 Leon. 80, 81.

32. When a prescription for a seat in a church is found by a verdict, the repairing, which is only a circumstance requisite to support the prescription, is of necessity included. *Stedman v. Hay*, Com. 366.

33. The taxing of costs by the jury, where costs are not recoverable, will not hurt the verdict as to the residue. *Greene v. Cole*, 2 Saund. 257.

34. The issue was, whether the plaintiff were taken upon a *copias ad satisfaciendum*; and found not taken upon that writ, but upon another, held good. Mo. 858.

[*1485] 35. If the jury find the particular wastes the verdict is good, although they say in the beginning of the verdict that the defendant *fecit vastum et venditionem*, &c., yet do not find any particular sale. *Greene v. Cole*, 2 Saund. 255.

36. Where a jury finds a matter according to law, but not according to the precise matter in the issue, it is good. *Fabian v. Winston*, Cro. Eliz. 209.

37. Where a verdict found words spoken of the plaintiff, as brother of the defendant, it is sufficient, though there was no averment

in the declaration that he was his brother. *Castle v. Bailey*, Com. 528.

38. If in trespass for disturbance of common apurtenant to an hundred acres, the jury find common for fifty only, it is well enough for the plaintiff. Palm. 269.

39. In replevin, the plaintiff in bar of the avowry entitled himself by custom to have common of pasture, &c., which custom was traversed and found for him; but that every commoner used to pay for the same a hen and five eggs annually; held the plaintiff on this verdict shall have judgment. *Gray v. Fletcher*, 5 Co. 78 b. Cro. Eliz. 405. S. C.

40. But if the jury had found that the plaintiff should have common, paying so many hens and eggs, the issue had been found against him. Id. *ibid.*

41. The issue was upon payment to the plaintiff the seventh day at such a place; the jury find specially an acceptance before the day at another place, and held good. Mo. 267.

42. In trespass, a verdict which finds the tenure in substance is good; *aliter*, in replevin. *Goodman v. Aylin*, Yelv. 148.

43. In debt for rent on a lease of copyhold and freehold lands, if the defendant plead eviction from all the lands in bar, and the plaintiff reply that another person was seised of the freehold, and traverse the seisin alleged in the plea, it is a general verdict, for the plaintiff is good. *Randal v. Breese*, 2 Show. 399.

44. A special verdict in *assumpsit* for the profits of a patent office, finding that the defendant had received the profits for seven years, is good, although it appear that the patent was only two years old. *Arris v. Stukeley*, 2 Mod. 263.

45. In an action of debt for 110*l.* upon the statute of 21 H. 8. for taking of farms, the issue was *non debet*, and the jury said *debet* 30*l.*, without showing for which farm, or which month, yet held good. *Eleis v. Archbishop of York*, Hob. 318.

46. In debt on bond for performance of covenants; breach that he cut down twenty oaks; plea that he did not cut down twenty oaks, or any of them; a verdict that he cut ten will support the declaration. *Teril v. Dune*, 2 Dy. 115. pl. 67.

47. Where an alienation supposed in fee is found but for life, it is good. *Gresham v. Barring*, Cro. Eliz. 506.

48. Obligation with a condition to pay upon the thirty-first of September; payment is pleaded to be at that day, and the verdict finds there was no payment the said thirty-first of September; yet a good verdict. *Purcase v. Jegon*, Cro. Car. 78.

49. An information was brought and laid in Devonshire, and the trial there, and yet the jury gave a privy verdict in the county of the city of Exeter, which was held good by the court, because the custom has always

been to give the verdict in that place. *Res v. Taddingham*, T. Raym. 193.

50. Where the jury give a privy verdict at night, and on the morrow give an open verdict in court, contrary to their privy verdict, the open verdict shall be good, and the first void. 2 Dy. 909. pl. 21. Mo. 33. S. P.

51. Trespass in three acres; the jury find in open court as to one for the plaintiff, for defendant as to another, but not agreeing as to the third, were sent back, and at night gave a privy verdict for the plaintiff in all; yet in the morning they affirm it for the third only, without noticing the alteration of the first verdict, yet the plaintiff had judgment for all. 2 Dy. 204. pl. 3.

52. A verdict that the church is void *per tempus semestris*, although it finds not the time of the avoidance, is good. Cro. Car. 343.

[*1486] IV.* WHEN A VERDICT IS VOID.

1. If the jury find what is no part of the issue, it is a void finding. *Muston v. Yateman*, 10 Mod. 300.

2. A verdict not directly to the point in issue is bad. 2 And. 189. Mo. 447.

3. A verdict which finds not for one or other certainly is not good, but there must be trial *de novo*. 1 And. 13, 14. 237.

4. A special verdict finding that a bankrupt bought and sold great quantities, &c., is faulty for the uncertainty. *Mayo v. Archer*, 1 Stra. 514.

5. In a general verdict, finding the point in issue by way of argument, although never so concluding, is not good. *Rowe v. Huntington*, Vaugh. 75. 187.

6. The issue was, whether a copyhold was grantable to three for the lives of two; the jury find that it is granted for three lives; this was argumentative only, and therefore a void verdict. *Rowe v. Huntington*, Vaugh. 87.

7. If jurors find matter which is not within their charge, and not pertinent to the issue joined, the court will disallow the verdict. *Dowman's case*, 9 Co. 14.

8. If the jury find a bargain and sale or a fine, and do not mention enrolment or proclamation, it shall not be intended. *Duncombe v. Wingfield*, Hob. 263.

9. The jury may give a verdict upon prescription; as, finding livery in respect of the long possession, &c.; but if they find the matter specially, the court cannot adjudge it a livery, &c. 1 Ro. 132.

10. A verdict that JS was seized jointly with another, does not warrant the issue that he was seized. Cro. Eliz. 306.

11. A verdict cannot be found contrary to the confession of the parties in pleading. Palm. 19.

12. If a jury do not find assets to a certain value, the verdict is insufficient; and a *verdict de novo* shall issue. 40 Edw. 3 pl. 13. 6 Mod. 3.

13. Where it is alleged that the jurors aforesaid to the truth of the premises (without adding "to speak," being elected, &c., this is erroneous. *The v. Adlam*, Andr. 160.

14. A verdict held void for evidence given to jury out of court. 1 And. 232, 233.

15. A special verdict finding a recognizance before the mayor and recorder, &c., without saying *secundum formam statuti*, &c., or *per scriptum obligatorium*, is void; and the recognizance shall be intended to be according to the statute. *Fulwood's case*, 4 Co. 64 b.

16. No privy verdict can be given in criminal causes which concern life, as felony, &c., because the jury are commanded to look upon the prisoner when they give their verdict; and so the prisoner is to be there present at the same time. *Res v. Taddingham*, T. Raym. 193.

17. But in criminal cases where the defendant is not to be personally present at the time of the verdict, a privy verdict may be given. Id. *ibid*.

18. Although the foreman deliver a verdict, yet, if the others do not assent, it is null and void, and they must deliver their verdict again. 1 And. 104.

19. In *assumpsit*, a verdict that the plaintiff has sustained damages by non-performance is not good. *Shelley v. Alsop*, Yelv. 77, 78.

20. Verdict on two *assumpsits*; if one be ill, the plaintiff cannot have judgment. *Walker v. Walker*, Comb. 303. 310. 2 Saund. 171 a.

21. In a writ *de valore maritaggi*, and issue taken upon the tenure, the jury assessed damages and costs, and did not inquire of the value of the marriage: held, the verdict is insufficient, and the omission cannot be supplied by a writ of inquiry of damages. *Cheyney's case*, 10 Co. 118 b.

22. Where, in *indebitatus assumpsit* brought in an inferior court for work and labour done, the issue is, whether the cause of action accrued within the jurisdiction, and the *venire* is whether defendant did promise *modo et forma predict.*, and the verdict is accordingly, this is bad. *Toe v. Adlam*, Andr. 160.

23. A verdict finding an *assumpsit modo et forma*, as alleged, without saying *prout* is erroneous. *Hollon v. Croft*, 2 Show. 93.

24. Where in debt on a covenant for paying 52*l.* 10*s.* per month, as long as a ship shall be out, the sum demanded is 500*l.*, and issue is joined on the payment of said monthly sum, and it is found that as to 357*l.* 11*s.*, defendant did not pay, and nothing is said as to residue of the 500*l.*, the verdict is ill. *Shepherd v. Hooker*, Andr. 156.

25. In an *ejectionis firme* the jury find the defendant guilty in *tanto minus mesuagii* in

occupationes, &c. quantum stat. super ripam, and not guilty for the residue; the verdict is void for the uncertainty. *Juzon v. Andrewes*, March, 97. pl. 100. 168. 172.

26. Where a man by lease, reciting a former lease to have been made, does demise for forty years after the expiration of that lease, paying the same rent as is mentioned in the recited lease, and only the lease for forty years and not the recited lease is found in the verdict, the verdict is void, and finds neither the one nor the other. *Rouse v. Huntington*, Vaugh. 74, 75, 76. 81, 82.

27. Where in *quo warranto* for usurping an office there are several issues, some of which are found for the defendant, yet if it appears on the whole he has no title, judgment must be against him. *Rex v. Cockrell*, Andr. 262.

28. Trespass for taking a tunick and a manteau, if the jury find the defendant guilty, *quoad* the tunick, and assign damages, but say nothing as to the manteau, it is ill; so, in debt for 7l. the jury find he owed 6l., but say nothing to the residue; all is ill, and discontinued. *Graves v. Morley*, 3 Lev. 55.

29. In trespass for entering a wharf, if the defendant plead a right of way over the wharf in certain stairs on the river Thames, and the plaintiff reply, that he had a more convenient way to the Thames than over the wharf, and issue is thereon joined, a verdict finding that he had no other way to the said stairs and Thames than through the said wharf, is insufficient; for though he had no other way to the stairs and Thames, he might have another way to the Thames. *Staple v. Haydon*, 6 Mod. 4.

30. A verdict which finds the wife guilty, and nothing as to the husband, is ill. *Drury v. Dennis*, Yelv. 106.

31. Where the defendant was charged with several trespasses, and found guilty as to one, and the jury find nothing as to the other, the verdict is ill. 3 Salk. 372. pl. 1.

32. The issue in trespass being whether it were the freehold of J B, and the verdict found it was the plaintiff's freehold for two parts, and of J B for the third part, and so a tenancy in common, the plaintiff could not have judgment. *Bingham v. Smeathwick*, Cro. Eliz. 457.

33. In an action of trover and conversion for taking away certain pots, and thirty pounds weight of pewter-pot metal, the special verdict finds that the plaintiff was possessed of the pots in the declaration, and so finds the special matter touching them; but they find nothing as to the thirty pounds weight of pewter-pot metal, neither finding the plaintiff possessed or not possessed, or the defendant guilty or not guilty of the conversion; this omission vitiates the verdict, although the conclusion is special, inasmuch as the conclusion is grounded on

the special matter which extends not to the metal; and this is not helped by the statute of 32 H. 8. c. 30. of jeofails: that statute, after issue tried, aids negligence or default of the parties, their counsel or attorneys, but not the verdict or fault of the jurors. *Beckman v. Maplesden*, Orl. Bridg. 60.

34. In waste, the finding generally that the defendant *fecit vastum vendition. et destructionem*, without finding the particular wastes, is ill and insufficient. *Greene v. Cole*, 2 Saund. 255.

V. OF SETTING ASIDE A VERDICT;—

(a) *For what cause a verdict may be set aside.*

1. A verdict was set aside where the jury cast lots how they should give it. *Phillips v. Fowler*, Com. 525. 1 Barnes, 325, 326. 8. C.

2. Though it was according to the evidence. *Hales v. Love*, 1 Stra. 642.

3. A verdict given by cross or pile was quashed. T. Jones, 83.

4. A verdict was quashed because the jury ate at plaintiff's cost. 2 Ro. 262.

5.* So, because a juror received money of the solicitor. 1 [*1488] Leon. 18.

6. A verdict was holden to be void, because the jury examined the witnesses apart. *Phillips v. Fowler*, Com. 527.

7. If a verdict is given on a juror's knowledge, he must be sworn thereto. 7 Mod. 2.

8. Verdict set aside, twenty-four jurors being returned on the *ven. fac.*, and forty-eight on the *hab. corp.* *Penrice v. Jackson*, Ca. Prac. C. P. 150.

9. Verdict set aside, one person having answered to another's name, and been sworn as a juror. *Norman v. Beaumont*, 2 Barnes, 362. 366.

10. If plaintiff amends his declaration without rule, having discovered a mistake in the declaration, and gets a verdict, court will set it aside. *Anon.* Prac. Ca. K. B. 159.

11. A verdict was set aside because the *placita* was made upon a wrong term. 1 Ld. Raym. 510.

12. Verdict set aside, no issue being joined. *Rye v. Crossman*, Ca. Prac. C. P. 102.

13. Where the plaintiff's cause of action is confessed, and the parties afterwards go to issue, which is found for defendant, the verdict shall be set aside and an inquiry awarded. *Broome v. Rice*, 2 Stra. 873.

14. If plaintiff has a verdict for more than he declares, it may be set aside. *Perceval v. Spencer*, Prac. Ca. K. B. 216.

(b) *For what not.*

1. If the jury eat and drink at their own costs after their departure from the bar, it does not avoid the verdict, but it is finable; but if they eat or drink at the costs of either party, and then give their verdict for him, this will avoid it. Dall. 16. Mo. 599. 1

Barnes, 324. 1 Leon. 132. 133. 3 Leon. 257.

2. Held, that a verdict once received cannot be avoided by alleging that the jury have eaten or drunk at the costs of either party. *Mo. 17.*

3. A verdict will not be set aside because some of the jury left the rest for some time. *Lord St. John v. Abbot*, 1 Barnes, 324, 325.

4. A juror challenged staying with the rest half an hour after their departure from the bar to consult upon their evidence, does not avoid the verdict. 2 Ro. 85.

5. If a juror deliver to his companions written evidence not delivered at the bar, nor given to him by either of the parties, it does not avoid the verdict. *Mo. 546.*

6. A verdict refused to be set aside on affidavit by two of the jurors that it was contrary to their intention, especially as it was not against evidence. *Palmer v. Crowle*, Andr. 382.

7. A verdict was refused to be set aside on the ground of a material variance, where the issue was entered of Trinity, and the record of nisi prius was of Easter, term. *Crofts v. Wilkins*, C. T. Hardw. 303.

8. A motion to set aside a verdict, because one of the juror's Christian name was Harry and not Henry, as in the panel, was denied. *Wrey v. Thorn*, 2 Barnes, 364.

9. If the verdict is objected to in point of law, it will not be set aside for variance. *Grave v. Cliffe*, 1 Barnes, 331.

10. Verdict being right in part, cannot be set aside though contrary to evidence; so in case of variance. 1 Barnes, 9. 317, 318. 333.

11. A verdict given on good evidence, and so certified by the judge, ought not to be set aside. *Rex v. John*, 8 Mod. 134, 135.

12. In trespass, not guilty to part, and a justification to part, merits (on justification) for plaintiff, and 5s. damages; no evidence on the not guilty; a general verdict will not be set aside. *Southerby v. Day*, 1 Barnes, 156, 157.

13. A verdict found in an inferior court is good, although twenty-four persons were returned upon the panel for the jury. *Say. 256.*

14. A verdict on *riens per descent*, that there were lands sufficient, but did not set out the value, held good. *Matthews v. Lee*, 1 Barnes, 329, 330.

15. Where the defendant is acquitted in any case on a criminal prosecution, it shall not be set aside. *Rex v. Jones*, 8 Mod. 208.

(c) *Of the motion for that purpose.*

1. After motion in arrest of judgment, a motion may be made to set aside the verdict for misbehaviour in the jury. [*1489] *Phillips v. Fowler*, Prac. Ca. C. P. 124.

2. But the new matter must be disclosed to him since the first motion, else it should

be moved in the first four days. S. C. 1 Barnes, 325, 326, 328.

VI. WHAT DEFECTS AND FAULTS ARE CURED BY VERDICT.

1. The want of an original is helped by verdict. *Anon.* 11 Mod. 2.

2. If a plaintiff in an inferior court be at the suit of C F generally, and the declaration be at the suit of C F executor, the variance is cured by the verdict. *Hale v. Clare*, 6 Mod. 150.

3. A verdict cures the want of a *distringas*, but not an ill *distringas*. *Bullock v. Parsons*, Holt, 496.

4. In trespass of assault and battery by husband and wife against husband and wife, a verdict finding the defendant's wife guilty, and *quoad residuum* not guilty, cures the declaration. *Hoket and Wife v. Stiddolph and Wife*, 2 Mod. 66.

5. Want of form does not hurt after verdict. 2 Ro. 433.

6. Uncertainty in the count or declaration is cured by verdict. *Roe v. Gatehouse*, Salk. 663. *Jocson v. Moor*, Con. 59.

7. A declaration in trover for ten pair of curtains and valons, is good after verdict. *Taylor v. Wells*, 1 Mod. 47.

8. So, a declaration in ejectment for corn-mills and a hundred acres of heath and furze generally, is good after verdict. 1 Mod. 90.

9. Recital in trespass cured by verdict. *Wilder v. Handy*, 7 Mod. 427. *Hail v. Douglas*, 489. *Warren v. Lapden*, 1 Barnes, 178.

10. It aids a fact alleged in a declaration at a day impossible, but not a day between the declaration and the verdict. *Blackall v. Heal*, Com. 12.

11. Want of averment of levancy and couchancy is ill on a general demurrer, but cured by verdict. *Cheade v. Miller*, 1 Lev. 196. 1 Vent. 165.

12. Want of an averment of the continuance of a life, is cured after verdict by statute 21 Jac. 1. c. 13. s. 2., and after judgment by confession, &c., by 4 Ann. c. 16. s. 2. 1 Saund. 235 b.

13. A declaration on a bill of exchange "my second and third not paid," is good after verdict, although it do not allege that they were not paid. *East v. Evington*, 7 Mod. 66.

14. *Assumpsit* upon an agreement, &c., and breach assigned that the defendant *non performavit agreementum predict.*; issue upon this joined, and a judgment in C. B. for the plaintiff, and a writ of error brought, and the breach said to be too general, but held good after a verdict. *Knight v. Keech*, Skin. 344.

15. Bond conditioned to pay 10*l.* upon a certain marriage, and issue taken that they were not married, and found for plaintiff; it will be intended after verdict that the 10*l.* was not paid. 1 Sid. 341.

16. An error in declaring in trespass in

the time of one king, and concluding against the peace of another, is cured by the verdict. *Day v. Musket*, 6 Mod. 80.

17. In an action for disturbance of common, claimed as appurtenant to lands, parcel of a manor, the omission of stating that the lands were held at the will of the lord, is cured by a verdict, for they shall then be intended copyhold lands. *Crowder v. Oldfield*, 6 Mod. 19.

18. *Indebitatus* for money received by the defendant for the plaintiff, for the use of the defendant, held good after verdict. *Palmer v. Staveley*, 1 Ld. Raym. 669. Com. 115. S. C.

19. A declaration by an administrator that administration was committed to him by A B, peculiar of C, in the cathedral of D, is good after verdict, without showing the authority of A B. *Mason v. Hanson*, 4 Mod. 133.

20. Trover brought by an administrator, who in pleading does not set forth administration rightly granted to him; this defect is helped by verdict. *Cheeseborough v. Linton*, Skin. 551.

21. The defendant sold cattle, affirming them to be his own, *ubi reuera* they were not, but it is not said that he affirmed them to be his own *sciens* the same to be the goods of another, or that he sold them *fraudulenter vel deceptivo*; yet good after verdict. *Cross v. Garnet*, 3 Mod. 261.

22. *Bis petitum* aided by verdict. *Fontleroy v. Aylmer*, 1 Ld. Raym. 241.
[*1490] 23.* A fault in the averment of non-payment is cured by verdict. *Elston v. Thorowood*, 1 Ld. Raym. 284.

24. In trover, the declaration was *de una longa mena cum plateis et abicis culinariis, Anglice*, a long table with shelves and dressers; moved in arrest of judgment, that this was uncertain; *non allocatur*, for after a verdict it shall be good, if by any possibility it may. *Cothurn v. England*, Skin. 289.

25. A verdict will aid a title defectively set forth, but not a defective title. *Salk*. 364. Ib. 664.

26. In case upon an agreement that the plaintiff was to buy for the defendant all the plumbs he could, &c., the plaintiff shows that he bought so many; the want of averring that they were all he could buy, is cured by verdict. *Anon*. 2 Ld. Raym. 1061.

27. A hundred was sued for a robbery, and though it did not appear that the fact in the declaration mentioned was done in the hundred, or that the robbery was in the highway, or done in the day-time, yet held good after a verdict. *Young v. Inhabitants of Totnam*, 3 Mod. 258.

28. In action on statute of hue and cry, when it is declared that the party went before S C secondary, without saying "then," this is helped by verdict. *Merrick v. Hundred of Osselstone*, Andr. 115.

29. Action on the case, &c. for negligently keeping his fire, &c., and that the defendant had kindled a fire in his close, which he *tam improvide et negligenter servavit*, but it burnt a close of heath of the plaintiff's; it was moved in arrest of judgment, that it does not appear to be done by the command of the master; adjudged for the plaintiff, for this being after a verdict, they are now upon the record, and it was matter of evidence whether it was his fire or not. *Turberwill v. Stamp*, Skin. 681.

30. It will aid a defective averment of the indorsement of a bill of exchange. *East v. Effington*, 2 Ld. Raym. 810.

31. Case for knowingly keeping a boar accustomed to bite animals, &c., is good after verdict. *Jenkins v. Turner*, 1 Ld. Raym. 110.

32. A promise to pay *quantum rationabiliter valeret*, instead of *valebant*, at the time of the promise, is good after verdict. *Bowyer v. Lenthall*, 3 Mod. 190.

33. It aids the omission of *contra pacem*. *Melwood v. Leach*, 1 Ld. Raym. 38.

34. Want of laying the time in the declaration aided by verdict in a court-baron. 1 Ld. Raym. 182.

35. Case for erecting a shed, and stopping the plaintiff's windows, *per quas lumen inferri consuevit et debuit*, good after verdict. *Rosewell v. Prior*, 1 Ld. Raym. 392.

36. Case for not delivering goods on or before a certain day, and that he was ready to receive at the day, but defendant did not deliver them; verdict for plaintiff; if delivery had been before the day, verdict had been for defendant, so cured by verdict. *Hammond v. Ouden*, 12 Mod. 421, 422.

37. Laying no particular time in trespass helped by verdict. *Wall v. Dukes*, 12 Mod. 105.

38. A verdict cures ambiguity, or an imperfect state of the plaintiff's title, but not an omission of what is the gist of the action. *Leveridge v. Hoskins*, 11 Mod. 237. n.

39. Verdict cures the defect of not stating title in a disturber in an action upon a promise to keep the plaintiff in quiet possession of a house. *Major v. Grigg*, 2 Mod. 213.

40. When a declaration will bear two constructions, and one will make it good and the other bad, the court after verdict will take it in the better sense. *Nesworthy v. Wyldeman*, 1 Mod. 42, 43.

41. A declaration is made good by verdict, which would have been ill upon special demurrer. *Hill v. Callop*, Holt, 544. 548.

42. A declaration in an action on the case for a way, was helped after a verdict, though the particular sort of way was not shown. *Warner v. Green*, Com. 114.

43. In an action for the use of a chariot for a year, the declaration was holden good after a verdict, though it does not aver that

the defendant had the use of the chariot for the year. *May v. King*, Com. 116.

44. It will be intended after verdict that toll is appurtenant to a manor. *Crispe v. Belwood*, 3 Lev. 425.

45.* In debt on bond dated 20th [*1491] March, to pay on the 28th March then next following, it shall be intended after verdict to be the current month. *Lister v. Stanly*, 1 Mod. 112.

46. A verdict cures the defect of not stating in what court a suit was commenced. *Smith v. Smith*, 1 Mod. 284.

47. A verdict cures the misrecital of the commencement of a particular statute. *Spring v. Bee*, 2 Mod. 241.

48. Case by assignee of commissioners of bankrupt, setting forth that the bankrupt recovered against the testator, and that goods of that value came to his hands, which he converted, not saying where, which would have been ill on demurrer, but well after verdict. *Turner v. Men*, 12 Mod. 306.

49. False Latin was held to be cured by a verdict. *Cambridge v. Lea*, 8 Mod. 380.

50. Where a grant of a thing is alleged, which in its own nature could not be granted otherwise than by deed, if the jury find the grant, it must be supposed evidence was given sufficient to prove the deed. *Muston v. Yate-man*, 10 Mod. 301.

51. A verdict cures the defect of not stating a special agreement. 6 Mod. 129.

52. An argumentative plea is not good, but is aided by verdict, or on a general demurrer. *Wall v. Fulwood*, Com. 130. 332. note.

53. A bad plea cannot be taken advantage of after issue thereon and verdict. 11 Mod. 2.

54. In covenant to repair, if the breach be assigned generally that he did not repair, a plea that he did repair is good after verdict. *Harman's case*, 2 Mod. 176.

55. If not guilty be pleaded instead of *non assumptit*, or *nil debet* for *nil detinet*, it is cured by verdict. 2 Saund. 319 a. *Marshall v. Gibbs*, C. T. Hardw. 173. *Howard v. Devonport*, Comb. 426.

56. So, a verdict therein *quod defendens indebitatus fuisse modo et forma*, held good after verdict, though informal. S. C. Comb. 426.

57. In debt on single bill, and *nil debet* pleaded, jury find *nil debet* to part, and *debet* the residue, held well after verdict. Salk. 364. 664.

58. *Non infregit conventionem* is good after verdict. 1 Sid. 289.

59. Payment after the day pleaded to a bond, is aided by verdict for the plaintiff. *Anon.* 1 Ld. Raym. 408.

60. To a justification of taking cattle as a distress for rent, the plaintiff replies that they were not levant and couchant; though this is an ill replication, yet, if the defendant takes issue upon it, and it is found against

him, the plaintiff shall have judgment. *Bel-lasis v. Burbricke*, 1 Ld. Raym. 170.

61. Trespass for beating and imprisoning his wife, &c.; the defendant justifies by warrant of the sheriff; the plaintiff replies *de injuria sua propria absque tali causa*, and issues upon it, and verdict for the plaintiff; and moved for a repleader, because *de injuria sua propria* is not a plea to matter of record, but held good enough after verdict. *Collins v. Walker*, T. Raym. 50.

62. Discontinuances in process or pleadings are helped after a verdict. 3 Salk. 130. *Ellery v. Hicks*, 4 Mod. 246. *Ayre v. Glessan*, Carter, 51.

63. A verdict helps every thing which is necessary to be proved upon the trial, and without which no verdict could have been given. *Blackall v. Heal*, Com. 12. note. *Palmer v. Staveley*, 12 Mod. 510.

64. If a declaration be for a trespass done on a day to come, it is cured by the verdict, because at the trial there must be evidence given of a fact done before the action brought. *Blackwell v. Eales*, 5 Mod. 286.

65. In trespass and taking fish from a free fishery, the omission of precisely stating that the fish was the plaintiff's property is cured by verdict. *Smith v. Kemp*, 4 Mod. 187.

66. So also the omission of showing a proper title in an action for disturbance of common. *Hill v. Gallop*, 4 Mod. 175.

67. Informal issue is cured by a verdict. *Cary v. Hinton*, 2 Stra. 973. 7 Mod. 213. S. C.

68. Where in an action against three, one pleads that himself and another are not guilty, upon which issue is joined, and verdict for the plaintiff, held that this is an informal, not an immaterial issue; *aliter*, *semble*, had the verdict been for the defendant. *Hill v. Fleming*, C. T. Hardw. 341.

69. In trespass, if the defendant justify* taking the cattle damage feasant as servant to and by the command of his master, and the plaintiff reply a license from the master, and traverse the command to the servant, the replication is double, and an issue on such a traverse is an immaterial issue; but these errors are aided by a verdict for the plaintiff. *George v. Kinch*, 7 Mod. 478.

70. The court refused to set aside the proceedings after a verdict, on the account of a mistake in inserting the word "London" in the copy of the declaration delivered, instead of the word "Middlesex." *Fox v. Cope*, Say. 154.

71. A trial in a wrong county is aided by verdict, and the statute 16 & 17 Car. 2. *Lord Calverley v. Leving*, 2 Comb. 472. *Sed vide* *Naylor v. Sharpless*, 2 Mod. 24.

VII. WHAT ARE NOT CURED.

1. A verdict will not help where the matter is not actionable, or where the party has taken a wrong remedy. 3 Salk. 30.

2. After verdict, nothing is to be presumed,

but what is either expressly stated in the declaration, or necessarily implied from those facts that are stated. 11 Mod. 257. n. *Spire v. Packer*, 6 Mod. 129 n.

3. The statute of jeoffails does not aid the want of alleging in the declaration that administration was granted, though after verdict for the plaintiff. *Lake v. Thacker*, T. Jones, 193.

4. In an action against the indorsee of a bill of exchange, if the plaintiff do not allege a demand and refusal of the acceptor at the day it was payable, it is error not cured by verdict. *Kuston v. Aspinall*, 7 Mod. 198.

5. If some of the counts in a declaration be bad, and entire damages given, the error is not cured by the verdict. *Smith v. Airey*, 6 Mod. 129.

6. If the breach of the condition of a bond be ill assigned, this fault will not be aided by the verdict. *Wotton v. Hele*, 2 Saund. 179.

7. A declaration for keeping a bull, which used to run at men, not saying *sciens* or *sci-enter*, held naught after verdict. Salk. 662.

8. Uncertainty in ejectment was held not to be cured by verdict. *Griffen v. Fawson*, 7 Mod. 457.

9. Where the writ contains more than is declared for, this is a variance not aided by the verdict, and judgment was arrested. 2 Vent. 153.

10. A verdict will not aid when the gist of the action is not laid in the declaration, though it will cure ambiguity. *Avery v. Hole*, 6 Mod. 129.

11. In covenant on a general warranty for quiet enjoyment, the defect in assigning a breach, that A, having lawful title entered, &c., without showing what title he had, is not cured by a verdict for the plaintiff in an issue on a plea protesting that A had not any lawful title, and affirming that he did not disturb the plaintiff. *Wootton v. Hele*, 1 Mod. 293.

12. If the gist of a plea be bad, it cannot be cured by verdict found for defendant. 2 Saund. 319 c.

13. In debt on bond made in London, if issue be joined on a plea that it was made in Middlesex, a verdict will not aid, for the issue is immaterial, and the 32 H. 8. c. 30. only cures informal issues. *Peck v. Hill*, 2 Mod. 137.

14. So, if in an action against an executor, issue be joined whether he had assets on a particular day, it is an immaterial issue, and not aided by a verdict. *Read v. Dawson*, 2 Mod. 139.

15. *Non assumpsit* pleaded in trover is not cured by verdict. *Noble v. Lancaster*, 1 Barnes, 321.

16. On an immaterial issue, the defendant shall plead again, even after a verdict for the plaintiff. *Anon.* Com. 148.

17. Where a jury are inveigled to give more damages than they ought, it is not

aided by verdict. *Ash v. Ash*, Comb. 357. 442.

VIII. CONSEQUENCE OF INSUFFICIENCY OF VERDICT.

1. If a special verdict on a will devising two different kinds of lands, omit to find the quantities of each kind, the court will award a *venire facias de novo*. 1 Mod. 101. *notis*.

2. If a verdict be insensible, there must be a *venire de novo*. *Monnington v. Davis*, Fort. 229.

3.* Where a jury has omitted to find a special matter of fact, the [*1493] court cannot make it good by indentment; there must be in such case a *venire de novo*. *Holland v. Fisher*, Orl. Bridg. 188. *Keat's* case, Skin. 667.

4. A verdict that finds but part of the matter in issue is ill, and a *venire facias de novo* shall go for the whole. *Rex v. Heyes*, 2 Ld. Raym. 1521.

5. In *assumpsit* to pay when requested, a promise to pay was found, but not when requested; held that plaintiff could not have judgment. Mo. 406.

6. Upon a special verdict, the judges will not adjudge upon matter, unless it is directly found. 2 Sid. 86.

7. The plaintiff shall not have judgment upon a verdict which falsifies the declaration. *Skinner v. Gunton*, 1 Saund. 230.

8. If a verdict do not find the whole that is in issue, no judgment can be given upon it. *Rex v. Simons*, Say. 36.

9. Where damages are given entire where they ought to be several, one may release the damages and take judgment. *Ryce v. Glossam*, Carter, 51.

10. A fault in a verdict to the advantage of the defendant cannot be assigned by him for error. 2 Saund. 456.

11. Although the issue is upon the tenure if the jury find for the plaintiff, and assess excessive damages, attain lies. *Cheyney's* case, 10 Co. 118 b.

12. When the court *ex officio* ought to inquire of any thing upon which no attain lies, the omission of it may be supplied by a writ of inquiry; but in all cases when any point is omitted whereof attain lies, it shall not be supplied by a writ of inquiries. *Id.* *ibid.*

IX. WHEN A VERDICT MAY BE AMENDED.

1. A verdict without issue joined may be amended. Cro. Jac. 502.

2. A special verdict was amended after error brought, and the record removed out of the Common Pleas. *Naiter v. Clarke*, T. Jones, 212.

3. Where the verdict and judgment disagree it is amendable. Cro. Jac. 632.

4. A verdict was amended by the notes of the clerk, and proof of the matter given in evidence by affidavit no paying costs. *Mays v. Archer*, 8 Mod. 49. 1 Stra. 514. S. C.

5. Even after judgment and writ of error

brought. 1 Ro. 82. *Vide contra, Mornington v. Try.* Cro. Eliz. 112.

6. There can be no amendment of a special verdict found of a felony. *Keate's case*, Skin. 667.

VERGE.

The court of the verge may try an indictment for murder committed within the limits of its jurisdiction. *Hollone v. Sir P. Lloyd*, 2 Show. 174.

VESTRY.

1. The majority of the parishioners at a vestry will bind the whole parish. *Newson v. Bawdry*, 7 Mod. 70. *Sloughton v. Reynolds*, Fort 172.

3. The right of adjournment is in the meeting at large. S. C. Fort, 170. 2 Stra. 1045.

3. A power of presiding does not infer a power of adjourning. S. C. Fort. 171.

3. A select vestry is legal. *Batson v. Sayer*, 2 Stra. 728.

4. In case for keeping one out of the vestry, the declaration must show he had a right to enter. *Phillybrown v. Ryland*, 8 Mod. 354. 1 Stra. 624. S. C.

VICAR AND VICARAGE.

1. All tithes of common right belong to the parson, therefore the vicar ought to show a title to tithes. *Grene v. Austin*, Yelv. 86.

2. Payment of tithes to the parson is a discharge against the vicar. Id. ibid.

3. He shall not have tithes of the parson's glebe, by the words in *minutis decimis totius parochias*; otherwise of an endowment by express words. *Blincot v. Barksdale*, Cro. Eliz. 578, 579.

4. Vicarages are endowed out of the rectory. 3 Salk. 378.

5. An endowment of a vicarage [*1494] of the* third part of the tithes of a manor was adjudged good, as well to the tithes of the demesnes as of the freeholds. Cro. Eliz. 462, 463.

6. Where a vicarage has had long continuance, it shall be presumed to have been endowed. *Crimes v. Smith*, 12 Co. 4.

7. A vicar can sue his parishioners to compel them to pay tithes. 2 Ro. 100.

8. The vicarage is derived from the parsonage. *Grene v. Austin*, Yelv. 86.

9. A vicarage is not lost for want of a presentation by the parson. Cro. Eliz. 873.

10. A vicarage may be dissolved three ways; 1st, by act of law, as by death; 2dly, by resignation; 3dly, by the ordinary. 2 Ro. 98.

11. It is not sufficient to allege seisin in fee of a rectory, and that he ought to present to the vicarage, but he must say, that he is impropriator, that he was seised in fee of a rectory impropriate. *Prince's case*, 3 Mod. 295.

12. No action will lie against the vicar-

general of a bishop for excommunicating a person, though the proceedings were erroneous, provided he has jurisdiction. 1 Saund. 75. n. [f].

[See ante, tit. DILAPIDATIONS, Vol. I. p. 594.]

VI ET ARMIS.

1. For what purpose inserted, see 1 Saund. 10. n. [m].

2. The insertion of the words "vi et armis" in an indictment of forgery is cured by 37 H. 8 c. 8. *Rex v. Marriott*, 2 Show. 5. 2 Lev. 221. 1 Sid. 140.

3. The omission of vi et armis when necessary is aided on a general demurrer, and also after. 1 Saund. 81. n. (1).

4. The denial of vi et armis will not preclude the defendant from the general reply at the trial, if the affirmative of the other issues lie on him. 1 Saund. 10. n. [a].

VIDELICET.

1. If what comes under a videlicet be impossible, or contrary or repugnant to the precedent matter, (or plaintiff's title), it is surplusage. 2 Saund. 291. 306. 1 Saund. 118. 169. 286 a. n. (12).

2. But if it is sensible and consistent, and not repugnant to the preceding matter, or if it be explanatory thereof, it may be traversed and must be proved. 2 Saund. 291.

2. So, where it is material and necessary to be alleged. 2 Saund. 291 a, b.

4. If it be material and be repugnant to the preceding matter, it vitiates the plea. 2 Saund. 291 c.

[See also ante, tit. PLEADING, div. IV. Vol. p. 1043].

VIEW.

1. A view is grantable only where the title is in question. Salk. 605.

2. A view being a dilatory proceeding is only to be granted in cases where it is necessary, and consequently it will not be granted, where it appears that the tenant knows what lands are demanded; nor where the tenant is in possession of no other lands in the vill than the demandant sues for. Willes, 347.

3. And in a counter-plea (to a prayer of view), it is not sufficient for the demandant to say, that the tenant is in actual possession of the lands demanded; he must add "and of no other lands in the same vill." Willes, 348.

4. But the tenant is entitled to a view, when he is in possession of more lands in the vill than those demanded. Willes, 347.

5. A view is grantable in *curia, claudenda*, but not after imparlance. Mo. 32.

6. A view is not necessary on *misdiſſet*, &c., in waste. Jenk. 225.

7. A rule for a view was granted on affidavit as to its utility. *Ellis v. South and others*, C. T. Hardw. 156.

8. In a criminal prosecution, a motion for

a view cannot be allowed without consent of parties. *Rez v. Redman*, 1 Keny. 384.

9. A view is never granted before appearance, unless in an assize. *Anon.* 1 Mod. 41.

10.* A view cannot be had [*1495] after a special impanelance. 2 Dy. 210. pl. 27.

11. A tenant, in a real action, may pray a view, either before or after the demandant has counted. *Davis v. Lees*, Willes, 344.

12. In dower against several defendants, if some confess the action, the others are not entitled to a view. 2 Dy. 179. pl. 41.

13. Before the view is granted the venire must be returned, and then the rule is, that so many of the panel shall view it, &c. *Anon.* Salk. 665.

14. In assize of the office of filazer, the post where he sits shall be put in view. 2 Dy. 114. pl. 63.

15. By 4 Ann. c. 16. the court may order it at some convenient time before trial, &c. 1 Mod. 41. *notis.*

16. If denied where it ought to be granted, it is error; *qu.* if so, when granted where it ought not. *Ashnel v. Ashnel*, 2 Lev. 117.

17. In assize the view of the jurors is never returned. *Greene v. Cole*, 2 Saund. 254.

18. If the officer returns that the jurors had the view, yet, if the contrary appears by examination on the trial, the return shall not conclude any of the parties. *Greene v. Cole*, 2 Saund. 265.

19. After verdict in assize, the party cannot allege that the jurors had not a view. Mo. 68.

VIII.

1. Parish, town, and vill, are to be intended to be the same, unless the contrary appears. 1 Ro. 27. Cro. Car. 182. 1 Ld. Raym. 22.

2. But said that it shall be intended, that a parish consists of more vills than one, unless the contrary is shown. *Geary v. Bearcroft*, 1 Ro. 22.

3. Two houses in an extra-parochial place are not enough to denote a vill. Between the *Parishes of Denham and Dalham in Suffolk*, 2 Stra. 1004. 1071.

4. Every vill must have a distinct constable, but if there are several vills in the same parish, and the constable of the parish belongs also to the vills, the whole forms but one vill. *Waldron v. Roscared*, 1 Mod. 78.

5. If a vill have no constable, it is but a hamlet. 12 Mod. 180.

6. If there are several tithings of Dale, Sale, and Downe, and a tithing-man to each of them, yet if the constable of Dale goes through all, they may go for several vills or one vill. *Green v. Proude*, 1 Mod. 117.

7. If the vill of D be named first, and afterwards the parish of D, with a *predictus*,

the parish and the vill shall be by indentment all one and co-extensive. Hob. 6.

VISITOR.

1. If a visitor be appointed by the founder of a college, and charities are given to that college afterwards, they are not subject to the controul of that visitor. *Rez v. Jennings*, 5 Mod. 420.

2. The appointment of a bishop without his christian name to be visitor, extends to his successors. *Bentley v. Bishop of Ely*, 2 Stra. 913.

3. The heirs of the founder are visitors of eleemosynary corporations, in default of appointment. *Phillips v. Bury*, 1 Ld. Raym. 8. Skin. 483. Holt, 724. S. C.

4. But not in ecclesiastical corporations. S. C. Skin. 495.

5. A visitor has power *eo nomine* to hear appeals. S. C. 4 Mod. 109. 1 Ld. Raym. 8. S. C.

6. A visitor may deprive without the concurrence of another person. S. C. 4 Mod. 110. 1 Ld. Raym. 58. Holt, 715. Skin. 449.

7. If a visitor has no authority by the founder to determine offences, yet it is incident to his office. *Rez v. Saint John's Cambridge*, 4 Mod. 238.

8. Royal foundations are not visitable by bishops. *Dean of Dublin v. Archbishop of Dublin*, Fort. 329.

9. The bishops can visit but once in three years. *Phillips v. Bury*, Skin. 478.

10. Though a visitor be, by the constitutions of the college, restrained from visiting *ex officio* above once in five years, yet he has a constant standing authority^a to hear complaints and redress [*1496] grievances. S. C. Skin. 478.

11. The visitor in his citation must pursue his authority. *Bentley v. Bishop of Ely*, 2 Stra. 913.

12. Where the visitor is disturbed and hindered, that cannot be called a visitation. *Phillips v. Bury*, Holt, 720, 721.

13. The power of a visitor cannot be controuled, because it is absolute. S. C. Holt, 722.

14. Corporation acts are examinable by the visitor. Fort. 299. *Bentley v. Bishop of Ely*, 2 Stra. 973. S. C.

15. The chancellor is visitor of all the king's free chapels, and of all colleges of the king's foundation. 1 Mod. 85.

16. In all eleemosynary corporations, there are visitors appointed either by the law or by the party. Id. *ibid.*

17. The founder and his heirs are visitors of lay corporations, and the bishops of spiritual corporations. *Parkinson's case*, Carth. 93. 3 Salk. 380.

18. Where they who are to have the charity are not incorporated, but trustees ap-

pointed for them, there arises no visitatorial power. *Phillips v. Bury*, Skin. 484.

19. Corporations for public government are not subject to visitors. S. C. 1 Ld. Raym. 8.

20. Corporations for private charity are subject to the founder and visitor. Id. *ibid*.

21. The visitors shall determine all that relates to persons that are of the foundation. *Rez and Reg. v. Saint John's College, Oxon.*, Holt. 437. Com. 238.

22. Where the crown has appointed a general visitor, it cannot afterwards enlarge his powers. *Bentley v. Bishop of Ely*, Fort. 300.

23. Contumacy is a good cause of deprivation. *Phillips v. Bury*, Skin. 489, 490. See Id. 447.

24. The visitor may punish one man for an act by him done jointly with others. *Bentley v. Bishop of Ely*, 2 Stra. 913.

25. Where a visitor has authority to deprive, and does deprive, the justice or sufficiency of his sentence as to the cause of it is not examinable in the common law courts. *Per Holt chief justice. Phillips v. Bury*, Skin. 489. 500. *See vide* Id. 503. 413.

26. A visitor has no power over a nominee till admitted to the foundation. *Rez v. Saint Johns, Oxford*, 4 Mod. 260.

27. No appeal lies from his sentence, for he is *fidei commissarius*, especially in the case of a fellow of a college, which is a thing of a private design, and does not concern the public. *Mr. Parkinson's case*, 3 Mod. 265.

28. His determinations are not examinable in any other courts. 1 Ld. Raym. 8. Skin. 13. 498. 513.

29. Where upon a *mandamus*, it is shown by the return, that there is a visitor, who has done an act, it is final, and the court is bound by it. *Phillips v. Bury*, Skin. 454. 468.

30. So also in a civil action. S. C. Skin. 488.

31. But from the sentence of one who is visitor as ordinary only, there lies an appeal, though not from the sentence of a visitor as patron. S. C. Skin. 485.

32. If the fellow of a college be deprived according to the statutes of the founder, the appeal must be to the visitor, and then to the delegates. 1 Mod. 85.

33. The court will not grant a *mandamus* to restore the fellow of a college who has been deprived by the visitor appointed by the founder. *Appleford's case*, 1 Mod. 82, 83.

34. When a visitation is made by the archbishop, all acts of the bishop are suspended by an inhibition. 3 Salk. 201.

35. The bishop of Ely being appointed visitor of the college of Saint John by the founder's statutes, has all the incidental powers of a general visitor, though some appeals are given to others, and a particular

time appointed for his visitations, and new fellowships having been endowed by a deed of covenants, in which a stipulation for the observance of the old statutes is contained, held that his jurisdiction extends equally to the fellows under such new foundation, though a remedy by distress is reserved to a chapter, in the event of the fellowship remaining vacant. *Master and Fellows of Saint John's College, Cambridge v. Toddington and the Bishop of Ely*, Keny. 441.

36. An appeal does not lie for the president of Magdalen college, Oxford, from a sentence of deprivation by the visitor. 2 Dy. 209. pl. 20.

37. Offences against the private statutes of a college are not pardoned by the act of grace. *Bentley v. Bishop of Ely*, 2 Stra. 912.

38. The college return, that they have a visitor, &c.; they need not specially return that the visitor has by the statutes power in the matter depending; for, by being visitor, he has power *eo nomine* to determine all matters that come as grievances before him. *Rez v. All Soul's College, Oxon.*, Skin. 13.

39. It need not appear upon the return, that the grievance was in the time of the present visitor, for he may determine a grievance in his predecessor's time. S. C. Skin. 13. [*See ante*, tit. MANDAMUS, div. I. (h). Vol. II. p. 922.]

VOUNTARY DEEDS.

1. A deed may be voluntary, and yet not fraudulent. 1 Mod. 119.

2. If a son be disoloute, and the father settle his fortune so as to prevent the son from spending all, though there be no consideration of money, yet it is not a fraudulent deed. Id.

3. If a consor of a judgment sells part of his lands, and makes a voluntary settlement of the other part, the lands so settled may be extended, and the party claiming by such voluntary settlement shall have contribution against the purchaser. W. Kely. 3.

VOUCHER.

1. The assignee of the assignee shall vouch and so also the heirs of the assignee, upon a warranty to one his heirs and assigns. *Spencer v. Clark*, 5 Co. 16 a.

2. If the tenant by courtesy come in as vouchee, he may have aid of him in the reversion. *Roll v. Osborn*, Hob. 21.

3. Where the father enfeoffs the son and heir with warranty and dies, the son in a *præcipe* against him may vouch the feoffor of his father, but he cannot vouch himself. Plow. 171.

4. Tenant in ancient demeane may vouch into the county, if the vouchee have nothing within the seigniority by which he can be summoned. 1 Dy. 69. pl. 35.

5. It may be by him who comes in as vouchee. *Roll v. Osborn*, Hob. 21.

6. In a *formedon* against *baron and feme*, she, received on default of her husband, may vouch another to warranty. 3 Dy. 298. pl. 28.

7. If a *feme covert* be tenant by receipt in *formedon*, it is no counter-plea that she has nothing but jointly with her husband. 3 Dy. 314. pl. 51.

8. In a writ of *cosinage* tenant in tail vouches himself. 1 And. 163.

9. The vouchee dying before he enters into the warranty, the tenant may vouch at large the son and heir, if of age. 1 Dy. 7. pl. 7.

10. That the tenant by receipt levied a fine to a stranger pending the writ, is no good counter-plea, for the demandant is estopped by his writ to say that he is not tenant. 3 Dy. 341. pl. 51.

11. No man shall vouch who is not privy to the estate; that is, who has not the same estate as well as the land to which the warranty was affixed. *Bole v. Horton*, Vaugh. 384.

12. In a *quod ei de forceat*, in the nature of a writ of entry in the *quibus*, in the nature of an assize of novel disseisin, wherein the tenant ought not to vouch, if the tenant vouches and demurs to the counter-plea of vouchee, and it be adjourned to another time, it is peremptory to the tenant, although the voucher was illegal. *Carewell v. Vaughan*, 2 Saund. 40, 41.

13. In *formedon*, the tenant vouches in C as son and heir of A, the son and heir of B; counter-plea, that B the grandfather, or any of his ancestors, never had, &c., is bad, without also counter-pleading the seisin of C himself, unless he were vouches as within age, and the parol prayed to demur. 3 Dy. 290. pl. 62.

14. Voucher cannot be by one parcener alone, after aid prayed of his fellow, if his fellow make default. *Roll v. Osborn*, Hob. 26.

15. When the vouchee enters generally into warranty, he shall warrant no [*1498] estate³ but that which the tenant has, unless in special cases. *Ib.* *ibid.*

16. A counter-plea of joint-tenancy of himself or his ancestors with J S, should expressly allege between which ancestor by name and J S, or that it is the vouchee himself, and that the joint-tenancy continues. 3 Dy. 341. pl. 51.

17. In *formedon*, the tenant vouching an infant as cousin and heir, must show how cousin. 1 Dy. 79. pl. 47.

18. When a man will be warranted by voucher, he must make it appear how the warranty extends to him. *Bole v. Horton*, Vaugh. 385.

19. He that counter-pleads voucher, shall

conclude to the county *et de hoc petit quod inquiratur per patriam*. Plow. 52.

20. Although the voucher be not counter-pleaded, but the demandant demurs to it, yet it is peremptory to the tenant if it be adjourned. *Carewell v. Vaughan*, 2 Saund. 41.

21. When two heirs are vouches, and the one has nothing, the other who has shall render the whole in value, although the warranty did not descend upon him alone. *Syme's case*, 8 Co. 52 a.

22. If the vouchee in *formedon* enter into the warranty as he who has nothing by descent without demanding the lien, issue that he has assets by descent is triable immediately, before the plaintiff counts against him. 3 Dy. 367. pl. 41.

23. A judgment upon it binds the land only from the time of the voucher. *Roll v. Osborn*, Hob. 23.

24. A vouches by entering into warranty becomes tenant to the demandant. Jenk. 100.

25. Where vouchee enters into the warranty, he is in of the same estate and interest as he was before to all intents and purposes. Plow. 7. See 1 And. 163.

26. Husband and wife being vouches shall be intended to be vouches in right of the wife. Plow. 103.

27. The vouchee may assign error between the demandant and tenant. Jenk. 69.

28. He shall be aided by a reversal by the tenant. *Ib.*

WAGER.

1. *Assumpsit* lies for a wager upon a foot race. *Field's case*, 2 Ro. 133.

2. In consideration that the plaintiff would give to the defendant 5s., the defendant promised to the plaintiff 40s. if ever he played at a game called Even and Odd, for money or wine, and avers he gave him 5s., and that the defendant played at the same game such a day, *unde actio accrevit*; held that the action lay. *Johnson v. Samworth*, T. Raym. 13.

3. A promise to pay 10l. if Charles Stewart should be king of England within six months, he being then in exile, was held good. *Andrews v. Herne*, 1 Lev. 33.

4. An *indebitatus assumpsit* will not lie for a wager. *Jackson v. Colegrave*, Carth. 338. *Walker v. Walker*, Holt, 328. *Contra*, *Eggleton v. Lewin*, 3 Lev. 118.

5. But it lies against a holder of the stakes on a wager won. *Walker v. Walker*, Comb. 303. Holt, 328.

WAGER OF LAW.

I. WHEN ALLOWED, p. 1498.

II. WHEN NOT, p. 1499.

III. MISCELLANEOUS, p. 1499.

I. WHEN ALLOWED.

1. In debt for an amercement in a court

baron the defendant can wage his law, but not in debt for a penalty. *Mo.* 276. *Woodroffe v. Wilgess*, T. Raym. 386. March, 15, pl. 35. 2 *Lev.* 106. *Mood v. Mayor of London*, 2 *Salk.* 683, 684.

2. So, in debt on an assignment by commissioners of bankrupts. *Cro. Jac.* 105. 2 *Lev.* 106.

3. It lies of money received by the hands of the plaintiff's wife. *Goodrich's case*, *Cro. Eliz.* 919.

4. In debt, it lies only where the contract is secret, and not where founded on any thing notorious. *Mood v. Mayor of London*, *Salk.* 683.

5.* In account, it lies where the [*1499] receipt was by the defendant of the plaintiff, but not where by or of a third person. *Mood v. Mayor of London*, *Salk.* 683. 12 *Mod.* 679. 8 *Mod.* 363.

6. But in detinue, it lies whether the receipt was of the plaintiff or of a stranger. *Mood v. Mayor of London*, *Salk.* 683.

7. In debt on an arbitrement, where the submission was by parol, the defendant may wage his law. *Id. ibid.*

8. If debt be brought against three, though two plead *ad patriam*, yet the other may wage his law. *Estrington v. Boucher*, *Hob.* 244, 245.

9. In debt upon a contract, where the contract was for a less sum than the plaintiff declared, or for two horses, where the plaintiff declared only for one, held, the defendant could wage his law without traversing the contract. *Mo.* 49.

II. WHEN NOT.

1. In inferior courts it is not allowed. *Cro. Car.* 112.

2. It does not lie in actions on the case. *Plow.* 182.

3. Upon an arbitrement, the defendant shall be ousted of waging his law, because a third person has notice of it. *Anon. Noy*, 96.

4. A man can never wage his law for a demand which is uncertain, because he cannot swear he paid that which consisted of damages only. *Edgcomb v. Dee*, *Vaugh.* 101.

5. In account by executors of a receipt by the hand of the testator, defendant cannot wage his law, because that is by other hands. 2 *Dy.* 183. pl. 60.

6. Secrecy is the ground of wager of law, and therefore it lies not for a bailiff in account. *Archer's case*, *Cro. Eliz.* 579. *Mo.* 468. *Page v. Barne*, 8 *Mod.* 303. *City of London v. Wood*, 12 *Mod.* 681.

7. To an information against the king's receiver for arrears of his account before auditors, he cannot wage his law. 2 *Dy.* 145. pl. 63.

8. It does not lie in debt for salary by one retained in husbandry. *Plow.* 122. *Mo.* 698.

9. Nor in debt for attorney's fees. *Mo.* 366.

10. And therefore debt lies against an executor for attorney's fees, because there the testator could not wage his law. *Edgcomb v. Dee*, *Vaugh.* 99.

11. It lies not in debt by a gaoler for meat and drink. *Mood v. Mayor of London*, 2 *Salk.* 683, 684. *Birke v. Walford*, *Cro. Eliz.* 818.

12. Nor in an action of debt, upon a prescription for a duty. 1 *Mod.* 121.

13. Nor in debt for scavage due by custom in London, confirmed by statute. *Mayor and Commonalty of London v. Deputies*, 2 *Lev.* 106.

14. Nor in debt on a bye-law, nor in any action where a wrong is supposed. *Mood v. Mayor of London*, 2 *Salk.* 683. *City of London v. Wood*, 12 *Mod.* 669. 677. 679.

15. Nor in debt for rent. *Mood v. Mayor of London*, 2 *Salk.* 683, 684.

16. It does not lie in detinue, where a charter concerning land is demanded. 2 *Ld. Raym.* 992.

III. MISCELLANEOUS.

1. It is in the discretion of the court whether they will permit the defendant to wage his law. 2 *Leon.* 110. 3 *Leon.* 212. 258.

2. In account, defendant having waged his law cannot afterwards waive it in part and confess the action as to that, but perform it for the residue; but he may waive the whole, and plead to the country. 3 *Dy.* 265. pl. 2.

3. Where wager of law is made instead of concluding to the country, the judgment is final. *City of London v. Wood*, 12 *Mod.* 676.

4. Wager of law in C. B. is with six compurgators. *City of London v. Vanacker*, 1 *Ld. Raym.* 500.

5. If in a joint action they wage law, and at the day given to come with good men to testify their credit, one fails to appear, the other shall not wage his law. *Noy*.

6. Plaintiff on bringing witnesses, and averring *Magna Charta*, may compel the defendant to wage his law. *City of London v. Wood*, 12 *Mod.* 679.

7. The plaintiff cannot be nonsuit if the defendant wage law the same term. 3 *Leon.* 28.

8.* An indictment of perjury [*1500] will not lie upon an oath in wagering law. 1 *Vent.* 296.

WAGES.

I. OF SEAMEN, p. 1500.

II. OF SERVANTS, p. 1500.

I. OF SEAMEN.

1. The wages of mariners are a duty at common law. *Hyde v. Partridge*, 3 *Salk.* 227.

2. The duty does not arise from the contract, but from the service done. 6 Mod. 26.

3. Freight is the mother of wages. *Anon.* 2 Show. 283.

4. Mariners lose their wages where the ship is lost or not unloaded. 1 Sid. 179. 236.

5. If a ship be lost, wages shall be paid in proportion to the money advanced for freight. *Anon.* 2 Show. 283.

6. A suit may be instituted in the court of admiralty for wages, although the ship had not sailed out of the river Thames at the time the wages became due. *Mills v. Gregory*, Say. 127.

7. Seamen employed in the river Thames in the outfit of a ship may sue in the admiralty for their wages, although from a disagreement between the owners, they are discharged while lying in the river, and although the voyage for which they were hired was never performed. *Osman v. Wells*, 11 Mod. 31.

8. If a mariner or ship-carpenter run away from the ship, he loses his wages. 1 Mod. 93.

9. The master of a ship may, by custom, deduct for damages from the seamen's wages. *Bellamy v. Russell*, 2 Show. 167.

10. The mariners are not prohibited from suing in the admiralty for their wages. *Clay v. Sadgrave*, Holt, 595.

11. Though the contract was made on land. *Anon.* Say. 137.

12. The mate or surgeon of a ship may sue in the court of admiralty for wages. *Ibid.*

13. On a libel for them, a special contract was suggested, but a prohibition to the admiralty denied. *The Mariner's case*, 8 Mod. 379.

14. But seamen cannot sue in the admiralty for wages, when the contract for them is by deed with unusual covenants. *Day v. Serle*, 7 Mod. 206.

15. Two or more sailors may join in a suit in the court of admiralty for their wages. *Mills v. Gregory*, Say. 127.

16. An action for seamen's wages must be commenced within six years. 2 Saund. 121 a.

17. A suit in the admiralty for seamen's wages must be brought within six years after the cause of action arises. *Hyde v. Partidge*, 11 Mod. 43.

18. But if the person entitled to such suit be at the time it accrues within age, a feme covert, *non compos mentis*, imprisoned, or beyond sea, he shall be at liberty to bring such action within six years after such disability has ceased. 11 Mod. 44. n.

19. The statute 21 Jac. 1. c. 16. does not extend to suits in the admiralty for seamen's wages. *Anon.* 11 Mod. 6.

II. OF SERVANTS.

1. The justices ought to certify the rates of servants' wages according to 5 El. c. 4. a.

15., though they continue them exactly as in the preceding year. 3 Dy. 265. pl. 3.

2. Justices of peace have only power to order the payment of the wages of statutable servants. 6 Mod. 91.

3. The 5 Eliz. c. 4. extends to covenant servants, if in husbandry. *Rez v. Cecil*, 11 Mod. 266.

4. Justices may order payment of wages by indulgence. *Shergold v. Holloway*, 2 Stra. 1002.

5. An order of justices made on the 5 Eliz. c. 4. to pay the wages of a person employed by an overseer of the king's work, in daily garden work in the garden at Hampton Court, is bad; for justices have only authority with respect to wages in husbandry, and it appears on the face of this order, that the party was a journeyman; but if an order be made for the payment of wages generally, the court will intend it to be for wages in husbandry. *Rez v. London*, 6 Mod. 264.

6.* Justices have power to make an order for wages, but [*1501] not for work done. *Rez v. Corbet*, 3 Salk. 261.

7. Justices could not formerly make an order on 5 Eliz. c. 4. for the payment of servant's wages on the oath of the servant. *Rez v. Cecil*, 11 Mod. 266. *Blake v. Dodemead*, 2 Ld. Raym. 1505.

8. But by 20 G. 2. c. 19., in cases within the act, the justices are empowered to examine the servant upon oath, and make an order thereon for the payment of wages; and by 31 G. 2. c. 11. s. 3., this power is extended to the cases of all servants in husbandry, though hired for less time than a year. 11 Mod. 267. n.

9. In an order for servant's wages, it ought to appear he was retained according to the statute. *Snape v. Douse*, Comb. 3.

10. And that the service related to husbandry. *Rez v. Helling*, 1 Stra. 8.

11. But if it does not appear what wages, it shall be intended husbandry. *Rez v. London*, Salk. 542. 484.

12. An order for the payment of so much money for work and labour, without saying "in husbandry," is bad. *Rez v. Corbet*, 6 Mod. 91. *Rez v. London*, Ib. 204. S. P.

13. An order to pay wages in husbandry and other monies shall be confirmed, if it appear upon examination that the other money was due for work in husbandry. *Blake v. Dodemead*, 2 Ld. Raym. 1505.

14. So, an order to pay 42s. for labour in husbandry, held good, though it does not appear to be such wages as the statute directs. *Rez v. Gouche*, 2 Salk. 441.

15. An order of justices to pay so much money for work and labour, without saying that it was for wages, is bad. *Rez v. Corbet*, 6 Mod. 91.

16. An order for the payment of so much

for work and labour in husbandry, is good. 6 Mod. 91. n.

WAIF.

1. If a man steals goods and bring them into a manor, and there leave them in a house, or in the custody of any one, or hides them, or leaves them in a place in order to take them at another time, and afterwards flies, these goods are not waif. *Foxley's case*, 5 Co. 109 a. Mo. 572.

2. Waif is where the felon in pursuit waives the goods, or from fear of being apprehended flies, and waives or leaves the goods. Id. *ibid*.

3. If the thief in his flight waive goods, they are forfeited, if the felon on fresh suit is not attained at the suit of the owner. *Foxley's case*, 5 Co. 109 a.

4. But the property of the goods waived remains in the owner, if he freshly pursue and convict the felons. 2 Leon. 192, 193.

5. The owner of a waif or estray may seize it, tendering satisfaction. *Harley v. Walsh*, 2 Salk. 686.

6. And in pleading he need not show the sum tendered. Id. *ibid*.

[See also *ante*, tit. ESTRAY, Vol. I. p. 625.]

WAIVER.

1. An executor cannot waive a term unless he renounce the whole executorship. 2 Vent. 209.

2. If demurrer or issue be joined upon the plea *pari darrein continuance*, this is a waiver of the first plea, if it went to issue; not so, if it were upon demurrer. *Stoer v. Gibson*, Hob. 81.

3. The king may waive a demurrer or issue, but not any other against the king without the attorney-general's consent. Cro. Car. 347.

4. A jointure limited by a use is waivable *in pais* after the death of the husband. Mo. 254.

5. Every ecclesiastical court must remit to the next, and cannot waive it for a higher. *Hutton's case*, Hob. 16. 186.

6. An acknowledgment or new promise within six years does not act as a waiver of the statute of limitations. 2 Saund. 64 a. n. [w].

[See *ante*, tit. REMITTER, div. III. Vol. II. p. 1167.]

[*1502] WALES.*

- I. OF WALES GENERALLY, p. 1502.
- II. OF THE COURTS OF GREAT SESSIONS IN WALES, p. 1503.
- III. OF THE COURT OF THE MARCHES OF WALES, p. 1503.

L. OF WALES GENERALLY.

1. Wales before the conquest of it by England was governed by its own laws. Vaugh. 399.

2. After the conquest of it by Edward the First, it was annexed to England *jure proprietatis*. Statute of Rutland, 12 Edw. 1. *Craw v. Ramsey*, Vaugh. 300.

3. It received laws from England as Ireland did, and differs nothing from it, but only in Ireland having a parliament. S. C. Vaugh. 300, 301.

4. It had a Chancery of its own, and was not bound by the law of England until 27 H. 8. S. C. Vaugh. 300. 301. 399, 400.

5. By that statute Wales was made part of the realm of England. *Draper v. Blaney*, T. Raym. 206.

6. Although Wales became the dominion of England from that time, yet the courts of England had nothing to do with the administration of justice there, in other manner than now they have with the Barbadoes, Jersey, &c., all which are of the dominions of England, and may be bound by laws made respectively for them by an English parliament. *Case of Process into Wales*, Vaugh. 400.

7. Since the act of 27 H. 8., the courts at Westminster have less jurisdiction in Wales than they had; for as they before had jurisdiction in all the lordship's marches, they now have it only in these four counties therein particularly mentioned, but none over the rest. Vaugh. 417.

8. The statutes of England are now in force in Wales. *Williams v. Gwyn*, 2 Saund. 43.

9. But the mere uniting and incorporating of Wales to England does not thereby make the laws used in England extend to Wales, without more express words. *Craw v. Ramsey*, Vaugh. 415.

10. The statute of 8 H. 6. c. 7. of the qualifications of knights to parliament was extended to Wales since the statute of 27 H. 8., by which Wales is united to England. *Berkley v. Rice*, Plow. 124.

11. Trials may be there made in some places by six jurors only. Cro. Car. 260.

12. Murders and felonies in any part of Wales may be tried in the next English county. *Rez v. Athoe*, 1 Stra. 553.

13. The summons of inhabitants in Wales, and the trial of an issue arising there in the next adjoining county was first ordained by parliament, and not at the common law. Vaugh. 404. 408. 412.

14. This ordinance extended not to all Wales, but only to the lordship's marches there; neither did it extend to the body of the principality of Wales to which the statute of Rutland only extended. Vaugh. 405. 408. 411, 412.

15. A *habeas corpus* will be granted of course to remove a prisoner from Wales to

an English county. *Rex v. Davis*, 2 Stra. 945.

16. A judgment given in Wales shall not be executed in England. *Vaugh*. 398.

17. A *certiorari* lies to Wales on indictments for misdemeanor. *Rex v. Lewis*, 2 Stra. 704.

18. A custom in Denbigh that a feme covert may, by surrender, alien her land there, is not abrogated by the 27 H. 8. c. 26. 3 Dy. 363. pl. 26.

19. If a seignory in Wales was to be tried, it should be tried by the common law, but if lands were held of the seignory, it should be tried within the manor. *Vaugh*. 407.

20. The exchequer in Wales is taken notice of as a court by the King's Bench. *Tregeny v. Fletche*, 1 Ld. Raym. 155.

21. Formerly no *feri facias*, *capias ad satisfaciendum*, or other judicial process, ran into Wales, but only an outlawry and an extent. *Vaugh*. 397. 412. 414.

22. A *latitall* or *capias* will now run into Wales. 2 Saund. 194.

23. But an original writ out of the Chancery here does not run in Wales. *Semb. Draper v. Blaney*, T. Raym. 206.

24. Since the 27 H. 8. c. 26., the provisions of 23 H. 6. c. 14. extend to Wales. 2 Dy. 113. pl. 57.

[*1503] 25.* By the statute of 1 Ed. 6. c. 10., the sheriffs of Wales ought to have their deputies in the courts at Westminster. *Draper v. Blaney*, T. Raym. 206.

26. After judgment in the courts of Wales, execution may issue out of the courts at Westminster, if the defendant's effects cannot be found within the jurisdiction. 1 Saund. 98. n. (2.) 2 Saund. 194.

27. The writs of *scire facias*, *capias ad satisfaciendum*, *feri facias*, and *elegit*, run into Wales on a judgment given in the courts at Westminster. *Whitrong v. Blaney*, 2 Mod. 10. 1 Lev. 291. *Draper v. Blaney*, T. Raym. 206.

28. A *capias ad satisfaciendum* shall go into Wales against bail upon a judgment recovered in the court of King's Bench against the principal. 2 Mod. 11.

29. By the statute of 34 & 35 H. 8. c. 26. all process for weighty causes shall be directed into Wales by the chancellor and council, which is intended the judges. *Draper v. Blaney*, T. Raym. 206.

30. Error lies from Wales to K. B. 2 Saund. 101 b.

31. A common recovery may be suffered upon it of lands in Wales. 2 Saund. 38 a.

32. In a suit in an ecclesiastical court in Wales for Welch words, the signification need not be averred. 1 Ld. Raym. 233.

II. OF THE COURTS OF GREAT SESSIONS IN WALES.

1. The court of K. B. takes judicial notice of the process of the great sessions in Wales, VOL. II.

and of the customs in Wales. *Peacock v. Bell*, 1 Saund 74.

2. Every day of the great sessions in Wales is as a several return. *Mellor v. Walker*, 2 Saund. 2.

3. They have jurisdiction to hold plea of lands not held of the king. *Cro. Car.* 172.

4. In an action there for slander, it is not necessary to aver that the hearers understood Welsh, if the slander were in that tongue. 1 Saund. 242 a.

5. It is not necessary to allege in a declaration that the cause of action arose within the jurisdiction. 1 Saund. 73. n. (1.)

6. A prohibition lies to the great sessions to stay a suit on a subpoena served out of the jurisdiction. *Vaughan v. Evans*, 1 Stra. 630.

7. An action on a *concessit solvere* lies there. 1 Saund. 68. n. (2.)

8. A *certiorari* lies to remove an indictment for murder from the grand sessions in Wales, and the court may direct it to be tried in the next English county. *Morris's case*, 1 Mod. 64. 68.

9. A *certiorari* to the grand sessions there is discretionary. *Gilb.* 160.

10. An indictment for riot may be removed from the grand sessions in Wales by *certiorari*. 2 Mod. 10 *notis*.

11. But if judgment be given in Wales, it cannot be removed into the Chancery by *certiorari*, and sent into the court of Common Pleas by *mittimus*, and then execution taken out on that judgment at Westminster. *Whitrong v. Blaney*, 2 Mod. 10.

12. A prohibition lies to the grand sessions for sequestering lands there on a process served in London. *Vaughan v. Evans*, 8 Mod. 374.

13. They may amend records, &c., by force of the statutes of 8 H. 6. c. 12., 8 H. 6. c. 15., and 27 H. 8. c. 26. *Williams v. Gwyn*, 2 Saund. 43.

III. OF THE COURT OF THE MARCHES OF WALES.

1. They have three powers; one for actions at common law, as debt and trespass, and there they cannot hold plea for more than 50l.; 2dly, cases of equity, and as to them there is no certainty; 3dly, of criminal cases. *Arnias v. Briggs*, 2 Ro. 308, 309. *Palm.* 364. S. C.

2. In debt brought there, the plaintiff ought to show the contract to be within the jurisdiction. *Brigg's case*, *Palm.* 364.

3. Trials and writs in England for lands in Wales were only for lordship's marches, and not for lands within the principality of Wales, for the lordship's marches were of the dominion of England, and held of the king in *capite* *Vide* statute 28 E. 3. c. 2. *Vaugh.* 411.

4. By the 26 H. 8. c. 6., power was given to the king's president and council in the

marches of Wales in several cases, as to indict, outlaw, and proceed against traitors, clippers of money,* murderers [*1504] and other felons within the lordship's marches of Wales, to be indicted in the adjoining county, but this did not extend to the principality of Wales. Vaugh. 413.

WARD.

Respecting ward and wardship, see *Hussey's case*, 9 Co. 71 b. 2 Brownl. 599. Hob. 93. 3 Bulstr. 275. 1 Ro. 448. Cro. Jac. 413. *Quick's case*, 9 Co. 129 a. *Myght's case*, 8 Co. 163 b. *Digby's case*, 8 Co. 165 b. *Hale's case*, 8 Co. 172 a. *Constable's case*, 8 Co. 173 a. *Gorge's case*, 6 Co. 22 a. *Lord Darcy's case*, 6 Co. 70 b. *Drury's case*, 6 Co. 73 a. *Bingham's case*, 2 Co. 91 a. *Floyer's case*, 9 Co. 125 b. Cro. Jac. 294. S. C.

WARDEN.

I. OF THE WARDENS OF A CHURCH OR CHURCHWARDENS, p. 1504.

II. OF THE WARDEN OF THE FLEET PRISON, p. 1504.

I. OF THE WARDENS OF A CHURCH OR CHURCHWARDENS.

1. Where the custom is for the parishioners to choose the churchwardens, the parson by colour of the canon cannot choose one; and if the minister of the bishop refuse to swear one of them chosen by the parish, a *mandat* lies to enforce him to it, and if the parson thereupon libels in the ecclesiastical court, a prohibition lies. March, 22 pl. 50. 67. pl. 104.

2. Churchwardens in London are a corporation, and may purchase lands to the use of the church, and in the country they are a corporation capable of purchasing goods for the benefit of the church. March, 67. pl. 104.

[See also ante tit. CHURCHWARDEN, Vol. I. p. 290.]

II. OF THE WARDEN OF THE FLEET PRISON.

1. In an action against him for escape, it must appear that the commitment is of record. 1 Saund. 38 b.

2. A bill may be filed against him in vacation. 1 Saund. 35 b. n. [f.]

[See also ante, tit. ESCAPE, Vol. I. p. 605.]

WARRANT.

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VII. OF JUSTIFICATIONS UNDER WARRANTS, p. 1509.

I.* NATURE OF THE INSTRUMENT. [*1505]

1. A warrant only signifies an authority; it does not *ex vi termini* imply an instrument under seal. Willcs, 412.

2. When a warrant is returned upon record in the case of the king, it is as strong as an office found. *Sir F. Englefield's case*, Poph. 20. 28, 29.

II. WHEN AUTHORITY MAY BE DELEGATED TO ANOTHER TO DO AN ACT BY A WARRANT OR POWER OF ATTORNEY, AND HOW IT SHOULD BE GIVEN AND EXECUTED.

1. A naked authority may be delegated to another by an express authority for that purpose. *Palliser v. Ord*, Bunb. 166.

2. Tenant for life who has power to make leases cannot make livery by his attorney. 2 Ro. 393.

3. A letter of attorney to J M to make livery, he being no party to the deed of bargain and sale, is good. *Moyle v. Exer*, Cro. Eliz. 905.

4. A letter of attorney, either to take livery or make livery is void, if the date of the charter of feoffment be mis-recited therein. *Mariot v. Smith*, Cro. Eliz. 603.

5. An authority *ad petendum recipiendum et recuperandum* a debt, is a sufficient power of attorney to sue and make an arrest. Palm. 394.

6. If a man give a letter of attorney to three jointly or severally to make livery, the three or one can make livery, but two cannot. 2 Ro. 257.

7. Every act done under a letter of attorney must be done in the name of the principal. *Shipman v. Thompson*, Willcs, 105.

8. As where it is given to execute a deed. *Frontin v. Small*, 2 Stra. 705.

9. If a letter of attorney be made to enter into all or any part of the lands in the name of the whole, and to make livery, the attorney may enter into any part, though in the possession of several tenants, and make livery severally. *Friend v. Drury*, Hard. 314.

10. A letter of attorney ceases to have effect on the death of the party giving it. *Shipman v. Thompson*, Willes, 105., and *Wynne v. Thomas*, Willes, 565.

III. OF A WARRANT OF SEIZURE.

A justice of the peace cannot grant a warrant to seize goods, unless on information that they have been stolen. *Anon.* 7 Mod. 99.

IV. OF A WARRANT OF DISTRESS.

A warrant of distress granted by two justices, under stat. 9 G. 2. c. 23., on a conviction for selling spirituous liquors without a license, need not be under the seals of the justices; it is sufficient if it be under their hands. *Padfield v. Cabell*, Willes, 411.

V. OF A WARRANT OF COMMITMENT.

1. A commitment by rule of court is no commitment by warrant within the *habeas corpus* act. *Rex v. Leonard*, 10 Mod. 429.

2. Where power is given to a justice to commit in default of distress, if he state in his warrant, that it is certified to him by the constable that there is none, the commitment is good. *Rex v. Whittleck*, 1 Stra. 263.

3. If a statute direct a commitment by two justices, a warrant for such purpose by one justice only is void. *Frankly's case*, 1 Mod. 68.

4. The species of treason need not be expressed in the warrant, because process in the same in one sort of treason as in another. *Harvey of Coombe's case*, 10 Mod. 334.

5. If directed to a wrong officer, it is bad. *Carth.* 78.

6. A warrant directed to the constables generally, cannot be executed by a constable out of his own precinct. *Rex v. Chandler*, 1 Ld. Raym. 546.

7. A constable may execute a warrant out of his liberty; but is not compellable to do it. — *v. Norman*, 1 Ld. Raym. 736.

8. An escape warrant on 1 Ann. c. 6. may be granted to a private person, but it must be executed by a constable, or other legal officer. *Rich v. Doughty*, 6 Mod. 154.

9. A judge's warrant cannot be executed after his commission is determined. *Carter v. Jewell*, 2 Ld. Raym. 1513.

10. Where a good warrant is illegally executed by an improper officer, it is void. *Rich v. Doughty*, 3 Salk. 149.

11.* A justice of the peace, in [*1506] granting a warrant of commitment, need not style himself "justice" in the warrant. 6 Mod. 75.

12. Churchwardens committed by a war-

rant for not accounting, there to remain till duly discharged according to law, is not good; for it should be, there to remain till they account. *Carth.* 152.

13. Commissioners of bankrupts' warrant to commit for not disclosing, &c., must aver, that the party was summoned and refused to attend. *Penrier and Wynne's case*, 2 Mod. 307.

14. Imprisonment for non-payment of taxes is not justifiable on a general warrant. *Masters v. Butcher*, 1 Ld. Raym. 740.

VI. OF A WARRANT OF ATTORNEY TO CONFESS JUDGMENT;—

(a) Nature of the instrument.

1. A warrant of attorney is no acknowledgment of a debt to ground an action on. *Pitman v. Hardy*, W. Kel. 96.

2. It is not a specialty so as to take a case out of the statute of limitations, when given as evidence of an acknowledgment; and therefore is of no avail if given more than six years before. *Clarke v. Figes*, 2 Stark. 234. Cited 2 Saund. 67 a. n. [z.]

3. Nor is it within the statute 8 & 9 W. III. (of breaches), though a bond be also given. 1 Saund. 58 a. n. [a.]

(b) Form of the warrant.

A release of errors may be given in the same deed with the warrant of attorney, if the judgment relates to a day before the date. *Landon v. Pickering*, 2 Stra. 1215.

(c) By an infant.

A judgment entered up under a warrant of attorney executed by an infant, will be set aside on motion; but as to a bond given at the same time with the warrant of attorney, the court will leave the party to his defence on a trial. *Wilmot v. Bye*, C. T. Hardw. 376.

(d) To a lunatic.

If plaintiff is a lunatic, an affidavit of the person who received the interest is sufficient. *Coppendale v. Sunderland*, 1 Barnes, 37.

(e) By one in custody.

1. A warrant to confess judgment may be given in custody. *Anon.* Salk. 402.

2. A warrant of attorney, given by an administrator for a debt due by the intestate, while under custody, on an arrest for a debt due in his own right, is void. *Sexton's case*, 6 Mod. 163.

3. A warrant to confess a judgment taken of a prisoner must be in the presence of an attorney on his behalf. *Barnes v. Ward*, Ca. Prac. C. P. 158. 6 Mod. 85. 2 Stra. 902. Salk. 402. S. P.

4. If a person arrested be really discharged, but not knowing it, or conceiving himself to be still in custody, gives, under such ignorance or apprehension, a warrant of attorney to confess a judgment, it is bad. *Inman v. Crew*, 6 Mod. 85.

5. A warrant to confess judgment given

by a prisoner in Ireland is subject to the rule requiring an attorney's presence. *Fitzgerald v. Plunket*, 2 Stra. 1247.

6. If a man be under arrest, and seemingly discharged by the bailiff, with a design that he should give a warrant of attorney to confess a judgment, without an attorney being present, and an intention to re-take him if he do not, the warrant of attorney is bad. *Inman v. Crew*, 6 Mod. 85.

7. An attorney need not be present on executing a warrant of attorney to confess a judgment in an inferior court. *Id. ibid.*

8. But an attorney must be present when a warrant of attorney is given by a person under arrest by process of an inferior court, to confess a judgment in a superior court. *Id. ibid.*

9. Warrant of attorney to confess a judgment by a person in custody, and no attorney present, held to be good, he being an attorney. *Walton v. Stanton*, Ca. Prac. C. P. 94. 1 Barnes, 28.

10. Otherwise if plaintiff is an attorney. *S. C.* 1 Barnes, 28.

11. One in execution may confess a new judgment without the presence of an attorney. *Watkins v. Hambury*, 2 Stra. 1245.

12. If one in execution give a [*1507] warrant* of attorney, where there was not an attorney present, it is good to a third person, as to bail, but not to the party himself. *Churchy v. Rosse*, 5 Mod. 144. *Anon.* Comb. 224.

13. Warrant of attorney to confess judgment to one who becomes a counter security for a prisoner, need not have the presence of an attorney, for it is only confined to the matter on which he is in custody. *S. C.* Holt, 398. *Holcomb v. Wade*, 3 Burr. 1792. *Prac.* Ca. K. B. 36, 38.

14. A warrant of attorney is good, though no attorney was present, if the bailiff who made the arrest was *bona fide* discharged. *Giddon v. Drury*, 7 Mod. 139.

15. If there be practice in obtaining a warrant of attorney from a person in custody under an arrest, it is bad, although an attorney was present. *Inman v. Crew*, 6 Mod. 85.

16. A warrant of attorney to confess judgment in the court of C. P. is well executed in the presence of an attorney of the court of K. B., and *vice versa*. *Inman v. Crew*, 6 Mod. 85. 2 Barnes, 36. 1 Stra. 530. *Contra*, *Anon.* Comb. 76.

17. An attorney's clerk being present at the execution of the warrant is not sufficient. *Barnes v. Ward*, 1 Barnes, 38.

18. There must be a sworn attorney. *Anon.* 11 Mod. 383.

19. The judgment and execution on a warrant of attorney taken of a prisoner will be set aside, if no attorney for the defendant is present. *Carter v. Smith*, Ca. Prac. C. P. 128. 6 Mod. 85. Comb. 224.

20. If it be given to confess judgment in C. P. by a defendant in custody on process issuing out of K. B. without an attorney being present on his part, the court of K. B. will interfere by way of attachment against the plaintiff and his attorney, the same to lie in the sheriff's office, until either judgment in C. P. be entered upon the roll, or a consent given in that court, that the judgment and execution be set aside with costs. *Woodin v. Colledge*, C. T. Hardw. 177.

(f) *By whom to be entered.*

Bail cannot enter judgment on a warrant of attorney. *Anon.* 11 Mod. 2.

(g) *How it should be entered.*

1. The attorney in entering judgment must observe the words of the warrant of attorney. *Mynn's case*, *Prac.* Ca. K. B. 35.

2. The warrant of one executor will not justify the entering a judgment against all. *Elwell v. Quash*, 1 Stra. 20.

(h) *Of the time for entering up judgment.*

1. If one give a warrant of attorney to confess a judgment for the saving bail harmless, though the debt be not paid, the bail cannot sue out execution until they are damned. *Anon.* 6 Mod. 78. *Anon.* 11 Mod. 2.

2. If the principal give a warrant of attorney to appear for himself and his bail, judgment may be signed against the bail for want of appearance. *Chivers v. Penn*, 2 Show. 161.

3. If a warrant of attorney be to confess judgment of a particular term, and the judgment be not entered of that term, the power is determined. *Pitman v. Hardy*, W. Kely. 96.

4. If an attorney enter up judgment on a warrant of attorney in a different term to that which is expressed in the warrant, the court will refer the matter to the master, and order compensation to the party grieved. *Mynn's case*, 1 Mod. 1.

5. If a warrant of attorney be to enter judgment of a particular term or at any time after, it may be entered up at any time during the life of the attorney. *Mynn's case*, 1 Mod. 1.

6. But if the warrant be general, and judgment be not entered within four terms, permission must first be had from the court on affidavit. 1 Mod. 1. *notis.* Comb. 40. *Anon.* 6 Mod. 212. *Woodward's case*, 7 Mod. 2.

7. Where a bond is given conditioned to pay at a future day, and a warrant of attorney to enter up judgment thereon, but judgment is signed and execution issued before that day, the judgment will be held regular; but the condition operating as a *cessat executio*, the execution will be set aside. *Anon.* C. T. Hardw. 270.

8. Judgment on an old warrant of attorney cannot be entered without leave of the court, on affidavit of the party* [*1508] being alive. *Pagnam's case*, 2 Show. 252.

9. Judgment on a warrant of attorney of above two years' standing was allowed to be entered, on affidavit that the defendant was alive. *Roundell v. Posnel*, Prac. Ca. C. P. 145.

10. The court permitted judgment to be entered upon a warrant of attorney against a defendant in Jamaica, on an affidavit that he was alive five months before. *Roundell v. Powell*, Willes, 66. 1 Barnes, 188. S. C.

11. Where a warrant is twenty years' old, rule to enter judgment must be only nisi, &c. *Hayme v. Hayme*, 1 Barnes, 37.

(i) *Effect of the death of either party.*

1. Judgment may be entered on a warrant of attorney after the death of the party giving it. *Fuller v. Jocelyn*, 2 Stra. 882. *Anon.* 1 Vent. 310, *contra*. *Seyliard v. Cassburne*, Ca. Prac. C. P. 6. *contra*.

2. Where the party having given a warrant of attorney dies the same day the judgment was signed, and before the signing, it shall not be set aside. *Fuller v. Johnson*, C. T. Hardw. 158. T. Raym. 18.

3. A judgment entered up in term on an old warrant of attorney upon the usual affidavit, is good by relation, though the party died early in the same day when the rule was granted. *Chancey v. Needham*, Andr. 53. 2 Stra. 1081. S. C.

4. Judgment on a warrant of attorney signed the day after defendant's death was refused to be set aside. *Savile v. Wiltshire*, 2 Barnes, 212.

5. A rule was made to enter up judgment at the suit of an executor, on a warrant to enter up judgment, &c., at the suit of testator, his heirs, and executors. *Coles v. Hasden*, 2 Barnes, 36.

6. On a warrant to enter judgment at suit of two, motion to enter judgment at suit of the survivor was formerly denied in C. P., but is now granted in both courts. *Britten v. Teasdale*, 2 Barnes, 43. 52. 1 Barnes, 35. 38.

7. If a man give a warrant of attorney to confess a judgment the first day of term, and die, it may be well entered any time during that term. *Anon.* 6 Mod. 86. *Rogers v. Bretton*, Ca. Prac. C. P. 11.

8. A warrant of attorney given in vacation to confess a judgment, is not vacated by his death before the judgment actually entered, which may be done as of the precedent term. *Woodward's case*, 7 Mod. 2. Holt, 401. Salk. 87. S. C.

9. If the party giving it die within a year, judgment may be entered up after his death, and will relate to the first day of the term he was living. 1 Saund. 219 f.

10. Where the party died after the judgment entered, but before the roll was brought in, it being a *post terminum* roll, was refused to be received. *Oades v. Woodward*, 3 Salk. 116.

11. If either party die in vacation within

a year after giving a warrant of attorney, judgment may be entered up of course at any time after in that vacation. *Oades v. Woodward*, 7 Mod. 94.

12. But the court refused to give leave to enter up judgment on an old warrant of attorney after plaintiff's death. *Wild v. Sands*, Stra. 718.

(j) *Effect of marriage.*

1. Held, that a warrant to confess judgment given by a feme who afterwards marries, is thereby revoked. *Anon.* Salk. 399.

2. But in a subsequent case, leave was given to enter up judgment on a warrant of attorney given by a feme sole, who married before it was entered. *Anon.* 7 Mod. 53. 12 Mod. 383. 1 Salk. 117. S. C. Lofft, 329. Ca. Prac. C. P. 38.

(k) *Consequence of the revocation of the warrant.*

A plaintiff may have leave to enter a judgment upon a warrant, though the warrant be revoked. *Oades v. Woodward*, 2 Ld. Raym. 850.

(l) *When the warrant is forged.*

A judgment entered upon a forged warrant of attorney was set aside, and a *vacatur* entered. *Gibson v. Bishop of Bath*, 1 Barnes, 159, 160.

(m) *Where the seals were torn off.*

A warrant of attorney being given, the* person executing it [*1509] snatched it out of the hands of the person to whom it was granted, and tore off the seals, and for this an attachment was obtained. *Anon.* 1 Vent. 3. Prac. Ca. K. B. 34.

VII. OF JUSTIFICATIONS UNDER WARRANTS.

1. A constable may keep the warrant for his own justification, but must make return of what he has done upon it. *Reg. v. Wyatt*, 2 Ld. Raym. 1196.

2. A warrant must be set forth specially when a trespass is justified under it. 1 Saund. 298. n. (1).

3. In false imprisonment, the defendant pleaded that *vicecomes misit quoddam warrantum*, without stating it to be *sub sigillo*; still it is sufficient, for it shall be intended to be under hand and seal. Palm. 357. 2 Saund. 305 a.

WARRANTY.

I. OF WARRANTIES RESPECTING REAL PROPERTY;—

(a) *Generally respecting them and their effects*, p. 1509.

(b) *Who can take advantage of them*, p. 1510.

(c) *Whom they bind*, p. 1511.

(d) *Warrantia charta*, 1512.

II. OF WARRANTIES OF PERSONAL PROPERTY, p. 1512.

I. OF WARRANTIES RESPECTING REAL PROPERTY;—

(a) Generally respecting them, and their effects.

1. The word "grant" in the case of a chattel real in itself imports a warranty. *Spencer, v. Clark*, 5 Co. 16 a.

2. The word "dedi," in a feoffment by deed makes a warranty in law. 4 Co. 81. 2 Saund. 38 a. n. (5). Cro Eliz. 864.

3. But the word "concessi" or "demisi," in the case of freehold or inheritance, does not import any warranty. *Spencer v. Clark*, 5 Co. 16 a. 2 Saund. 38 a. n. (5).

4. A warranty is made mutually by the word "excambium" in an exchange. 2 Saund. 38 a. n. (5).

5. A warranty by a person for himself and his heirs to another and his heirs is a general warranty. *Buckhurst v. Fenner*, 1 Co. 1.

6. If a charter of feoffment be made with warranty, and the deed be delivered, and afterwards livery be made, yet the warranty is good. *Fitzherbert's case*, 5 Co. 79 b.

7. If a man leases rendering rent, and further binds himself and his heirs to warranty, the express warranty does not toll the warranty in law. 4 Co. 81.

8. An implied warranty is made in partition. 2 Saund. 38 a. n. (5).

9. An express warranty will not restrain a warranty in law; for where there is a warranty in law, and an express warranty, it is at the election of the party to take advantage of either. *Harrison v. Burwell*, Vaugh. 126, 127. 1 Saund. 60 a. n. [k]. 4 Co. 81.

10. If there be two joint-tenants with warranty, and partition be made between them by judgment in a writ of *partitio facienda*, by force of the stat. 31 Hen. 8. c. 1., the warranty remains; but if they had made partition by deed by consent after the said act, the warranty had been gone. *Morrice's case*, 6 Co. 12 b.

11. Warranty annexed to partition is void, and if a parcener make a feoffment and warrant that feoffee shall hold without partition, it is also void. Mo. 21.

12. An implied warranty is made in a gift in tail in a lease for life of land reserving rent, and in dower assigned. 2 Saund. 38 a. n. (5).

13. One may be bound by a warranty, though he could not by any means avoid it. *Baldwin v. Smith*, 1 Co. 66 b.

14. Intent without covin or disseisin will not avoid a warranty. *Fitzherbert v. Leach*, W. Jones, 397. *Fitzherbert's case*, 5 Co. 79 b.

15. Collateral warranty made by covin to bar the remainder shall be accounted as a warranty to commence by disseisin. Mo. 469.

16. Although the disseisin was to the

tenant for life, or to one who was to be bound by the warranty, yet inasmuch as he consented to the disseisin, it shall not* prevent the warranty commencing by disseisin. *Fisher- [*1510] bert's case*, 5 Co. 79 b.

17. Two joint-tenants with warranty; the one disseises, the other disseisee brings assise, and on his prayer has judgment to recover in severalty, the warranty is gone. *Sed quare. Morrice's case*, 6 Co. 12 b.

18. A warrant shall be construed according to the strict letter and words of the deed. And. 262.

19. A warranty is both a covenant real and personal in several respects. *Roll v. Osborn*, Hob. 28. 34.

20. Though it seems to be entire, it may by construction of law be divided. S. C. Hob. 24.

21. A warranty annexed to an estate for years is but a covenant against the rightful entry of a stranger. *Wotton v. Hill*, 2 Saund. 178.

22. When a warranty is annexed to an estate for years in a fine, it is only a covenant for damages in the personal lien. 2 Saund. 180.

23. A warranty made to two joint-tenants and their assigns extends only to a joint assignment. *Roll v. Osborn*, Hob. 25.

24. Two make warranty; one dies; the survivor and the heir of the deceased, or the survivor alone, shall be vouched or sued in *warrantia chartae*, at the election of the party; and each one warrants the whole. Mo. 20.

25. A warranty is no bar where the estate is not discontinued or divested by the fine. 1 Lev. 36, 37.

26. In every warranty two things are implied; a voucher, and a rebutter. 2 Mod. 14.

27. A warranty is to secure against all eviction by elder title, either by entry or action. *Roll v. Osborn*, Hob. 26.

28. A bond to warrant and defend the land extends to tithes only, not trespasses. Mo. 175.

29. A warranty is not to secure against tortious entails. *Tisdale v. Essex*, Hob. 35.

30. A warranty cannot enlarge an estate. Poph. 138.

31. The warranty on a fine levied by tenant in tail shall not bar the remainder; 1st, because every warranty ought to be knit and annexed to an estate; 2nd, because it is a maxim in law that no warranty shall extend to bar any estate of freehold or inheritance which is in esse in possession, reversion, or remainder, and not displaced and put to a right before or at the time of the warranty made; 3rd, a warranty cannot enlarge an estate. *Heywood v. Smith*, 10 Co. 96 b. 97 a.

32. Rights of entry are bound by collateral warranty. *Smith v. Tyndal*, 2 Saik. 686.

33. But though a warranty binds or bars, it does not extinguish a right. *Id. ibid.*

34. If annexed to the grant of an advowson, it will entitle the grantor to a recompense in land if it be recovered against him. *Cooper v. Andrews*, Hob. 43.

35. A warranty made to two joint-tenants is lost by partition at common law. *Roll v. Osborn*, Hob. 25. *Owen*, 104.

36. Otherwise of a feoffment. *Owen*, 104.

37. If a man makes a feoffment in fee with warranty, and take back an estate in fee, the warranty is gone, for he takes back as large an estate as he warranted. 1 Mod. 182, 183. *Carter*, 242. *Roll v. Osborn*, Hob. 24.

38. Where I have a warranty for twenty acres, and infeof J. S. of one, the whole warranty is gone. *Cro. Eliz.* 469.

39. Upon a lease by tenant in tail for three lives, the lessor dies without issue, the warranty is determined. *Cro. Eliz.* 602.

40. The court of Chancery will not relieve against a collateral warranty binding before the act for the amendment of the law. *C. T. Talb.* 237.

41. If a man seised in fee conveys land to another and his heirs without warranty, all the title-deeds belonging to the purchaser as incident to the land, though not granted by express words. *Buckhurst v. Fenner*, 1 Co. 1.

42. A collateral warranty must be pleaded in a writ of right. 2 Saund. 45 l.

(b) *Who can take advantage of them.*

1. *Cestuy que use* may take advantage of a warranty annexed to the estate. *Salk.* 685.

2. The plaintiff in ejectment [*1511] may make* title by a collateral warranty. *Salk.* 685.

3. A warranty to a man his heirs and assigns extends to a stranger, to whose use the feoffor suffered a recovery. *Hob.* 27.

4. A warranty descends only upon the heirs at law. *Cro. Jac.* 218.

5. Covenant may be brought upon it, without showing any eviction. 10 Mod. 142.

6. He that is in by recovery in the post can take no advantage of it, nor he that is in the *per*, unless it be in the *per* by him to whom the warranty was made. *Hob.* 27.

7. But if feoffee with warranty suffer a common recovery to the use of himself and his heirs, he may vouch still, for it is his old estate. *Id.*

8. The father cannot take the benefit of a warranty made to the son. *Orl. Bridg.* 441.

9. An assignee of land cannot take advantage of a warranty made to the vendor and his heirs. *And.* 299.

(c) *Whom they bind.*

1. A warranty binds the heirs, though not named. 2 Saund. 38 a. n. (5).

2. A warranty by father and son jointly binds the son doubly. 2 Saund. 38 a. n. (5).

3. Where the warranty is by two jointly, the heir and survivor may be vouched, or the survivor alone; *secus*, in a joint obligation. 2 Saund. 38 a. 38 b. n. (5).

4. A warranty to a man his heirs and assigns, extends to all assigns, and their assigns, *toties quoties*, 2 Saund. 38 b.

5. A warranty extends to an assignee of part. 2 Saund. 38 b.

6. A collateral warranty binds the right, but only till the warranty be defeated. *J. Bridg.* 77.

7. A collateral warranty binds not the king without the actual assets. *Hob.* 339.

8. A warranty does not bind the land before judgment had in a *warrantia chartae*. *Holt*, 175.

9. A collateral warranty binds upon a presumption in law that the ancestor will not bar his heir by his warranty, but he will leave him as good an advancement. *Orl. Bridg.* 261.

10. A being tenant for life, remainder to his son B in tail, remainder to his own right heirs, levies a fine with warranty to the use of C in fee; on the death of the tenant for life, this warranty descending on the son will bar his entry as remainder-man in tail, notwithstanding the connuses of the fine come in by way of use; for either the connusee or his heir or his assignee may plead the deed with the warranty in bar to an ejectment for the land. *Williamson v. Hancock*, 1 Mod. 192.

11. By 4 Ann. c. 16. s. 21, all warranties by tenant for life descending to a remainder-man or reversioner are void, and all collateral warranties by an ancestor who has no estate of inheritance in the land are void against his heir. 1 Mod. 193 *notis.* 2 Mod. 17 *notis.*

12. Tenant in tail of an advowson in gross grants the same in fee; a collateral ancestor releases with warranty; it is a bar to the issue. 3 Leon. 212.

13. Feme tenant in tail, remainder to her sisters in fee; the tenant in tail and her husband levy a fine to the use of them two and the heirs of the body of the wife, the remainder to the heirs of the husband, with warranty against them and the heirs of the wife; feme dies without issue; the warranty is a bar. *Carter*, 243.

14. The collateral warranty of tenant in tail descending, though without assets, upon a remainder-man or reversioner, will bar the remainder or reversion. 1 Mod. 183 *notis.*

15. If husband and wife levy a fine *sur concessit* to A for ninety-nine years, if he should so long live, with a general warranty against all persons during the said term, an action of covenant will on the death of the husband lie against the wife upon the warranty. *Wootton v. Hele*, 1 Mod. 290.

16. A warranty extends only for the life of warrantee, unless it be to him and his heirs. 2 Saund. 38 b.

17. A warranty does bind an infant if his entry is not lawful. *Dillon v. Froine*, Poph. 71.

18. A warranty descending upon an infant does not bind. *Tipping v. Cosins*, 1 Ld. Raym. 35.

19. At common law, the distinction of a lineal and collateral warranty was useless and unknown; and as to any effect* [*1512] of law, there was no difference between a lineal and collateral warranty; but the warranty of the ancestor descending upon the heir, be it the one or the other, did equally bind. *Bole v. Horton*, Vaugh. 366.

(d) *Warrantia chartæ.*

1. Warrantia chartæ will lie in all actions real, either before or pending those actions, though a voucher or rebutter lie in those actions. Hob. 22.

2. It will lie where land and damages, or land only, have been recovered. Hob. 23.

3. It does not lie on a general warranty where the warranty is only against the feoffor and his heirs, unless *dedi* be in the charter or deed. 2 Dy. 221. pl. 17. Cro. El. 861.

4. It will not lie upon a deed that passes nothing. Hob. 22.

5. Nor where damages only have been recovered. Hob. 23.

6. No one shall have a warrantia chartæ who is not privy to the estate, who has not the same estate as well as the land to which the warranty was annexed. Vaugh. 384.

7. It must be brought by the tenant in demand of the land; but in some cases it may be brought by the vouchee. Hob. 21.

8. In warrantia chartæ, if the lands lie in two counties, plaintiff must suppose in his count that he is impleaded in both. 2 Dy. 221. pl. 17.

9. This is a real action, and binds the land. Yelv. 139.

10. A judgment in it binds the land from the teste of the writ. Hob. 22.

11. Warrantia chartæ depending is no bar in covenant. Yelv. 139.

II. OF WARRANTIES OF PERSONAL PROPERTY.

1. Where the seller has the possession of chattels, the bare affirming them to be his makes a warranty. *Medina v. Stoughton*, Salk. 210. Holt, 208. 1 Ld. Raym. 593.

2. Otherwise where he has not possession, for there is room to question his title; and *caveat emptor*. S. C. Salk. 211.; but see id. note.

3. Such affirmance is no warranty on a sale of lands, whether the seller be in or out of possession. *Medina v. Stoughton*, Salk. 211.

4. A warranty of goods ought to be at the time of sale. Holt, 5. Cro. Jac. 470. 630.

5. Or before the sale, but not after. 2 Ld. Raym. 1120.

6. A man offers plate to sale with warranty, and afterwards sells it to the same person for

less money; the warranty does not extend to the sale. 1 Stra. 414.

7. In an action on the case, a declaration, stating "that the plaintiff bought such wines of the defendant, and that the defendant in consideration thereof then and there warranted them to be merchantable," is good after verdict, for it shall be intended that the warranty and the contract were made at the same time. *Mew v. Russell*, 2 Show. 284. Skin. 104. *Beningsage v. Ralphson*, 2 Show. 250. *Hoveler's case*, Latch, 156.

WARREN.

1. The owner of the soil within a free chase may, by prescription, have common for his sheep, and warren for his conies, but he cannot surcharge nor make burrows in other places, &c., unless he have warren by grant; but a new warren cannot be erected without charter. Case of *Forests*, 12 Co. 12.

2. If one has a warren by charter in all his manor, he may erect a lodge and make coney-burrows in any place. Cro. Jac. 156. Case of *Forests*, 12 Co. 22.

3. Warren in a common is good, and the commoners cannot kill the conies damage feasant. Owen, 104.

4. In free chases, he who has any freehold within them may cut the timber and wood growing upon it without any view or license, but if he leave not sufficient for covert, he shall be punished at the suit of the king; so, if a common person has chase in another's soil, the owner of the soil cannot destroy all the covert. Case of *Forests*, 12 Co. 22.

5. A warren in another land is not suspended by taking a lease of parcel of the land. *Butt's case*, 7 Co. 23 b.

6.* Warren granted to A in all his lands in D; he shall not have [*1513] a warren in lands afterwards purchased in D. *Buckley v. Thomas*, Plow. 130.

7. An action does not lie against a man for making coney-burrows in his own lands. *Boulston's case*, 5 Co. 104 b.

8. A warrenner may kill any dog that uses to hunt his conies. Cro. Jac. 44.

9. If a dog be killed in pursuing conies, it is not necessary in a plea of justification to allege that he could not otherwise be prevented. 1 Saund. 84. n. (3).

WASTE.

I. WHAT CONSTITUTES WASTE, p. 1513.

II. WHAT IS NOT WASTE, p. 1514.

III. REMEDIES FOR WASTE;—

(a) *By an action of waste;—*

1. By whom it lies, p. 1514.

2. By whom not, p. 1515.

3. Against whom it lies, p. 1515.

4. Against whom it does not lie, p. 1515.

5. For what sort of waste it lies, p. 1516.

6. Where maintainable, p. 1516.
7. Of the writ, p. 1516.
8. Declaration, p. 1516.
9. Abatement of the writ, p. 1517.
10. Pleas, p. 1517.
11. Evidence, p. 1518.
12. View, p. 1518.
13. Judgment, p. 1519.
14. Of the writ of estrepement, p. 1519.
- (b) *By an action on the case in the nature of waste*, p. 1519.
- (c) *By action of trespass*, p. 1519.
- (d) *By action of trover*, p. 1519.
- (e) *By seizure of the thing wasted*, p. 1520.
- (f) *By injunction to restrain waste*, p. 1520.
- (g) *When it is a forfeiture*, p. 1520.

I. WHAT CONSTITUTES WASTE.

1. If the lessee do any act by which the nature of the thing demised is changed, it is waste; *secus* if he only better a thing in the same kind. *Lord Dracy v. Askwith*, Hob. 234. 2 Saund. 259.

2. Whatever is considered as waste in a court of law, shall be so considered in a court of equity. 1 Mod. 95.

3. It is waste to convert ancient meadow into arable. Mo. 101. 2 Saund. 259. Hob. 234.

4. So, to turn wood into pasture, to dry up a piscary, to suffer a surrounder, or suffer to decay the pale of a park. *Lord Dracy v. Askwith*, Hob. 234.

5. To convert arable or pasture land into wood, or wood into arable land, is waste. 1 Dy. 37. pl. 43. 2 Saund. 259.

6. Ploughing up strawberry beds is waste. 2 Saund. 259. n. [c].

7. Or converting meadow into orchard. 2 Saund. 259.

8. The lessee of a house, with a clause *quod possit commodum suum inde facere meliore modo*, &c., cannot pull it down. *Colt v. Bishop of Coventry*, Hob. 159.

9. It is waste to remove out doors, although the lessee himself has erected them; otherwise of indoors and partitions; also to remove glass or windows affixed before the lease, or any fixtures. Mo. 177. 2 Saund. 259. 259. a.

10. With respect to the exceptions in favour of trade and matters of ornament, see 2 Saund. 259 a. 259 a. n. [e].

11. So, pulling down a house and rebuilding it smaller or larger than before. 2 Saund. 259.

12. It is waste to pull down a house and rebuild it, although it is too ruinous to be repaired. 1 Mod. 95.

13. To build a new house is no waste, but to take timber either for the building or repairs of it, is waste. *Lord Dracy v. Askwith*, Hob. 234. 2 Saund. 259.

14. If a lessee pull down a brewhouse and build dwelling-houses on its site, it is waste. *Cole v. Forth*, 1 Mod. 95.

15. Though the tenements newly built are of greater value. *Cole v. Greene*, 1 Lev. 309.

16. Converting corn-mill to a fulling-mill is waste. Cro. Jac. 182.

17.* Lease conditioned that lessee shall not do any waste; [*1514] suffering the house to go to ruins, is waste within the statute, and a breach of the condition. 3 Dy. 281. pl. 21. 2 Saund. 259.

18. If the lessee build a new house, and keep it not in repair, it is waste; and the writ must be in *domibus dimissis*. *Lord Dracy v. Askwith*, Hob. 234.

19. Waste was assigned in permitting the sea-banks or the banks of a river to be so ruinous that the sea overflowed the land. Mo. 62. 69. 73.

20. If the lessee of a manor open a mine, it is waste. *Lord Dracy v. Askwith*, Hob. 234.

21. Digging for gravel, lime, or clay, &c., in unopened pits or mines is waste; but otherwise, if in open pits or mines, or if the mines are granted by name. Mo. 101. 2 Saund. 259. 259 a, b.

22. A "demiseth, granteth, and to farm letteth, &c., with all manner of timber trees, great oaks excepted;" yet the lessee may not fell any timber. 3 Dy. 374. pl. 18.

23. To fell willows growing in the soil of a manor, or pollards not fit for building, is waste. *Guffy v. Pinder*, Hob. 219. Mo. 101.

24. Cutting birch trees used for timber in the country where they grow, is waste. Mo. 812.

25. So, cutting down fruit trees. 2 Saund. 259.

26. Or cutting down timber trees to the value of 3s. 4d. 2 Saund. 250. 259.

27. Eradicating white thorns, adjudged waste, but not *succindo et vendendo*. Cro. Jac. 126.

28. Lopping and topping ashes and elms, is waste. 1 Dy. 65. pl. 2.

29. Destruction of heir-looms. 2 Saund. 259. n. [c].

30. So, if tenant for life of a park, warren, dovehouse, piscary, &c., kill so much game, &c., that enough is not left for stores. Id. ibid.

II. WHAT IS NOT WASTE.

1. It is not waste to stub up thorns, bushes, &c. 2 Saund. 259.

2. The lessee can cut trees for reparations, although he covenants to repair at his own costs. Mo. 23.

3. To dig a meadow, or to drain a sewer, is no waste. *Lord Dracy v. Askwith*, Hob. 234.

4. So, cutting a trench in a field to carry off the water. 3 Dy. 361. pl. 12.

5. If the house be ruinous *tempore dimis-*

sionis, the lessee may pull down and rebuild. 2 Leon. 189.

6. If the lessor build a house after the lease, and the lessee keep it not in repair, it is no waste. *Lord Dracy v. Askwith*, Hob. 234.

7. If the lessee of mines by special name open a new mine, it is no waste, but to take timber for the maintenance or use of it, is waste. *Id. ibid.*

8. The destroying of conies, &c., is not waste by the lessee of a warren. *Moyle v. Moyle*, Noy, 70.

III. REMEDIES FOR WASTE;—

(a) *By an action of waste;—*

1. By whom it lies.

1. One may have an action of waste upon several leases, and upon several grants of a reversion. Cro. Jac. 330.

2. Waste in the *tenuit* lies by an assignee in the reversion against lessee for years, after assignment, excepting the benefit of the coal mines and trees; the exception being void. *Sanders v. Norwood*, Cro. Eliz. 683.

3. Waste lies against lessee for years, with a proviso that the lessor might cut and carry away the timber growing, &c.; for this is a covenant only and no exception. *Lushford v. Sanders*, Cro. Eliz. 690.

4. If the king grant *annum diem et vastum*, the grantee can have waste. 1 Ro. 182.

5. A tenant in common who leases his part to his companion for years can sue him for waste. Mo. 71.

6. Lessee for life, with a contingent remainder, is no bar to him in reversion to bring an action of waste. Aley, 16.

7. Lease for years, remainder for life, the lessee for years makes waste; the lessee for life dies; the remainder-man in fee can punish the waste. Mo. 18.

8. Lease for years, remainder to D for life, without impeachment of waste, remainder to G in tail; tenant commits waste in the life of D, who dies before waste* [*1515] brought; action lies for him in remainder. Cro. Jac. 688.

9. Though tenant for life or years be dispossessible for waste during the life of tenant in reversion or remainder, yet after his death he in reversion in fee can have his action of waste. *Bray v. Tracy*, W. Jo. 51.

10. Tenant for life, remainder for life, remainder in fee; tenant for life commits waste; he in the remainder for life dies; the remainder-man in fee may have an action of waste against the tenant for life. *Paget v. Cary*, 5 Co. 76 b.

11. So also if the remainder-man for life after the waste committed had surrendered to him in the remainder in fee. *Id. ibid.*

2. By whom not.

1. If tenant for life or years, without impeachment of waste, make lease for years or otherwise, he in remainder in fee cannot

have his action for waste. *Bray v. Tracy*, W. Jo. 21.

2. It does not lie for grantee of reversion by fine without attornment. 1 And. 285.

3. The plaintiff having but a third part of a reversion in common with two others, cannot bring waste. *Hill v. Hart*, Cro. Eliz. 357.

4. Tenant in tail, after possibility of issue extinct, cannot have an action of waste. 2 Saund. 251.

5. A remainder-man in tail bargains and sells the land, and then levies a fine without proclamations; the bargainee cannot have waste, because he holds but for life. Mo. 220.

6. An action of waste does not lie in ancient demesne. *Greene v. Cole*, 2 Saund. 254.

3. Against whom it lies.

1. Waste lay at common law only against tenant by the curtesy or in dower. *Meyer of Norwich v. Johnson*, 3 Mod. 90.

2. Waste was given by the statute of Gloucester against tenant for life or years, and treble damages. *Ib.*

3. The lessee is liable for all waste done upon the land by whomsoever committed. Saund. 259 b. n. [f].

4. Every assignee of the first lessee, mediate or immediate, is within the act 11 H. 6.

c. 5. against assignments to prevent actions of waste. *Booth v. Skevington*, 5 Co. 77 a. 2 And. 23.

5. Although the act speaks only of him in reversion, yet he in remainder is within it. *Id. ibid.*

6. The pernaney of the profits is traversable, and not the intent with which the defendant granted. *Id. ibid.*

7. It lies against the assignee of the lessee of part of the term, *Semb. Stretton v. Cuske*, Yelv. 37.

8. An occupant shall be punished for waste, for he has the estate of the lessee for life; tenant by statute-merchant, statute-staple or *elegit*, are not of the statute of Gloucester against waste. *Dean and Chapter of Worcester's case*, 6 Co. 37 a.

9. It lies against the devisee of the occupation of a term for years. Plow. 524.

10. Waste lies against the king's grantee, *e. g.* where the particular estate is forfeited and granted over by the king. 1 Ro. 20.

11. If lessee devises his term and dies, and then his executors do waste, and afterwards assent to the devise, an action of waste in the *tenuit* lies against the executors. *Sanders v. Marwood*, 1 Brownl. 141. Cro. Eliz. 683. S. C.

12. Waste lies against an administrator of a rightful executor, though the statute charges only executors *de son tort* and administrators, that they shall be liable as the executor or intestate. *Holcomb v. Petit*, 3 Mod. 113.

13. Waste lies against an executor *de son*

sort of a term for years. *Mayor of Norwich v. Johnson*, Comb. 7. 3 Mod. 93.

14. If a disseisor does waste, an action lies against the disseisee. 1 Leon. 264.

4. Against whom it does not lie.

1. Tenant for years or for life, was not punishable for waste at common law. *Wilton v. Berkley*, Plow. 247.

2. If there be lessee for life, with remainder for life, no action of waste lies against the first lessee during the continuance of the remainder; but if there be remainder for years, it does not lie. 1 Ro. 388.

3. Tenant for life without impeachment of waste, shall not be impeached in any action of waste; but such tenant* has [*1516] no absolute interest in the trees. 4 Co. 63 a.

4. A lease for years may be made without impeachment of waste. *Udal v. Udal*, Aleyn. 82.

5. If the lessor sell the trees which are not excepted, and the beasts of the lessee enter and destroy the springs, the lessor cannot charge him in waste. Mo. 9.

6. If a woman tenant for life takes husband, who commits waste, and afterwards the woman dies, the husband is not within the statute of Gloucester, and shall not be punished for this waste. *Southcote v. Clifton*, 5 Co. 75 b. Lutw. [253. 256.].

7. Waste does not survive against an executor. 2 Saund. 252.

8. An action of waste is not maintainable where the lessee repairs before action brought, yet the defendant ought to plead the special matter. *Whelpdale's case*, 5 Co. 119 a.

9. If lessee without impeachment of waste cut the trees or prostrate the house, the lessor cannot have an action, but he can retake them. Mo. 327.

5. For what sort of waste it lies.

1. There was no remedy at common law for voluntary or permissive waste by lessee for life or years. *Cudlip v. Rundall*, 4 Mod. 10.

2. Waste will not lie against the lessee for houses destroyed by a tempest. *Couper v. Andrews*, Hob. 40.

3. So, if the house is destroyed by fire, no action of waste lies. 1 Saund. 323 b.

4. It does not lie for timber cut between the levying a fine by tenant for life and the entry to avoid it. 1 Saund. 319 e. n. [m].

5. A negligent or permissive waste is not punishable at common law in a tenant at will; otherwise of voluntary waste by him. *Countess of Salop v. Crompton*, Cro. Eliz. 777. 784. *Panton v. Isham*, 3 Lev. 359. n.

6. Waste lies under the statute of Gloucester for permissive as well as voluntary waste. 1 Saund. 323 b.

7. Waste does not lie for cutting trees reserved or excepted by the lease. 1 Dy. 19. pl. 110. 1 Leon. 49. 2 And. 133.

6. Where maintainable.

1. An action of waste is maintainable in London by the custom. *Greene v. Cole*, 2 Saund. 254.

2. The jurisdiction of the court in London to hold plea in waste is not taken away by the statute of Gloucester. Id. ibid.

7. Of the writ.

1. One writ of waste may lie upon several leases. Noy, 13.

2. Waste by one joint-tenant to whom the other releases; plaintiff may by his writ suppose that he leased alone. 2 And. 97.

3. The writ being in the *tenet*, not *tenuit*, is not good, and the defendant being charged in right of his wife, who was tenant for life and dead, the action is gone, for it should be *fecerunt vastum*; but, if otherwise, concord with satisfaction is a good plea here, for damages only are recoverable. *Sacheverell v. Bagnoll*, Cro. Eliz. 356, 357.

4. If waste is brought by baron and feme, the writ must conclude to the feme only. *Earl of Clanrickard v. Sidney*, Hob. 1.

5. A writ of waste against baron and feme, supposing the wife held the lands *ex demissione* J J, her former husband and the count special, is not good, for it ought to have been special, and is not aided by 18 Eliz. after verdict; otherwise, if there is no writ. *Greenfield v. Dennis*, Cro. Eliz. 722.

6. Waste in land cannot be assigned to be in cutting trees, but it may in digging chalk, clay, gravel, &c. *Anon.* Mo. 73. pl. 200.

7. Although the writ only recites, that by the statute *non licuit alicui facere vastum, &c.*, in *domibus, bovis, et gardinis*, omitting *terris*, and in the conclusion thereof it is said, that the defendant *fecit vastum de terris, &c.*, yet the writ is good; and so, it is, if more is in the end of the writ than in the premises. Lutw. [653.]

8. Declaration.

1. The declaration must charge the defendant according to the nature of his tenancy. 2 Saund. 233 a.

2. It must show how the plaintiff is entitled to the inheritance; and if the plaintiffs* are parceners, it must [*1517] be so stated. 2 Saund. 235.

3. The plaintiff declared, that one enfeofed another to the use of the plaintiff and his heirs; and did not say, that he enfeofed the other and his heirs; still it was held good. Mo. 871.

4. If plaintiffs are husband and wife, the reversion must be stated to be in both. 2 Saund. 235 a. n. (2).

5. In waste brought by the grantee of the reversion against tenant for life, it ought to be shown, that the waste was done after the attainment. Plow. 202.

6. If plaintiff be assignee, he need not name himself so, if he sets out his title specially as such. 2 Saund. 235 a. n. (2).

7. A lease is made to commence at a future day, before which the reversion is several times granted over; afterwards the lessee entering commits waste; the last assignee may count *ex assignatione* of each to whom the land came after the lease made, although there was no tenure under them. 2 Dy. 206. pl. 11.

8. If the writ be general, "whose heir he is," and the declaration state an inheritance in special tail, it is no variance. 1 Saund. 235 a. n. (2).

9. Plaintiff declared, that an abbot was seised, in right of his abbey, of the place wasted, and demised to defendant, and that Hen. 8. being seised on the dissolution, granted to plaintiff and his heirs *tenementa predicta per nomen manerii de C. cum pertinentiis*, this is sufficient, without averment that the land in lease is part of the manor. 2 Dy. 207. pl. 14.

10. It must show the quality and quantity of the waste done. 2 Saund. 235 a. n. (3).

11. In waste for pulling down walls, they must be alleged to be covered. 2 Dy. 108. pl. 31.

12. So, for destroying a manger and plank floor, that they were fixed to the soil. Ib.

13. A declaration in an action of waste, that the defendant ploughed up the land, which was pasture, "*et sic facit vastum*," is bad for uncertainty, even after verdict. *Gunning v. Gunning*, 2 Show. 8.

14. It must state it to be to the disinheriting of plaintiff. 2 Saund. 236. n. (4).

9. Abatement of the writ.

1. If waste be brought by tenant in tail, and, pending the action, he becomes tenant after possibility, the action is gone. 1 Ro. 106.

2. In waste, the plaintiff made title to the reversion by descent; the defendant pleaded in abatement, that his title to the reversion was by devise, and then traversed the descent, and held good on a general demurrer. *Ferrers v. Williams*, Lutw. [657].

10. Pleas.

1. If waste be brought in the *tenet*, the tenant may plead a surrender to the lessor, and demand judgment, because it should have been in the *tenuit*. *Stubbins v. Bird*, 2 Mod. 65.

2. If the house be destroyed by enemies, or tempest, the tenant must plead it in excuse if he means to take advantage of it. 2 Saund. 238. 422.

3. So also if the house was in a ruinous state at the commencement of the lease. 2 Saund. 238 a. 259 a.

4. In waste against a woman tenant for life by use limited, she pleaded that the house was so ruinous *tempore mortis viri sui in grossa, manerio et corruptum quod per debilitatione mareris reparare non potuit*, and held a good plea. Mo. 54.

5. In waste by an infant heir against his guardian, where he appears by attorney, the guardian cannot plead the nonage, but should take it by protestation. 2 Saund. 103 b.

6. "Nul waste" is the general issue; it admits nothing, and must conclude to the country. 2 Saund. 238.

7. Waste assigned in cutting down and selling, when defendant had only lopped; upon *nul* waste pleaded, he may give the special matter in evidence. 1 Dy. 92. pl. 16.

8. Where the defendant has matter of excuse or justification, he must plead it specially. 2 Saund. 238. 238 a.

9. The general issue may be pleaded as to part, and a justification to the rest. 2 Saund. 238.

10. If before waste brought the lessee repair, he must plead it specially, for he may not give it in evidence under the general issue. 3 Dy. 276. pl. 51. 3 Salk. 150. 2 Saund. 238 a.

11.* If a termor commit waste, he can amend it, and if afterwards [*1518] waste be brought, he can plead that he has repaired; but if once the suit of waste be commenced, the termor cannot plead repairs subsequently made. 2 Ro. 283. 2 Saund. 238 a.

12. If waste is committed and repaired before action brought, it is sufficient; but otherwise if there be a condition that no waste shall be committed. Lat. 227.

13. Plea in bar, *non dimisit*, or that defendant had nothing under plaintiff's lease. 1 And. 208.

14. Grant to the tenant that he shall not be impeachable of waste; he shall not plead this in bar, but only have an action of covenant thereupon. *Lee v. Wood*, J. Bridg. 117.

15. It cannot be pleaded that plaintiff covenanted to repair. 2 Saund. 150.

16. Waste for ten oaks; plea, "that defendant cut down three to make posts, which he did make, and placed in the ground to divide *separalia clausa* there," but did not allege the number of closes, or that they had used to be divided, or that all the three were expended; and "as to the residue, that they were dry, hollow, and rotten at the tops, not being sufficient timber for building;" this was held not to be a sufficient justification. 3 Dy. 332. pl. 26.

17. If the trees be excepted out of the lease, this must be pleaded in an action of waste. 2 Saund. 238.

18. Waste declared on in six acres of wood justification in one acre of land is bad. 1 Dy. 37. pl. 44.

19. Waste in cutting and selling trees; justification for cutting is bad, without answering the selling also. 1 Dy. 35. pl. 33. *Sed vide Green v. Cole*, 2 Saund. 255 *contra*.

20. Waste by the assignee of the reversioner, who claimed under the original lessor, for cutting and selling trees; plea, that the

reversioner sold him all the trees that could be spared, wherefore he cut them, &c.; demurrer; 1st. because the plea does not answer the selling; 2d. because no consideration was shown for the sale of the trees; 3d. because, not being excepted out of the lease, reversioner had not the property in him, and could not sell them; 4th. because, admitting that he might sell, the sale must be by writing; 5th. because the bargain and sale is void for uncertainty, no arbitrator, &c. being appointed to declare what could be spared. 1 Dy. 90. pl. 6.

21. To waste in cutting down three hundred oaks, he pleads as to two hundred for reparations, as to the rest he keeps them to employ about repairs *tempore opportuno*, &c.; the plea is bad. *Gorges v. Stanfield*, Cro. Eliz. 593.

22. The lessee of a house and wood covenanting to repair at his own costs, and cutting trees for the repairs, may justify his lease in an action of waste; the lessee must resort to his covenant; so, if the lessor had covenanted to repair, and did not, the lessee cutting trees for repairs may justify. 2 Dy. 198. pl. 53. 3 Dy. 314. pl. 94.

11. Evidence.

1. The plaintiff is not bound to prove the whole of the waste as stated in the declaration, but shall recover *pro tanto*. 1 Leon. 300. 2 Saund. 235 a. n. (3).

2. Under the general issue "nul waste," the plaintiff must prove his title as laid, and also the kind of waste alleged. 2 Saund. 238.

12. View.

1. In waste the jurors ought to have a view of every parcel of the land to assess the damages. Noy, 5.

2. The jurors may view the place wasted when the officer is not present. *Greene v. Cole*, 2 Saund. 253.

3. If the place wasted is shown to the jury by the plaintiff's servant, if it is by the sheriff's command, it is sufficient. Lutw. [658].

4. Six jurors, at least, ought to have the view, or otherwise the judgment shall not be taken. *Greene v. Cole*, 2 Saund. 251. 255.

5. In waste it is not necessary to appear on record that the jury had the view. *Strode v. Osborne*, 1 Show. 3 Comb. 113. S. C.

6. Although the jurors ought to have the view, yet it is not necessary for the officer to return it. *Greene v. Cole*, 2 Saund. 254, 255.

7. The court on the trial ought to examine whether the jury have had the view or not. *Id. ibid.*

8* The examination ought to [*1519] be on a *voir dire* of six of the jurors, and that is sufficient. *Ferrers v. Williams*, Lutw. [658].

9. But if the jury be sworn, that they know the place wasted, that is sufficient, although they are not sworn, whether they have viewed it. *Id. ibid.*

10. If, on examination of the jurors, it appears that none of them have had the view, the trial shall be stayed. S. C. Ib. 657.

13. Judgment.

1. The judgment in an action in the *tenet* is for the place wasted, and also for the damages. 2 Saund. 250.

2. In the *tenuit* it is for damages only, and not for the place itself. 2 Saund. 250. 1 Leon. 48.

3. If waste is assigned in several places, and the jury have not viewed some of them, they may find *nul waste fecit*. *Ferrers v. Williams*, Lutw. [658].

4. If the jury find a verdict under 40s., the judgment shall be for the defendant. 2 Saund. 250.

5. Estreperment upon formedon, and because waste was afterwards committed, costs and damages were recovered. Mo. 100.

6. It ought to appear by the record that the jurors came out of the four next wards to the place wasted. *Greene v. Cole*, 2 Saund. 255, 256.

7. In a writ of waste the jury have view by statute, and the judgment may be with or without *per visum juratorum*. *Strode v. Osborne*, 1 Show. 3. Comb. 113. S. C.

14. Of the writ of estreperment.

1. A writ of estreperment lies in an action of waste, as well at any time before judgment as after, and before execution. *Folliamb's case*, 5 Co. 115 b.

2. Estreperment lies in a writ of error and attain. Mo. 622.

3. But not in partition. 4 Leon. 60.

4. The sheriff by this writ may resist those who would do waste, and if necessary may arrest them, or make a warrant to others to do it, or he may take the *posse comitatus* to help him. *Folliamb's case*, 5 Co. 115 b.

5. The writ may be directed either to the tenant and his servants, or to the sheriff or coroner. *Earl of Cumberland v. Countess Dowager*, Hob. 85.

6. If it be directed to the tenant and his servants, and he or they do waste, they are imprisonable for contempt; not so, when it is directed to the sheriff or coroner, though they have notice of it. *Id. ibid.*

7. In waste, where it is confessed, as upon *nihil dicit*, the writ to the sheriff is only to inquire of the damages, nor need it be that he go in *propria persona*, for that is only to inquire of the waste, where there is default on the *distingas*. 2 Dy. 204. pl. 1.

8. The writ of estreperment is not a returnable writ. 2 Mod. 218.

(b) *By an action on the case in the nature of waste.*

1. It lies for permissive as well as voluntary waste. 2 Saund. 253 a.

2. But not for permissive waste against tenant at will. 5 Co. 13 b.

3. If lessee has covenanted not to do waste, lessor may either have case or covenant. 2 Saund. 252 a, b.

4. The declaration need not set out plaintiff's title; nor should it state the estate which the plaintiff has in remainder or reversion. 2 Saund. 252 b.

5. It must state the nature and kind of waste, and the same must be proved, but the whole need not be proved as laid. 2 Saund. 252 c.

(c) *By action of trespass.*

1. An action on the case does not lie against tenant at will for permissive waste; but if tenant at will commits voluntary waste, it amounts to a determination of the will, and an action of trespass lies against him. *Countess of Shrewsbury v. Crompton*, 5 Co. 13 b. Cro. Eliz. 777. S. C.

2. Lessee for years cuts down timber trees, and some distance after carries them away; trespass *vi et armis* lies; and in such case felony may be committed. *Udal v. Udal*, Aleyn, 83.

(d) *By action of trover.*

Lessee for life cuts timber trees; he in reversion may bring a trover, though he did not seize them. *Rex v. Holland*, Aleyn, 16.

[*1520] (e)* *By seizure of the thing wasted.*

Tenant for life, the remainder for life; tenant for life cuts down timber trees; he in the reversion may seize them, although he cannot have an action during the life of him in remainder. *Udal v. Udal*, Aleyn, 81. Mo. 327.

(f) *By injunction to restrain waste.*

1. The court of Chancery will restrain tenant in tail after possibility of issue extinct from pulling down houses or defacing a seat; the like of tenant for life dispunishable of waste by ex-grant. *Lord Glenorchy v. Bosville*, Ca. T. Talb. 12.

2. Tenant in tail cannot be restrained by that court from committing any manner of waste. S. C. Ib. 16.

(g) *When it is a forfeiture.*

Upon an estate limited to a man for life, remainder to a feme for years, who intermarry, both estates are forfeited by waste done. 2 Leon. 7.

WATERCOURSE.

1. A prescription to have a watercourse to an ancient mill is not destroyed by pulling down the old building, and erecting a new mill on the same stream. *Palnis v. Heblethwait*, 2 Show. 250.

2. Case lies for diverting or stopping a watercourse running to a mill of the plaintiff, according to the custom of the place.

Richards v. Hill, 5 Mod. 206. Cro. Car. 499, 500. 575. Comb. 9. 42.

3. The precise mode of enjoyment needs not to have been always the same. 2 Saund. 114. n. [b].

4. It lies for stopping a river, whereby the plaintiff's lands are drowned, though the plaintiff had no title in the land at the time of the first stopping of it. *Westborn v. Morant*, 3 Leon. 174.

5. Case for maliciously throwing down a dam, by which he diverted a great part of water that *currere consuevit et debuit* to his mill, without alleging a prescription to the water, or that the mill was an ancient mill, is good. *Palmer v. Heblethwait*, 1 Show.

64. 2 Saund. 114. *Sed vide* Skin. 65. S. C.

6. If it be alleged to be an ancient mill, it must be so proved. 2 Saund 114. *Heblethwait v. Palnis*, Carth. 84.

7. An action for disturbing a watercourse with a *currere debuit* only, without saying *solebat*, is good. *Jackson v. Salway*, 1 Show. 350. Comb. 9. 42.

8. For, being against a wrong-doer, possession is sufficient. *Palnis v. Heblethwait*, 2 Show. 243. 249. 1 Saund. 113 h.

9. A declaration for diverting a watercourse, without *currere debuit et debuit*, held well. *Prickman v. Trip*, Comb. 231. Palm. 290. *Duncomb's case*, Het. 34.

10. Such a declaration held good after verdict, though it stated no *terminus a quo* of the stream; nor that it is used to run, &c.; for they must be intended to have been proved. Skin. 339. 316.

11. In an action for diverting a watercourse which ran to B's house, he should state that he was owner of the house at the time, not that he is in the present tenor. *Moore v. Browne*, 3 Dy. 319. pl. 17.

12. An action for diverting a watercourse running in, by, and across the land, &c., must state for what purposes the water was used. 2 Show. 507.

13. In an action on the case for digging ditches and diverting a watercourse, it shall be presumed after verdict that the injury was consequential. *Leveridge v. Hoskins*, 11 Mod. 257.

14. In an action on the case for stopping water running to the plaintiff's mill, with a *continuando*, a plea that the stopping was *contra voluntatem*, and that on such a day, which was between the first and the last day laid in the *continuando*, the plaintiff himself had abated the nuisance, is not good in bar of the action, for in an action on the case the plaintiff is still entitled to the damages that accrued before the nuisance was abated. *Kendrick v. Bartland*, 2 Mod. 253.

15. An information lies for cutting down the banks of a public river, and thereby diverting the course of the water, although that part of it is by act of parliament vested in private persons, and an action given them

[*1521] for* damages done to it. *Rex v. Staunton*, 2 Show. 30.

WAY.

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I. RESPECTING RIGHTS OF WAY.

1. A man may have a right of way over the soil of another person, either by necessity, by grant, or by prescription. 6 Mod. 3. Willes, 72.

2. A way over grantor's land is incident to the grant of a close surrounded by it. 1 Saund. 323.

3. So, if he grant the land and reserve a close. Ibid.

4. If I sell a close through which I had a way, the way remains, though not excepted in the sale. Cro. Jac. 170.

5. The grantee of lands shall have all the ways, easements, &c. which the grantor had; and therefore, by the grant of a house to which there is a way by necessity, the grantee shall have the way, although it be not expressed in the grant. 6 Mod. 4.

6. A way of necessity is in fact a way by grant. 1 Saund. 323 a.

7. Though a man may sometimes have a way by provision of law, it ought plainly to appear that it is of absolute necessity. Lutw. [521].

8. The grantee of wreck, has, of necessity, a right of way to it over the land of another. Anon. 6 Mod. 149.

9. Persons using navigable rivers may by custom have a right of way on its banks. *Rex v. Chisworth*, 6 Mod. 163.

10. Towing on the banks of navigable rivers is justifiable of common right. *Young v. —*, 1 Ld. Raym. 725.

11. A custom to have a way over another man's ground to church or market is good, because it is an easement, and no profit. *Peers v. Lucy*, 4 Mod. 365.

12. Lessee for life or years, or tenant at will, may prescribe to have such way, because it is only an easement. *Peers v. Lucy*, 11 Mod. 366.

13. A custom for all occupiers of a close in such a parish to have a footway is not

good, for the plaintiff ought to prescribe in him who has the inheritance. *Pain v. Patrick*, 3 Mod. 294.

14. A general way and a private way by prescription are inconsistent, and cannot be claimed together. *Chichester v. Lethbridge*, Willes, 72.

15. A right of way cannot be claimed from one part to another of another man's ground; but a man may claim a way from one part of his own ground over another man's ground, to another part of his own ground. *Staple v. Heydon*, 6 Mod. 5.

16. If a man have right of way through the house of another, he cannot use such way at unseasonable hours, nor bring an action for stopping it, without having previously requested and given notice to have it opened. *Toblin v. Fuller*, 1 Mod. 27.

17. A prescriptive right of way is extinguished by unity of possession. 1 Saund. 323 a. n. [g].

18. But a way of necessity is not. 1 Saund. 323 a.

II. ACTION FOR DISTURBANCE OF A RIGHT OF WAY.

1. Case or assize lies for stopping a way to a person's freehold. Cro. Eliz. 466. 845.

2. Case lies for stopping up a common passage, if plaintiff can show any special* damage from it. [*1522] Moore, 170. T. Jo. 156.

3. But an action will not lie by an individual for an obstruction in a public highway, unless he sustain a particular damage; but if the plaintiff state that the defendant obstructed, &c. by a ditch and gate across the road, by which the plaintiff was obliged to go a longer and a more difficult way, and that the defendant opposed him in attempting to remove the nuisance, this is a sufficient damage to support the action. Willes, 73.

4. An action lies for stopping a way without showing title. *Tenant v. Goldwin*, 2 Ld. Raym. 1093.

5. A declaration for disturbance in a right of way held good without prescription alleged. *Winford v. Wollaston*, 3 Lev. 266.

6. Count against a tortfeasor was only *quod viam habere debuit*, and held good on special demurrer. *Blackley v. Slater*, Lutw. [46].

7. In an action for disturbance of a way, the plaintiff should declare that he was possessed of a certain messuage, &c., by reason whereof he had, &c. a way. 2 Saund. 114.

8. A count in an action on the case for a disturbance in a way adjudged ill after verdict, because it was claimed *ad quantum pecuniam terre per estimat*. four acres. *Jones v. Hamond*, Lutw. [48, 49].

III. JUSTIFICATIONS UNDER RIGHTS OF WAY.

1. To trespass, a plea that there was a highway from such a place to such a place,

that the plaintiff stopped the same, so that the defendant could not pass, and therefore that he went over the plaintiff's close, is good. *Abson v. French*, 2 Show. 28.

2. If a man prescribe for a way, he must show in what vill the place is which is the *terminus ad quem* of the way. *Lutw.* [647].

3. To an action for a right of way claimed by necessity, the defendant may show that the plaintiff has another way convenient to that which he claims; but such a plea cannot be pleaded where the way is claimed by grant or prescription. *Staple v. Heydon*, 6 Mod. 4.

4. If a man prescribe for a way to B, he cannot justify going farther. *Lutw.* [44].

5. If A has a way over B's ground to a close called Blackacre, A cannot justify driving his beasts over this way to Blackacre, and so on to another close lying beyond it. *Howell v. King*, 191.

6. If trespass be brought for using a way against one who has enjoyed it for twenty years, (which of itself raises a presumption of a grant), he should justify under a non-existing grant. 2 *Saund.* 175. 175 a.

7. Prescription for a right of way for A and others (not naming them), is uncertain and bad, even after verdict. *Willes*, 72.

8. If an ancient footway is stopped, and a new way set out, it is no trespass to go in the new. *Horne v. Widlake*, *Yelv.* 141. 8 E. 4. 5. a. 1 *Brownl.* 212. *Noy*, 128.

9. A, the owner of a close situate within a close belonging to B, had a prescriptive right of way through B's to his own: twenty-four years ago B stopped up the old way, and made a new way, which was used ever since, until lately, when B stopped it up; in an action brought by B against A, for going over the new way, it was holden that A could not justify using the way as a way of necessity, but that he should have either gone the old way, and thrown down the enclosure, or brought an action against B for stopping up the old way. *Reynolds v. Edwards*, *Willes*, 282.

IV. RESPECTING THE LIABILITY TO REPAIR A HIGHWAY.

1. Where persons chargeable by statute to repair the highways become insolvent, the parish is bound. *Anon.* 1 *Ld. Raym.* 725.

2. If a man be bound by prescription to repair a way, he is not bound to put it into better repair than it has been time out of mind before. *Rex v. Cluworth*, 6 Mod. 163.

3. A grantee of a private way is bound to repair it. 1 *Saund.* 322 a. n. (3). 2 *Saund.* 114 a.

4.* If a manor be held by [*1523] tenure of repairing a highway, the alienee of any part of such manor is liable to the whole charge. *Rex v. Buccleugh*, 6 Mod. 151.

V. ACTION FOR NOT REPAIRING A WAY.

1. An action on the case does not lie by any particular person for not repairing, unless he sustains a particular damage, but an indictment is the proper remedy. 3 Mod. 291.

2. In an action for not repairing ways, it must be alleged that the defendant *reparare debet*. *Pain v. Patrick*, 3 Mod. 291.

3. The jury found that *reparare non debet*, but did not find who ought to repair; yet adjudged good. 3 *Salk.* 392.

VI. INDICTMENT FOR NOT REPAIRING A HIGHWAY.

1. The county, of common right, is bound to repair highways; and therefore, if an indictment for not repairing a highway be brought against a particular person, it must be shown how he was bound to repair, whether by reason of tenure or prescription. 6 Mod. 151. n.

2. An indictment against a borough for not repairing a way to a church, must state how such borough is bound to repair. 2 Show. 201.

3. An indictment for stopping a footway to a church *ad commune nocumentum* is good. 3 *Salk.* 392.

4. If a bridge or highway be out of repair, a *distingas* shall issue against the inhabitants to make them repair it; but neither the king's courts nor the justices of the peace can impose a tax for it. *Rogers v. Dacresant*, 1 Mod. 194.

5. A *distingas* shall go for the non-repair of a way, although the offender have been fined. *Rex v. Cluworth*, 6 Mod. 163.

6. Indictment against a parish for that the highway was very foul, and so narrow that the people could not pass, held bad for not showing that it was out of repair. *Rex v. Inhabitants of Stratford*, 2 *Ld. Raym.* 1169.

7. To an indictment for not repairing a highway, the defendant to discharge himself must plead that others are bound to repair it, for this cannot be given in evidence under the general issue. *Rex v. Saint Andrews*, 1 Mod. 112, 113. 3 *Salk.* 392.

8. Upon an indictment for not repairing, the defendants may be admitted to a fine before verdict, upon a certificate that it is repaired. 3 *Salk.* 393.

9. The court will not fine a defendant convicted of not repairing a way, until it be certified whether it is or is not repaired. *Rex v. Cluworth*, 6 Mod. 163.

[See ante, tit. HIGHWAY, div. V.; Vol. I. p. 760.]

VII. RESPECTING THE DIVERTING OR REMOVING A HIGHWAY.

1. The inhabitants of a county cannot of their own authority change a highway; it must be done by act of parliament. *Rex v. Walls*, 6 Mod. 307.

2. A way cannot be said to be removed or diverted, but stopped. 1 And. 234.

VIII. RESPECTING ENCROACHMENTS ON A WAY. Encroaching upon a highway draws the charge of repairing it. *Rex v. Inhabitants of Stretton*, 2 Ld. Raym. 1170.

IX. MISCELLANEOUS.

1. The sessions cannot make an order for the repair of a highway, for they have no jurisdiction but upon presentment. *Rex v. Wells*, 6 Mod. 307.

2. The appointment of the six days upon the highways by 22 & 23 Car. 2. c. 17. must specify the particular days. *Rex v. Kime*, 2 Ld. Raym. 858.

WEIGHTS.

1. In debt for an amercement in a court leet for obstructing the jury in examining weights, it should be shown that they were not examined before. *Moore v. Wicket*, Andr. 48.

2. It should also be shown that the attempt to enter a shop to examine [*1524] the weights* was made at a reasonable time. *Id. ibid.*

3. In the declaration in the above case the obstruction was alleged to have been made 1st December; and the presentment appearing to be of an obstruction made 9th May, it was held ill, the facts being different. *S. C. Andr. 50.*

4. If a man bargain and sell so many acres of wood, it shall be measured according to the usage of the county. *Finch's case*, 6 Co. 67 a.

WEIRS.

The statute of Magna Charta *quod omnes kidelli deponantur de cetero penitus per Thameriam*, &c., extends only to open weirs for taking fish; the first statute which extends to abating mill stanks, &c., is 25 E. 3. c. 4. *Case of Chester Mill*, 10 Co. 137 b.

WESTMINSTER HALL.

If a man be found guilty of striking in Westminster Hall, he forfeits his lands and loses his right hand. Dall. 23.

[See ante, tit. STRIKING, pl. I. Vol. II. p. 1352.]

WILL.

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I. WHO MAY MAKE A WILL.

1. The age for making a will to dispose of goods, chattels, and personal estate is fourteen. *Anon. Comb. 50. 1 Salk. 44.*

2. But lands cannot be disposed of by will till twenty-one. *Id. ibid.*

3. Except by custom. 2 And. 12.

4. Yet, if one be born 1st February at eleven at night, he may make his will of lands at one in the morning on the last day of January, in his twenty-first year, because the last day of his full age is then begun. *Anon. Salk. 44.*

5. The ordinary is the proper judge of the age at which a person may make a will. *Smallwood v. Berthouze*, 2 Show. 204.

6. A devise of land by one within age, who dies after full age, is void; otherwise if there be a new publication. 1 Sid. 102.

7. An idiot or lunatic cannot make a will. 2 And. 12.

8.* A will is void for nonsane memory, although the deviser has [*1525] some sense, if his sense is not perfect. *Mo. 760.*

9. Though a testator does not dispose of his estate with that prudence another might, yet it is no proof of his being *non compos*. *Burr v. Davall*, 8 Mod. 59, 60.

10. A feme covert cannot in general make a will. 1 Saund. 278 g.

11. What kind of will she can make, see 2 And. 12. 92., and ante, tit. *BARON AND FEME*, div. VII. pl. 9. &c., Vol. I. p. 209.

II. WHAT MAY BE DEVISED.

1. At common law, there could be no devise of lands; the statutes 32 & 34 H. 8. make them devisable. *Hitchins v. Barret*, 1 Show. 551. 1 Saund. 276 c.

2. A custody (as a guardianship in socage) is not in its nature testamentary; it cannot

pay debts, nor legacies, nor be distributed as alms. *Bedell v. Constable*, Vaugh. 182.

3. A man cannot release a debt by will. *Anon.* 1 Vent. 39. *Pidgeon v. Harrison*, 1 Sid. 421, 422.

[See *Ante*, tit. DEVISE, div. I. (c) Vol. I. p. 494, 495.]

III. WHAT WRITING AND FORM OF WORDS, EXECUTION; AND PUBLICATION, ARE NECESSARY TO THE VALIDITY OF A WILL.

1. A parol will of lands devisable was good at common law. 1 Dy. 53. pl. 11.

2. By 29 Car. 2. c. 3., all devises of lands and tenements shall be in writing, and signed by the testator or some other persons in his presence, &c., 1 Mod. 117 *note*.

3. Before the statute of frauds, it was not necessary for a will to be under the hand of the testator; it was sufficient by statute 32 H. 8., if reduced to writing by his direction. *Coventry v. Coventry*, 10 Mod. 469.

4. An actual devise by words was held not to be sufficient for a stranger to write the will, but there ought to be an actual will. *Lawrence v. Kete*, Aleyn, 54.

5. One commands another to write his will, devising his house and forty acres of land to another; he writes a devise of the house, with the appurtenants; no land passes. Mo. 221.

6. A will made before the statute 27 H. 8. and republished afterwards, was held good to pass lands though not according to that statute. 1 And. 7.

7. One before the act of frauds, &c. made his will and signed it, declaring it to be his will in the presence of one witness, and died after the act; this was held not to be within the act. *Anon.* Skin. 227.

8. Where the deviser became senseless before the will was written, yet as it was written before he died, it was held to be a good will. *Lawrence v. Kete*, Aleyn, 55.

9. A paper-writing indented, made between father and son, in which the father agrees to give the son so much, and the son agrees to pay certain debts, if it contain expressions resembling the form of a will, shall be taken as a last will though it was both sealed and delivered as a deed. *Green v. Proude*, 1 Mod. 117.

10. If the intention of the testator be certain, the will, though not fully expressed, is good. *Smith v. Miford*, 4 Mod. 131.

11. Memorandum that S B (the testator) does declare and express that J B and his heirs shall be heir to his lands, is a good will. *Dime v. Munday*, 1 Sid. 362.

12. If a will refers to any writing, it is as well as if the writing was inserted *verbatim*. *Lord Lansdown's case*, 10 Mod. 99.

13. But a will cannot refer to words only without writing. Cro. Jac. 145.

14. One may make his will, and yet die intestate, i. e. where no executor is appointed. *Anon.* Comb. 20.

15. Without an executor a will is void. Plow. 185.

16. A will gnawn in pieces by rats, yet by help of the pieces put together was afterwards proved. *Etheringham v. Etheringham*, Aleyn, 2.

17. If a will be written by the party's own hand, it is good within the statute 29 Car. 2. of frauds, though not signed at the bottom. *Lemayne v. Stanley*, 3 Lev. 1.

18.* A will without a seal is good to pass land. March, 206. [*1526] pl. 245.

19. Sealing a will is signing. *Warneford v. Warneford*, 2 Stra. 764.

20. A will written by the hand of the testator, and declared in the presence of three witnesses, though not signed by him in such presence, is a good will. *Semb. Anon.* Skin. 227.

21. It is not necessary that the witnesses to a will should see the testator sign it. *Peate v. Ougly*, Com. 198.

22. A will of lands according to the statute ought to be attested by three witnesses in the testator's presence or view. *Edleston v. Speake*, Holt, 222. 742. Comb. 158. S. C.

23. A will published in the presence of three witnesses, but subscribed by them in an adjoining room, and out of the sight of the testator, is void by 29 Car. 2. c. 3. *Machell v. Temple*, 2 Show. 289.

24. But if the testator might see the witnesses subscribe, though did not actually, it is a good subscription in his presence within the statute of frauds; otherwise if he was in a state of insensibility. *Day v. Smith*, 12 Mod. 37. Salk. 688. Comb. 158. Salk. 688. *note*.

25. If a man make his will, and it is attested and subscribed by two witnesses in the presence of the testator, and he afterwards makes a codicil confirming his will in several particulars, which is attested and subscribed in the presence of the testator and two witnesses, one a witness to the will, the other not, this is not a good will, not being attested and subscribed by three witnesses. *Lee v. Libb*, 3 Salk. 395. Holt, 742. Carth. 35. Comb. 174, 175. S. C. 1 Show. 69. 88.

26. One makes his will, signs it, and declares it in the presence of three witnesses, then does an act which amounts to a revocation, and then republishes his will in the presence of two witnesses; this is a good will. *Semb. Anon.* Skin. 227.

27. If attested by three witnesses, whereof the devisee of the land was one, not good, because he cannot be a witness for himself. *Hilyard v. Jennings*, Carth. 514.

28. The attestation of a will need not state that the witnesses subscribed their names in the presence of the testator. *Bruce v. Smith*, Willes, 1. *Croft v. Pawlet*, 2 Stra. 1109.

29. Whether they signed in his presence (the attestation not expressing that fact, and

the witnesses being dead), is a question for the jury. Salk. 688 note.

VI. OF NUNCUPATIVE WILLS.

1. A will written out before testator's death from notes taken from his mouth, is good, though never read to him. 1 Dy. 72. pl. 2.

2. Nuncupative wills must be put in writing within six days after their making. *Nab v. Nab*, 10 Mod. 405.

V. OF SEVERAL WILLS.

1. A man may make particular wills, or rather pieces of one will, of as many things or estates as he is possessed of. *Hitchins v. Barret*, 1 Show. 543. 549 552.

2. A subsequent will may be made so as to consist and stand with a former; it may also revoke part and confirm part of a former will. S. C. 3 Mod. 204.

3. If a man make a duplicate of his will, still it is but one will. S. C. 1 Show. 550.

4. If two wills are made without dates, they are both void; otherwise of codicils. S. C. 3 Mod. 208.

VI. OF CODICILS.

1. Although a man can have but one will, he may have several codicils. *Hitchins v. Bassett*, 1 Show. 549.

2. If it do not appear what date the codicils are of, they shall all stand together. S. C. 1 Show. 550.

3. The will and codicil make but one will, for the codicil is part of it. *Acherly v. Vernon*, Fort. 192, 193.

4. A codicil signed and published in the presence of three witnesses was held a republication of a will, and that both made but one will. *Acherly v. Vernon*, Com. 381.

5. It is a good republication of a will, though not said to be annexed. S. C. Fort. 193.

6. One adds a codicil to his will with these words: "I do hereby revoke that [*1527] part* of my will wherein I make A B and C three of my trustees;" decreed, that no part of the will was revoked, but barely the names of those three trustees. *Acherly v. Vernon*, 10 Mod. 520, &c.

VII. WHAT IS A GOOD REVOCATION OF A WILL.

1. A will of a personal estate made before marriage is presumed to be revoked by a subsequent marriage. *Lugg v. Lugg*, 12 Mod. 236.

2. The birth of a child is a virtual revocation of a will of personal property. *Overbury v. Overbury*, 2 Show. 242.

3. The wife and children must be unprovided for. 1 Saund. 278 d.

4. A will devising real estate may be virtually revoked by the same alteration in the circumstances of the testator's family as will revoke a will disposing of personal property. *Overbury v. Overbury*, 2 Show. 242 *notis*.

5. It seems that the alteration presumed from a subsequent marriage and the birth of

a child, are the only circumstances sufficient for this purpose. S. C. 2 Show. 242 *notis*.

6. It has however been determined, that a subsequent marriage and the birth of a posthumous child, the wife of the testator being *groossement enceinte* at the time of his death, is an implied revocation of a will. 2 Show. 242. 1 Saund. 278 d.

7. The marriage of a woman operates as a revocation of a will made by her prior to such marriage. *Forse and Hembling's case*, 4 Co. 60 b. 1 And. 181. Goldsb. 109. S. C. 1 Saund. 278 g. 2 Show. 242 *notis*.

8. A will is revoked by altering or new-modelling of the estate devised, even by a bare fine. 1 Saund. 278.

9. Or by an imperfect conveyance; or by a recovery, even when suffered to confirm his will. 1 Saund. 278 a.

10. A latter devise, though void, is a revocation of a former, if inconsistent. *Radeliffe v. Roper*, 10 Mod. 94. 233.

11. So, by a contract for the sale of lands devised (in equity). 1 Saund. 278 b. n.

12. After a devise of an estate generally, a conveyance executed to trustees of an advowson included in the devise, is a revocation of it with respect to the advowson. *Sparrow v. Hardeastle*, Keny. 67.

13. A devise of land in fee is revoked by a feoffment to the use of the devisor in fee and his heirs. *Dieter v. Dieter*, 3 Lev. 108. 1 Saund. 278.

14. A devise was of land in possession and another in reversion; a feoffment afterwards made of all the land by livery of the land in possession, without attornment of the tenant of the land in reversion, is a countermand of all. Mo. 429.

15. So, by conveyance of mortgagee to mortgagor. 1 Saund. 277 c.

16. Although a mortgage in fee after a devise of the estate is in law a total revocation, yet in equity it is a revocation *pro tanto*. *Casburne v. Inglis*, C. T. Hardw. 399. 1 Saund. 277 c. 3 Salk. 315.

17. And the devisees shall have the equity of redemption. *Countess of Bridgewater v. Duke of Bolton*, 3 Salk. 315.

18. So by cancelling. 1 Saund. 279 b, c, d.

19. A will revoking all former wills, though not signed by the testator in the presence of three witnesses, is sufficient to revoke a former will; for that clause of the statute 29 Car. 2. c. 3., which requires that the testator should sign in the presence of three witnesses, only refers to the last member, "or other writings," and not to the first, "other will or codicil." *Holl v. Clark*, 3 Mod. 218.

20. A written will might be revoked by parol at common law. 3 Dy. 310. pl. 81.

VIII. WHAT IS NOT A REVOCATION.

1. Marriage alone, or even marriage and the birth of children who die in the lifetime of the testator, is not sufficient to revoke a will. 2 Show. 242 *notis*.

2. The rule that a will of personal estate is presumed to be revoked by alteration of the testator's circumstances, and which extends to real estates and posthumous children, may be repelled by circumstances. *Lugg v. Lugg*, Salk. 592 note.

3. A man having issue two sons, Thomas his eldest son, and Richard his [*1528] youngest son, Thomas having issue John,* Richard having issue Mary, devised his estate to his son Thomas for life, and afterwards to his grandson John and the heirs male of his body, and if he die without issue male, then to his grand-daughter Mary in tail, and charged it with some payments; and then, "provided that if his son Richard should have a son by Margaret his then wife, all his estate should be to such first son and his heirs, he paying as Mary should have done;" the birth of a son under this proviso will not defeat the estate limited to Thomas, for it only extends to the estate limited to Mary. *Ewerd v. Hare*, 2 Mod. 293.

4. If a man after making his will dies, leaving his wife *enccinte* of a son, the will is not void by our law, though it is by the civil law. *Reynell v. Abingdon*, Palm. 508.

5. Where a person gave legacies, and made his wife residuary legatee, after whose death he married again and had a child, with whom he perished by shipwreck, held the will was not revoked. Salk. 592 note.

6. A will might be revoked by parol before the statute of frauds; also, a will might be revoked by a subsequent will, which, though void in itself, was yet good to revoke the former. 3 Mod. 207.

7. It was held not to be a revocation of a will to say, "I shall die without a will," or, "J S shall be my heir." 2 Sid. 75.

8. A will shall not be revoked by doubtful words. *Hutchins v. Bassett*, 3 Mod. 206.

9. Revocations from inconsistencies will not be admitted, unless where the inconsistency is plain and unavoidable. *Archerley v. Vernon*, 10 Mod. 521.

10. Therefore, if there be two devisees in a will of the same lands, the law will make the devisees joint-tenants, rather than the latter devise should be esteemed a revocation of the former. *Cartwright v. Cartwright*, 10 Mod. 512.

11. A will sufficient to pass a personal estate will not amount to a good revocation of a former will, whereby the real estate is devised according to the statute of frauds. *Limberg v. Mason*, Com. 451.

12. A will disposing of lands, though attested by three witnesses, is not a revocation of a former will within the words of 29 Car. 2. c. 3., "or other writings declaring the same," unless the attestation be in the presence of the testator, although it expressly revokes all former wills. *Eggleson v. Speake*, 3 Mod. 259. *Eccleston v. Petty*, Carth. 80.

Comb. 156, 157. *Eccleston v. Speake*, 1 Show. 89.

13. A subsequent will which does not appear, shall not be any revocation of a written will which does appear. 3 Mod. 204, 205, 206. *Nosworthy v. Bassett*, Comb. 90, 91. *Hutchins v. Bassett*, 1 Show. 544.

14. A special verdict finding a will of lands, and that afterwards the testator made *aliud testamentum*, imports not any revocation of the former. Salk. 592.

15. A real estate purchased after the will made is not thereby devised. Salk. 257.

16. An executory devise is destroyed by the death of the devisee, where he dies before the thing happens, though it be to him and his heirs. *Cookes v. Bellamy*, 1 Sid. 187.

IX. RELATIVE TO THE REPUBLICATION OF A WILL.

1. A person makes a will during an incapacity, and afterwards becomes capable, the will is not good without a new publication. Holt, 246. 251.

2. Lands purchased subsequently to the making of the will do not pass by the statute of wills, unless the will is republished, or the land has been articulated and contracted for previous to the making of the will; although by express stipulation the agreement is not to be carried into execution until a future day, which is after the making of the will. 11 Mod. 130 n.

3. Writing the name of another executor in the will after the livery is a new publication of the will, to pass the land. Mo. 429.

4. Rehearsal and allowance of a will is a republication, without new writing or dating it. 2 Dy. 143. pl. 56.

5. A republication may be by re-execution or by a codicil. 1 Saund. 277 d, e, f. 277 f. n. [i].

6. Unless a contrary intention appear on* the face of the codicil. [*1529] 1 Saund. 277 f.

7. The making of a codicil *quatenus* a codicil will not amount to a new publication. *Lord Lansdowne's case*, 10 Mod. 98.

8. Nor the inserting a new legacy, or another executor, and this before the statute of frauds. 10 Mod. 97.

9. A having a son and a grandson, both of the name of Robert, devise lands to his son Robert and his heirs, and gives a legacy to his grandson Robert; the son dies in the lifetime of the testator; the testator afterwards annexes a codicil to his will, and publishes his will *de novo*, declaring that his grandson shall have the land as his son would have enjoyed it, if he had lived: the grandson cannot take the lands thus devised, for by the death of the son the devise was void, and therefore could not be revived to the grandson by the parol declaration. *Strade v. Perryers*, 2 Mod. 313. 314. 1 Mod. 267. *Stead v. Berier*, 2 Show. 64. 8. C.

10. The republication of the will can only make it a new will so far as the old will would go, if, instead of being republished only, it had been newly made at the time of republication. 2 Mod. 313.

X. HOW A WILL MAY BE REVIVED.

1. A will which has become null by parting with the estate devised, will not be revived by an after repurchase. 1 Saund. 276 f.

2. A will void *ab initio* (as for infancy, &c.,) cannot be made good by a subsequent act. *Hane v. Burton*, Comb. 84.

3. If a subsequent will be cancelled, the prior one is re-established. 1 Saund. 279 c.

XI. GENERAL RULES RELATIVE TO THE CONSTRUCTION OF WILLS.

1. In the interpretation of wills the rule of law is, that the intention of the testator ought to be supported as much as possible, as far as is consistent with the rules of law. *Gore v. Gore*, 10 Mod. 502. 523. 2 Mod. 223. *Stephens v. Stephens*, W. Kely. 170. *Reeves v. Newenham*, 2 Ridgw. 36. *Falkland v. Bertie*, Holt, 232. Plow. 162. 413. 522, 523. 540. *Petty v. Goddard*, Orl. Bridg. 39. 2 Leon. 42, 43. *Papilion v. Voyce*, W. Kely. 30. *Bosworth v. Forard*, Orl. Bridg. 158.

2. No clauses or words in a will are to be rejected, if they may have any meaning, or can have a reasonable construction. *Darlieson v. Beaumont*, Fort. 25. *Morington v. Davis*, Fort. 228. 2 Ridgw. 81.

3. The mere force of the words is not so much to be regarded as the true intent. *Petty v. Goddard*, Orl. Bridg. 39.

4. Where words are of an ambiguous signification, the intent of the deviser must fix the meaning of them. *Mandeville v. Lord Carrick*, 3 Ridgw. 365.

5. Where the intent of a testator appears not clear, we are to judge the words of his will according to the construction of law upon such words in a deed. *Collingwood v. Pace*, Orl. Bridg. 412.

6. The testator is presumed in law to be *inops consilii* at the time he makes his will. Plow. 162, 163. 413. 540. *Marks v. Marks*, 10 Mod. 422, 423.

7. And therefore great latitude of construction is to be allowed in the words, and they are favourably construed. *Marks v. Marks*, 10 Mod. 420. 523. Orl. Bridg. 52.

8. And the law will by construction supply words of art in favour of a testator's interest. *Holmes v. Meniell*, Skin. 19.

9. Improper words in a will will sometimes in law be supposed to be meant properly, to support the will; as, *heredibus procreatis*, if there be no issue, will be supposed to be meant *procreandis*. *Darblson v. Beaumont*, Fort. 27.

10. Words in a will which work in disharmony, ought to be clear and strictly taken. *Gold v. Goddard*, T. Jones, 112. 114.

11. Words in wills are to be taken in that

sense as is consistent with reason. *Burr v. Davall*, 8 Mod. 90.

12. The intent of a testator must be manifest and certain, not obscure and doubtful. *Collingwood v. Pace*, Orl. Bridg. 411.

13. An implication against the words of a will, or an intention against a rule of law, must be so expressed that it be certain to the court. S. C. Ib. 413.

14. No will receives strength or authority from a resolution or judgment in another will, for every little circumstance* differs it; and it is rare [*1530] to have so much as a proportion or analogy in reason of one case to another. *Petty v. Goddard*, Orl. Bridg. 38.

15. The clear interpretation of words may be departed from, if they will bear another sound interpretation, where the other parts of a will manifest the latter intention; and absurdities and contradictions may thus be avoided. S. C. Ib. 58.

16. That part of a will shall be taken to be in force which is last in the will, and agrees with the general intent; the last words in a will, and the first in a deed, shall stand in force. S. C. Ib. 59. Dall. 3.

17. A general subsequent clause in a will shall never be extended further than the first clause which is special. *Thomas v. Howell*, Skin. 319.

18. A will is an ambulatory instrument during testator's life. 1 Saund. 278 g.

19. The words *now living*, in a will, shall be intended at the time of the death of the testator. *Durdant v. Burchet*, Skin. 208.

20. A will and codicil are to be taken together as one act. *Reeves v. Newenham*, 2 Ridgw. 43.

[See ante, tit. DEVISE, div. III. Vol. I. p. 497.]

XII. RELATIVE TO THE CONSTRUCTION OF PARTICULAR WILLS AND DEVISES.

1. There needs not that formality to make an estate at will as there does to another estate at common law. *Geary v. Bearcroft*, Orl. Bridg. 489.

2. If the intention of the testator be plain, an estate in fee or in tail shall pass by such words in a will as would not have been sufficient to have conveyed those estates by deed. *Lord Say and Sele's case*, 10 Mod. 46.

3. Devise to the heir for life, remainder in contingency, is good, and the descent of the reversion does not merge his estate for life. *Plunket v. Homes*, 1 Sid. 47.

4. A term can be devised to one for life, remainder to a second and third, &c., if they were all *in esse*; but not otherwise. *Love v. Wyndham*, 1 Sid. 451.

5. A will in these words, "I make my niece executrix of my goods, lands, and chattels," cannot be construed into a devise of the land, neither will it subject the land to the payment of debts. *Piggott v. Penrice*, Com. 254.

6. Devise of a term to A, and if he die, to B, after he attains the age of twenty-two years; A dies; B dies before he attains the age of twenty-two years; the executor of A will take the residue of the term. *Fynmore v. Crockford*, 2 Sid. 151.

7. Limitations in wills are not differently construed from deeds where proper legal words are used. *Gilb.* 184.

8. Devise to four daughters, share and share alike, equally to be divided, makes them tenants in common. *Packman v. Cole*, 2 Sid. 53. 78.

9. A conveys to B, in trust to perform his will, and afterwards declares the uses by indentures; the word "will" must mean his last will, and he may alter the uses at his pleasure. 3 Dy. 314. pl. 97.

10. A latter clause in a will shall not be taken in a larger sense than what goes before; as, a devisee to his daughter, upon condition she marry his nephew, &c.; proviso, if she refuse to marry him at or before she is twenty-one years of age, or in the meantime she marry another, &c.; and she did marry another, the nephew dying at twelve; these words, "or in the meantime marry another," must be intended marrying so as to make her incapable of marrying the nephew. *Thomas v. Howell*, 4 Mod. 67, 68.

11. Where the first devisee is also executor, a release of the executory interest made to him at his request amounts to an assent to take as devisee. *Lampet's case*, 10 Co. 46 b.

12. By the word utensils in a will, plate and jewels do not pass. 1 Dy. 59. pl. 15.

13. Land devised to the heir of an alien is void. *Collingwood v. Pays*, 1 Sid. 193, 194.

14. A term is devised to A, and if he die without issue, then to B; the devise to B is void. *Love v. Wyndham*, 1 Sid. 450.

15. Devise to an infant in *ventre sa mere* is void. 1 Ro. 110. 137.

XIII. OPERATION OF A WILL.

1. A will of personal estate [*1531] passes every* thing testator possessed at his death. 1 Saund. 277 c.

2. But a will does not pass lands which the deviser has not at the date of it. 1 Saund. 276 f. 277. 277 a.

3. A devise of "all my lands, tenements, and estates whatsoever, which I shall be possessed of, or invested with, at the time of my decease," will not pass an estate purchased after the making of the will. *Bunker v. Coke*, 11 Mod. 106. 121.

4. Lands not agreed for until after the making of the will do not pass either at law or in equity. 11 Mod. 130. n.

5. Devise of land to one for life, remainder to A, upon condition he pays so much out of the profits, he is not bound to pay till the death of tenant for life. 1 Ro. 198.

6. If a term be devised in tail, remainder

over, the remainder is void; and if the issue die within the term, the executor of the first deviser can take it back, and in the interim the executor of the devisee will have it, and not the heir. 1 Sid. 37.

XIV. RELATIVE TO THE OBTAINING PROBATE OF A WILL AND ITS EFFECTS.

1. No one can prove a will but he who is named executor therein. *Wankford v. Wankford*, Salk. 309.

2. As where an executor after administering, and before probate, dies, his executors cannot prove it. *Id. ibid.*

3. But if an administering executor proves the will, his executor shall be executor to the first testator, and in that case there needs no new probate. *Id. ibid.*

4. An entire will of lands and goods may be proved in the spiritual court, but the probate does not affect the lands. *Holt*, 180. *Stroud's case*, 1 Mod. 90.

5. A prerogative probate, without *bona notabilia*, is only voidable. *Rex v. Loggen*, 1 Stra. 73.

6. The same will is often proved in both courts, viz. temporal and spiritual. *Sevil v. Kirby*, 10 Mod. 386.

7. Because proof in the one court establishes it for lands, the other for chattels only. *Id. ibid.*

8. An appointment in the nature of a will made by a feme covert must be proved in the spiritual court. 1 Mod. 212 *notis*.

9. A will made by a freeman of London may be proved and inrolled in the hustings of that city. 2 Show. 249.

10. The spiritual court cannot refuse to grant probate pending a commission of appraisement. *Rex v. Bellesworth*, 2 Stra. 857.

11. A *mandamus* lies to compel the grant of a probate of a will. *Anon.* 2 Show. 48.

12. A probate of a pretended will before it is avoided, stops claimants as next of kin. *Bennett v. Cradock*, Keny. 131.

13. The probate is conclusive evidence of a will, and cannot be controverted at common law. *Sir R. Raine's case*, 1 Ld. Raym. 262. *Anon.* Com. 150. 1 Saund. 275. n. [b].

14. It is conclusive evidence against a charge of forging the will. *Rex v. Vincent*, 1 Stra. 481.

15. Money paid to an executor under it shall discharge a debtor. 1 Saund. 275. n. [b].

16. An executor may maintain trover before probate. *Frederick v. Hook*, Carth. 154.

17. Executor may be sued for a legacy where he proves the will, though he does not live in that diocese. *Edgeworth v. Smalldridge*, 2 Stra. 847.

XV. HOW A WILL SHOULD BE PLEADED.

1. A will must be pleaded to have been made in writing. 1 Saund. 276 d.

2. And executed according to the statute. 1 Saund. 171 a.

XVI. HOW TO BE GIVEN IN EVIDENCE.

1. Held no proof could be admitted of a will in writing, without producing the will itself. Comb. 395.

2. The probate is good evidence. *Rex v. Rains*, 12 Mod. 136.

3. Two witnesses to a will, and two to a codicil annexed to the same will, one of the witnesses to the codicil was a witness to the will; the third person is not a good witness to the will, for he [*1532] never^d did see it. *Lea v. Libb*, 3 Mod. 282.

4. A devisee was held not to be a sufficient witness to a will, within the statute of frauds. *Hilliard v. Jennings*, Com. 91. 12 Mod. 276. S. C.

5. So, where one of the subscribers to the attestation of a will, had an annuity devised to his wife, he was held not to be a credible witness within the statute. *Holdfast v. Dowling*, 2 Stra. 1253.

6. But a legatee may be a witness against a will, but not for it. Salk. 691. Vide *ib.* 547.

7. And see the 25 G. 2. c. 6. and cases cited. 12 Mod. 277 *notis*.

8. A will shall not be read on proof of witness's hand, unless there be positive proof that he is dead. *Hungate v. Fothergill*, Com. 614.

9. If there are three subscribing witnesses to a will, this is sufficient within the statute of frauds and perjuries, though upon the trial one of them would not swear that he saw the testator seal and publish his will, if it be proved to be his hand, and that he set it as a witness to the will. Holt, 742, 743. Skin. 413.

10. Proof a will cannot be made against a man by confession of his own witness. *Pyke v. Crouch*, 1 Ld. Raym. 730.

11. It shall be left to a jury to determine merely from circumstances, without any positive proof, whether the witnesses to a will (being all dead) set their names in the presence of the testator. *Hands v. James*, Com. 531.

12. A recital of a will in a copyhold admittance, is evidence against any but the heir. *Anon.* 1 Ld. Raym. 735.

XVII. WHEN AN AVERMENT MAY BE MADE, OR PAROL EVIDENCE ADMITTED TO CONTROL OR EXPLAIN A WILL.

1. In general, an averment will not be allowed, either to support or defeat a will. *King v. Portington*, 3 Salk. 334.

2. It is never allowed against the express words of a will. *Blisset v. Cranwell*, Salk. 227. Cro. El. 75.

3. Devise by A to B, his sons, and the heirs of his body, remaining to C and the heirs male of his body, on condition that he

or they or any of them shall not alien, discontinue, &c.; an averment out of the will that it was the intent of the devisor to include his son and heir within the condition shall not be received. *Lord Cheyney's case*. 5 Co. 68 a.

4. A man may aver that there are two towns of Dale, to wit, Overdale and Netherdale, and no Dale only. *Anon.* Moore, 48.

5. So, where a remainder *seniori puero* was limited by one fine, the daughter or son can aver what the intent of the word *puero* was, because it is a word indifferently used for one or the other. *Lanc v. Couper*, Moore, 105.

6. A testator having two sons named John, devises to his son John; evidence *dehors* the will may be given to show which son is meant; but if no direct evidence can be given to show the intent, the will is void for the uncertainty. *Lord Cheyney's case*, 5 Co. 68 a.

7. A will of lands cannot be construed by parol proof. *Ld. Falkland v. Bertie*, Holt, 231. 744, 745.

8. Parol evidence is not admitted to determine the construction of any will. *Lowfield v. Stoneham*, 2 Stra. 1261.

9. A devise to a wife for her life cannot at law be averred to be in satisfaction of her dower. *Lawrence v. Dodwell*, 1 Ld. Raym. 438.

XVIII. RESPECTING THE FORGERY OF A WILL.

Pending a suit in the spiritual court touching the validity of a will, an indictment for forging it ought not to be tried. *Rex v. Rhodes*, 2 Stra. 703.

WITHERNAM.

1. A writ of *capias* in withernam was superseded, because the writ was made oppressively long. *Adams's case*, 7 Mod. 17.

2. Bail to this writ is taken body for body. 7 Mod. 17.

3. A withernam may be stayed by bringing the damages in court, and submitting^d to a form *pro con-* [*1533] *temptu*. 2 Leon. 174.

4. A *capias* issued out against the defendants, who entered their appearance with the filazer, and moved for a *superedeas* to the withernam, and offered by their counsel to plead *non ceperunt*, which they were ordered to do, and to give bail to appear *de die in diem*. *De la Bastide v. Reynell*, 4 Mod. 183.

5. Upon return of a withernam, if the plaintiff tenders the damages, he shall have a special writ to restore his cattle. 3 Leon. 236.

6. How cattle taken by withernam must be used, see 1 Leon. 220.

7. It seems that beasts taken in withernam may be laboured. 3 Leon. 235, 236.

[See also *ante*, tit. REPLEVIN, div. XXV. Vol. II. p. 1202.]

WITNESS.

I. RELATIVE TO THE COMPETENCY OF PERSONS TO GIVE EVIDENCE;—

- (a) *Apprentice*, p. 1533.
- (b) *Bailiff*, p. 1533.
- (c) *Attorney or counsel*, p. 1533.]
- (d) *Commissioner*, p. 1533.
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- (f) *Factor*, p. 1534.
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- (a) *By action*, p. 1541.
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I. RELATIVE TO THE COMPETENCY OF PERSONS TO GIVE EVIDENCE.

(a) *Apprentice*.

An apprentice may be a witness for his master in an action *per quod servitium amisit*. *Lewes v. Fog*, 2 Stra. 944.

(b) *Bailiff*.

In case against a sheriff for a false return of *non est inventus* to a *capias ad satisfaciendum*, the bailiff cannot be a witness to prove that he endeavoured to take him, &c. *Powell v. Hord*, 2 Ld. Raym. 1411. 1 Stra. 650 S. C.

(c) *Attorney or counsel*.

1. A counsel, attorney, or solicitor, ought not to be examined against his client, because he is bound to keep his secrets. *Cuts v. Pickering*, 1 Vent. 197. Skin. 404.

2. An attorney cannot be a witness in respect of a cause where he has been concerned;

but Holt, C. J. held he ought to declare any thing he knows otherwise than as attorney. *King v. Warden of the Fleet*, 12 Mod. 341.

(d) *Commissioner*.

Commissioners for the trial may be witnesses in treason. Case of *High Treason*, J. Kely. 12.

(e)* *Executor*. [*1534]

1. An executor who is not residuary legatee may be examined as a witness in a suit concerning the estate of his testator. *Anon.* 1 Mod. 107.

2. Where an heir is sued, an executor shall be a good witness to prove the debt paid out of the personal estate. *Webb v. Sutton*, Nels. 177.

(f) *Factor*.

A factor may be evidence for his master. *Mason v. Hodgson*, 11 Mod. 226.

(g) *Heir at law*.

The heir at law may be a witness for the title, but the remainder-man not. *Smith v. Blackham*, Salk. 283.

(h) *Husband and wife*.

1. The general rule is, that husband and wife cannot be witnesses for or against each other. 11 Mod. 224. n. T. Raym. 1.

2. A wife is not a witness, though with consent. *Parker v. Sir Woolston Dixie*, bart. C. T. Hardw. 264.

3. The wife of one defendant cannot be witness for the other, on an indictment against two. 2 Stra. 1095.

4. A woman cannot be admitted on evidence to prove her marriage with a man that is living. *Broughton v. Harper*, 2 Ld. Raym. 752.

5. But there are some exceptions to the rule that a wife cannot give evidence; as in cases of high treason, rape, forcible marriage, &c. 11 Mod. 224. n.

6. The exception seems formerly to have been confined to cases of treason. T. Raym. 1.

7. In an action by a husband, for assaulting with intent to ravish his wife, the wife is a competent witness. *Anon.* 11 Mod. 224.

8. So, a wife is a competent witness against her husband upon an indictment for assault upon herself. *Rex v. Azer*, 1 Stra. 633.

9. The evidence of the wife alone is not sufficient to prove no access in the husband, in order to make a settlement for the issue as bastards. *Rex v. Inhabitants of Bedell*, Andr. 9. C. T. Hardw. 79.

10. But after non access is otherwise proved, her testimony will, *ex necessitate*, be evidence as to the putative father. *The King v. Reading*, C. T. Hardw. 79.

11. A wife *de facto* will be allowed to give evidence of the nullity of her marriage, through bigamy, in support of her action. *Westbrooke v. Strutville*, 1 Stra. 79.

12. The wife of a party was admitted to prove her husband's death. *Rushden v. Carwesse*, 1 Stra. 568.

13. In an action on the case for enticing

away the plaintiff's wife, the declarations of the wife are not admissible in evidence. *Winsmore v. Greenbank*, Willes, 578.

(i) *Infamous persons.*

1. It is the infamy of the crime, and not the nature of the punishment, which destroys the competency of the offender. *Pendock v. Mackender*, 5 Mod. 75 *notis*. Salk. 690. *Rudock v. Mackinder*, 7 Mod. 415. n. *Rez v. Crosby*, 12 Mod. 72.

2. Burning in the hand does not impeach the credit of a witness, unless the crime for which it was inflicted affects it, as if it be for stealing. *Rez v. Warden of the Fleet*, 12 Mod. 341.

3. Formerly persons convicted of petty larceny were incompetent witnesses, although they had suffered the punishment of the law; but now by 31 Geo. 3. c. 35., no person shall be an incompetent witness by reason of a conviction of petty larceny. *Rez v. Davis and Carter*, 5 Mod. 75 *notis*. *Pendock v. Mackinder*, Willes, 665.

4. After standing in the pillory for a libel a man may be a witness, but after standing there for forgery he cannot, because it is an infamous judgment. *Rez v. Davis*, 5 Mod. 74.

5. One indicted of perjury in the time of Cromwell, and verdict against him, but through the death of Cromwell no judgment was entered, was held a good witness. *Fitch v. Smalbrook*, T. Raym. 32.

6. A charge upon oath of subornation of perjury does not disable a witness, but it goes to his credit. *Anon.* Holt, 754.

7. In felony, the king's pardon before attainder, prevents corruption of blood, and makes the person a good witness. *Rookwood's case*, Holt, 685.

8. A man that had stood in the [*1535] pillory* is restored to his credit as a witness by a general pardon. *Rez v. Crosby*, 1 Ld. Raym. 39. 5 Mod. 16. S. C. 12 Mod. 72.

9. But one convicted of perjury on the statute, though pardoned, cannot be a witness. *Anon.* 3 Salk. 155.

10. A pardon of felony (although after conviction and burning in the hand,) restores a man to be a witness; not so of perjury. *Anon.* 1 Vent. 349. *Rez v. Cclver*, T. Raym. 369. *Rez v. Castlemain*, T. Raym. 380.

11. The evidence of bawds is rejected in all cases by the spiritual court, as infamous persons. *Savil v. Kerby*, 10 Mod. 385.

(j) *Infant.*

An infant of any age may be sworn as a witness, if he is conscious of the danger of perjury. *Young v. Slaughterford*, 11 Mod. 286.

(k) *Interested persons.*

1. It is a principle of the common law, that evidence shall be given by persons disinterested. *Reg. v. Muscol*, 10 Mod. 193.

2. A party who supports the suit cannot

be a witness. *Hopkins v. Neal*, C. T. Hardw. 202.

3. He that apprehends himself interested, though not strictly so, is no witness. *Fotheringham v. Greenwood*, 1 Stra. 129.

4. A person liable to answer in damages is not a competent witness. *Cherk v. Dealy*, Holt, 756.

5. Though a witness is not immediately concerned in the event of a cause, yet if he be any way interested in the question upon which the cause depends, it is a sufficient objection to his evidence. *Reeves v. Symonds*, 10 Mod. 292.

6. As where an action is brought by a commoner for his right of commoning, no person that claims a right of common upon the same title may be allowed to give evidence to establish the general right. *Id. ibid.*

7. But one commoner may be a witness for another claiming common, where a specified number only are entitled. *Hockley v. Lamb*, 1 Ld. Raym. 731.

8. In cases of general concernment, as for common, *modus decimandi*, or the like, the freeholders, inhabitants, or parishioners, are not allowed as witnesses one for another. *Hob.* 92.

9. No one shall be allowed to give evidence about any matter in favour of the hundred to which he belongs. *Reg. v. Horsey*, 10 Mod. 150.

10. So, though he be so poor at the time as to pay no taxes. *Id. ibid.*

11. Where the repair of a highway is in question, none shall be admitted to be evidence who lives in that parish where the way is. *Buckeridge's case*, 4 Mod. 49.

12. On an indictment against a county for not repairing a public bridge, the inhabitants of the district in which the bridge is situated are good witnesses. *Rez v. Wills*, 6 Mod. 307.

13. On an indictment for not repairing a bridge which the defendant is bound to repair *ratione tenuræ*, the inhabitants of the county may be witnesses. 2 Show. 47.

14. Formerly poor inhabitants, though they paid no taxes, could not give evidence in actions against the hundred on the statutes of hue and cry; but now by 8 Geo. 2. c. 26., they may give testimony in the same manner as if they were not inhabitants. *Berret v. Stok*, 1 Mod. 74.

15. A parson cannot give evidence on a question affecting the boundaries and extent of his parish. *Wharton v. Robinson*, 7 Mod. 63.

16. A person claiming the like interest with that in controversy, though under a different title, is no witness. *Farmers of Neugate Market v. Dean of St. Paul's*, 12 Mod. 372.

17. So, when an action was brought against A for a quantity of stockings, and A pleaded that it was not he but B who bought

them, and sent them to France in the way of trade, B was not permitted to swear himself to be the buyer, because upon that question depended the right to the profit which had been made of the stockings. *Reeves v. Symonds*, 10 Mod. 291, 292.

18. A person claiming by the custom is not a good witness, but a tenant of a manor who does not claim is. 12 Mod. 24.

19. A sailor who claims wages, [*1536] no witness* concerning the loss of the ship. *Dunsley v. West-brown*, 1 Stra. 414.

20. A person to whom the thing in demand is made over as a security, among other things which are a sufficient security without it, cannot be a witness. *Norris v. Napper*, 2 Ld. Raym. 1008.

21. One who may be a loser by the deed, or gainer by the verdict, cannot be a witness on an indictment against another for forgery. *Watt's case*, 3 Salk. 172.

22. Under the statute of distributions, none of the children of the intestate can be admitted as evidence. Skin. 223.

23. A being indebted to B, gives him a note in a feigned name, which note was run away with, A pays B the money, an action is brought against A on the note, B is no evidence to prove the note run away with. *Anon.* 12 Mod. 564, 565.

24. The original drawer is not a good witness to prove he did not draw the bill, but a release makes him good. *Dupays v. Shepherd*, Holt, 297. *Anon.* 12 Mod. 341.

25. The maker of a promissory note not allowed to be a witness on an indictment against the payee for perjury, in denying an agreement not to put it in suit against the maker. *Tamen quare Rex v. Nunex*, C. T. Hardw. 265. 2 Str. 1043. 2 Sess. C. 377. pl. 201.

26. In trover for a bill of exchange, the person who carried it to the defendant indorsed blank, was held a good witness. *Lucas v. Haynes*, 2 Ld. Raym. 871. Salk. 230. S. C.

27. It is an objection to a witness that he has received money from one of the parties. *The Queen v. Jennings*, 11 Mod. 228.

28. A witness at a trial, had made a bargain with the plaintiff, who promised her 1000*l.* if she recovered, and she was not allowed to be sworn. *Hicks v. Gore*, 3 Mod. 85.

29. The evidence of a woman was rejected, because her husband had received a bond of 30*l.*, and was to receive 20*l.* more if the cause went in favour of the party who had subpoenaed her. *Whithall v. Sir G. Saunders*, W. Kely. 62.

30. One whose wife has an annuity devised for her separate use is not a good witness to the will. *Holdfast dem. Anstey v. Dowling*, 2 Stra. 1253.

31. But a person cannot be deprived of the

testimony of a witness in his favour, on account of the witness having laid a wager on the event of the cause. *George v. Pierce*, 7 Mod. 31. Skin. 586.

32. A freeman of a corporation disfranchised without having been summoned, cannot be examined as a witness in a cause for a toll claimed by the corporation. *Brown v. Corporation of London*, 11 Mod. 225.

33. But in a cause in which the members of a corporation are interested, if any of them are disfranchised, and have no intention or expectation of being received again into the corporation, they are competent witnesses, although they were disfranchised for the purpose of enabling them to give their testimony. *Skinner's Company v. Jones*, 6 Mod. 167.

34. A corporator who has acted under the right claimed may be a witness to prove the usage. *Boyfield v. Brown*, 2 Stra. 1069.

35. On a trial concerning the constitution of a borough, whether any person can be elected in the common council but those who are inhabitants and hold burgage tenures, one who comes within both these qualifications is no witness to prove the constitution. *Stevenson v. Nevinsom*, 2 Ld. Raym. 1353.

36. On a *scire facias* to avoid a patent office, a person who is to be deputy to the plaintiff in case the patent is repealed, may be examined as a witness. *Haarings's case*, 1 Mod. 21.

37. Where there are two qualifications to an election of an officer, he who has but one only may be a witness as to the right of election. *Stevenson v. Nevinsom*, 1 Stra. 583.

38. The objection on the ground of interest to an elisor named with another to return a jury of freemen why are to elect a mayor of a corporation, being a witness in a cause wherein the mayor elected was defendant, goes to credit, but not to competency. *Rex v. Bray*, C. T. Hardw. 358.

39. So also as to one of such jury who* had so elected the de- [*1537] fendant the mayor. Id. *ibid.*

40. A patron is never allowed to be a witness to maintain the title of his clerk. *Jones v. Bean*, 4 Mod. 17.

41. A devisee or legatee is not a good witness to a will within the statute of frauds. 1 Ld. Raym. 507. *Hilliard v. Jennings*, Com. 91.

42. The son of a legatee no witness in the spiritual court, but a good third witness to a nuncupative will within the statute of frauds. 1 Ld. Raym. 85.

43. The son of a contingent legatee cannot be a witness in the spiritual court. 1 Ld. Raym. 91.

44. But a legatee may be a witness against a will, though not for it. *Ozenden and Percrice*, Salk. 691.

45. On a suit by creditor against executor,

a legatee was admitted to prove assets. *Anon.* 12 Mod. 385.

46. A legatee may be a witness to prove the will after he has released. *Pyke v. Crouch*, 1 Ld. Raym. 730.

47. So, a person prejudiced by a will, may be admitted to prove it forged. *Anon.* 12 Mod. 340.

48. The creditor of a bankrupt is no witness to prove him a gamester. *Shuttleworth v. Bravo*, 1 Stra. 507.

49. A creditor who pays money to his debtor's servant, is not a competent witness to prove such a payment in an action by the master against the servant. *Theobald v. Tregoll*, 11 Mod. 261.

50. In an action by an executor against a person who has received money due to the testator, the original debtor is not a competent witness to prove the payment of the money. *Clerk v. Dealy*, 6 Mod. 151.

51. A creditor was allowed to prove that the debtor was not entitled to his discharge on the mint act. *Norcott v. Norcott*, 1 Stra. 650.

52. A creditor who is paid is a witness on *plene administravit*. *Kingstone v. Grey*, 1 Ld. Raym. 745.

53. The owners of goods on board cannot be evidence for the master of the ship, for they are all concerned in one bottom and in one adventure. *Sandys v. Custom House Officers*, Skin. 174.

54. A carrier brings an action for goods lost out of his custody, the owner of the goods is no witness. *Tiley v. Cowling*, 1 Ld. Raym. 744.

55. In case for negligently steering his ship, &c., the pilot is no witness for the defendant. *Martin v. Hewickson*, 2 Ld. Raym. 1007. Holt, 756. Salk. 287. S. C.

56. The tenant in possession is no witness in ejectment for the landlord, as being liable for the mesne profits. *Bourne v. Turner*, 1 Stra. 622.

57. Neither can he be made a witness. *Id.* *ibid.*

58. A man who conveys lands may be a witness against his title, but he is not compellable. *Tilly's case*, 2 Ld. Raym. 1008.

59. An informer entitled to part of the penalty is no witness. 1 Stra. 316. Andr. 240. Gilb. 111. *Jenkins v. Hankeys*, 3 Mod. 114, 115.

60. The evidence only of the person entitled to the benefit of a conviction, is not sufficient to support it. *Rex v. Piercy*, Andr. 18.

61. But in some criminal cases, interested persons are allowed to be witnesses by reason of necessity. *Reg. v. Muscot*, 10 Mod. 193, 194.

(l) Lord of a manor.

Lords of customary manors are not allowed as witnesses to establish a right in a lord of another manor. 1 Stra. 658.

(m) Master and Servant.

1. The master is no evidence of paying money; *contra* of a servant. *Theobald v. Tregoll*, 11 Mod. 261.

2. A goldsmith's servant, who over-pays money, is a witness in an action for it again. *Martin v. Horner*, 1 Stra. 647.

3. The original debtor was admitted as a servant to prove the payment by another. *Brownson v. Avery*, 1 Stra. 507.

4. In an action against the master for the negligence of his servant, the servant, having a release from the defendant, is competent. *Jarvis v. Hayes*, 2 Stra. 1083.

5. The servant is a witness in an action by a master for beating him. *Duel v. Harding*, 1 Stra. 595. 1054. *Contra*, *Daneby v. Westbroome*, 1 Stra. 414.

(n) Mortgagor.

A person who has mortgaged a copyhold* estate is not a compe- [*1538] tent witness in an ejectment concerning it. *Anon.* 11 Mod. 354.

(o) Parent.

Where the legitimacy of her son is in question, a mother may be a witness to prove her own marriage. *Stapleton v. Stapleton*, C. T. Hardw. 277.

(p) Partner.

Where a plaintiff goes upon the credit of divers partners, the act of one partner is evidence against the others, except they show some disclaimer. — *v. Layfield*, Salk. 292.

(q) Particeps criminis.

1. In trespass, if the taking appear to have been felonious, yet a person, though proved by his own testimony to be a particeps criminis, is a competent witness. *Lutterell v. Reynell*, 1 Mod. 282, 283.

2. The son took the father's money and gave it to A, and the son's evidence was admitted in trover against A. *Anon.* Salk. 289. Holt, 757. S. C.

3. If a person, having a number of trees planted in boxes, desire another to let them stand in his garden, and permit his gardener to take care of them, the gardener is a good witness in an action of trover brought by the owner of the trees against the alienee of the garden. *Oliver v. Vernon*, 6 Mod. 170.

4. A person who gives a bribe to another to vote at an election for members of parliament, is a competent witness to prove the bribery, in an action for the penalty under the stat. 2 G. 2. c. 24. *Mead v. Robinson*, Willes, 422.

5. On a prosecution for penalties under the statute 9 Ann. c. 14 s. 5., the loser of the money at cards is a good witness to prove the loss. Willes, 222. n.

6. Confederates in the same treason may give evidence. *J. Kely*, 17. 33.

7. For an information upon the statute of usury, the parties to the supposed usurious contract are not competent witnesses. *Smith's*

case, 12 Co. 69. *Jennings v. Hankeys*, 3 Mod. 114. *Rex v. Warden of the Fleet*, 12 Mod. 339. *Shank qui tam v. Payne*, 1 Stra. 633.

8. He who borrows the money may be a witness after he has paid the money, but not before. *Long's case*, T. Raym. 191.

9. If A pledge jewels with B upon an usurious contract, and B afterwards takes A's bond for the principal and interest, A may be examined as a witness on a prosecution against B, for the usury. *Rex v. Sewel*, 7 Mod. 119.

10. A won money of B by means of C and D packing the cards; upon an indictment against C and D, A cannot be a witness, because interested in the conviction, for he might give the record of it in evidence on a prosecution against him as a participes criminis. *Luttrell v. Reynell*, 1 Mod. 283, 284.

11. Where one defendant is fined, he is a witness for the other. *Rex v. Fletcher*, 1 Stra. 633.

(r) *Party injured.*

1. A witness may be admitted out of necessity; as, on the statute of hue and cry, the person robbed may give evidence. *Rex v. Warden of the Fleet*, 12 Mod. 340.

2. A woman taken away by force is allowed to be a witness of the fact. *Rex v. Fexas*, 4 Mod. 8.

3. In an information for debauching a young lady, she was allowed to be sworn as an evidence on behalf of the party accused. *Gray's case*, Skin. 82.

4. The party oppressed is good evidence on an indictment for the oppression. *Anon.* 12 Mod. 512.

5. In an action for a rescue, the party rescued is a competent witness. *Wilson v. Gray*, 6 Mod. 211.

6. On an indictment for a cheat in procuring a note from A, A cannot be a witness. *Semb. Rex v. Whiting*, Salk. 283. 1 Ld. Raym. 396. S. C.

7. Yet A being cheated, was admitted as a witness to prove the fact on the indictment. *Rex v. Mackartney*, Salk. 286. Holt, 300, 301. S. C.

(s) *Party to the suit.*

1. In an action of assault, &c., brought by husband and wife, it was held, that what the wife said, immediately upon the hurt received, and before she had time to* [1539] contrive any thing for her own advantage, might be given in evidence. *Thompson v. Trevanion*, Skin. 402.

2. In an information on the statute of deer stealing, the party and prosecutor may be a witness. *Rex v. Drake*, Comb. 35.

3. So on a prosecution for the penalty under 23 G. 2. c. 13. s. 1., for seducing artificers to go out of the kingdom, the prosecutor is a competent witness, though entitled to half the penalty. *Wilkes*, 425. (n. c.)

4. In assault, one joined in the *simul cum*

may be a witness, if not served with process. *Hill v. Fleming*, C. T. Hardw. 264.

5. Defendants under a *simul cum*, in an action of trespass, may be witnesses for the plaintiff, if no evidence is given against him. *Leonard v. Stacey*, 6 Mod. 69.

6. In an action for a tort, those against whom there is no proof may be acquitted, and give evidence for the defendant. *Anon.* 1 Mod. 11.

7. A defendant in battery, or trespass, or riot, &c., may be a witness, except process be sued against him, or he appear and plead; then he shall not be sworn, if it appear such evidence would have been given against him, as would have made it a question to the jury, if he had been guilty or not. *King and Culpepper*, Skin. 673.

8. If A declare against B with a *simul cum*, viz. C, B shall not be deprived of C's testimony, unless evidence be given of his being some way concerned in the facts, and that process in that action had issued against him, and endeavours used to take him. *Lloyd v. Williams*, C. T. Hardw. 123.

9. A defendant in ejectment is no witness on an indictment for perjury at the trial. 1 Stra. 104.

10. If there be several defendants in an information, some of whom have not pleaded, on the attorney-general entering a *non pros* as to them, they are good witnesses. *Anon.* 12 Mod. 40.

11. One indicted, but who for want of replication to a plea of *misnomer* is discharged, may be witness for the other defendants. *Rex v. Sherman*, C. T. Hardw. 303.

12. Where there are several defendants in Chancery, each of them may make use of the evidence of the rest. *Gibson v. Albert*, 10 Mod. 19.

13. But if a plaintiff in Chancery make any one a defendant without cause, he shall not be allowed the benefit of his evidence, though it is otherwise in the case of trustees, for the plaintiff may make use of their evidence, though they be defendants, because it is necessary to make them so. *Id. ibid.*

(t) *Prisoner.*

1. A prisoner having escaped may be a witness to prove the escape voluntary, on a traverse of an inquisition against the gaoler. *Rex v. Ford*, Salk. 690.

2. A prisoner who had given a bond for his being a true prisoner, was admitted a witness to prove a voluntary escape. *Rex v. Warden of the Fleet*, 338.

(u) *Subscribing witness.*

1. Where the bail is a subscribing witness, he shall be obliged to testify. *Hawkins v. Perkins*, 1 Stra. 406.

2. One not a witness to a deed may be evidence of its execution. *Taylor's case*, 11 Mod. 262.

(v) *Trustee.*

1. A trustee has not the privilege which a professional man has, of declining to give evidence relative to the estate or persons which are entrusted to him. *Sir T. Jones v. Countess of Manchester*, 1 Vent. 197.

2. Trustees who had purchased lands were admitted to prove the value of them, notwithstanding the objection, that it was to discharge themselves of breach of trust. *Kinsman v. Crooke*, 2 Ld. Raym. 1166.

(w) *In respect of religious principles.*

All persons who believe a future state are competent witnesses in this country. *Omi-chund v. Barker*, Willes, 549.

II. OF THE METHOD OF GIVING EVIDENCE.

1. A peer, in giving his evidence in causes between party and party, must be sworn, and give his evidence, not only upon his honour, but upon his oath. *The Earl of Shaftesbury v. Lord Digby*, 2 Mod. 99, 100.

2.* The depositions of witnesses, professing the Gentoo religion, who were sworn according to the ceremonies of their religion, taken under a commission out of Chancery, may be read as evidence here. *Omi-chund v. Barker*, Willes, 538.

3. In a writ of right, the tenant shall give evidence, because he is in the affirmative. *Heiden and Ilgrave's case*, 3 Leon. 162.

4. He who is in the affirmative must give evidence first. *Id. ibid.*

5. Where a plea is in the affirmative, the proof lies on the defendant. *Hilliard v. Phaley*, 8 Mod. 180, 181.

6. Examination of witnesses twice to the same thing is irregular. *Nels*, 138.

7. If several issues are to be tried at the same time, the evidence as to every issue may be given separately. *Say*, 131.

8. Where written evidence is produced, the other side may have the whole read, after such parts thereof are read as the party producing it directs. *Andr*, 259.

III. HOW THE EXAMINATION OF A WITNESS SHOULD BE CONDUCTED.

1. A person is not to be suffered to discredit a witness of his own calling. *Adams v. Arnold*, 12 Mod. 375. *Holt*, 298.

2. A lawyer of counsel may be examined upon oath as a witness to the matter of agreement, not to the validity of the assurance, or to the matter of counsel; and in examining of a witness, counsel cannot question all the life of the witness, as whether he be a whoremaster, &c., but if he has done any notorious act which gives just exception against him, this may be taken. *March*, 83. pl. 135.

3. They who produce a witness may examine him in chief only; but the party against whom he is produced may examine him upon a *voir dire*, whether he be con-

cerned in interest. *Case of the Corporation of Bewdley*, 10 Mod. 151.

4. But in case other evidence be offered to prove him interested, then the witness himself shall not be examined upon a *voir dire*. *Reg. v. Muscot*, 10 Mod. 193.

5. The competency of a witness who has appeared to be interested, and subsequently been examined, is admitted. *Anon. Keny*, 389.

6. A person entrusted to make a bargain, not to be admitted to prove any thing to defeat it. *Anon.* 1 Ld. Raym. 733.

7. Witnesses may be examined out of the hearing of each other, by the favour of the court in treason, but the prisoner cannot demand it as a right. *Trial of Thomas Vaughan*, Holt, 689.

8. A witness swears but to what he has seen or heard generally, or more largely, to what has fallen under his senses. *Vaugh.* 142.

9. A witness who never saw the party write, is improper to prove his handwriting. *King v. Culpeper*, Holt, 293.

10. A paper purporting to be a previous examination of the witness, as to the matter in issue, taken before a magistrate, and signed by him, but not by the witness, was not admitted to be read in evidence in order to discredit him. *Tireman v. Hanwell*, C. T. Hardw. 306.

11. One not a witness may evidence a lease, &c. *Taylor's case*, 11 Mod. 262.

12. Where a witness swears to a matter, he is not to read a paper for evidence, though he may look on it to refresh his memory; but if he swears to words, he may read, if he swears he committed them to writing immediately. *Dupays v. Shepherd*, Holt, 296.

13. A witness being brought to establish a charter, his evidence was objected to by reason of his being a mortgagee under the corporation, as was inferred from an answer of his to a bill in Chancery; but this answer being ambiguous, the court was of opinion he should be admitted to explain his answer. *Reg v. Bewdley*, 10 Mod. 151.

IV. OF THE EXPENSES OF A WITNESS.

A witness who attends voluntarily to give evidence on a trial is entitled to his expenses. *Anon.* 6 Mod. 140.

V. OF THE PRIVILEGES OF A WITNESS.

1. A person subpoenaed to give evidence* is protected from ar- [*1541] rest *cundo et redeundo*. *Anon.* 1 Mod. 66.

2. Justices of peace may discharge one arrested coming to the sessions. *Clarke v. Molineux*, 1 Lev. 159.

VI. OF THE DEATH OF A WITNESS.

1. The testimony of a witness on one trial may, after his death, be given in evidence

on another trial. *King v. Carpenter*, 2 Show. 48.

2. If a witness be to testify what another, since dead, said at a former trial upon his oath, the record of that trial must be produced, or else such evidence is not to be admitted. *Anon.* 2 Show. 163.

VII. REMEDY AGAINST A WITNESS FOR NOT GIVING EVIDENCE;—

(a) *By action.*

1. Debt lies on the statute for not appearing as a witness, and the plaintiff may declare for 10*l.*, and such damages as the court will give. *Shore v. Meddison*, Comb. 449. 458.

2. In debt upon the statute of 5 Eliz. c. 9., it was resolved that it sufficed to leave a note of the process at the house of the witness, and though there be not a reasonable sum delivered to him for costs and charges according to the distance of place, as the statute says, yet if he accept it, he is bound; he that will maintain an action upon this statute, ought to aver that he was damnified. *Goodman v. West*, March, 18. 43. Cro. Eliz. 130. 1 Leon. 122.

(b) *By application to the court and attachment.*

1. Whoever subscribes his name as a witness to any thing, does thereby undertake to give his evidence when it shall be wanted, and if he refuses, the court will compel him to it. *Clark v. Ethrick*, 10 Mod. 333.

2. When persons are witnesses to an arbitration bond, they may be compelled by rule of court to make affidavit of their being so. *Id.* *ibid.*

3. Attachment lies against a witness for not attending on a subpoena. *Hammond v. Stewart*, 1 Stra. 510. *Wyatt v. Winkworth*, 2 Stra. 810.

4. A witness ought to have a reasonable notice of trial. *Hammond v. Stewart*, 1 Stra. 510.

5. Delivery of a subpoena to a servant, who said he had delivered it to his master, who declared he would attend, is not sufficient to ground attachment against the master. *Wakefield's case*, Ca. T. Hardw. 303.

6. Where the witness attended on his subpoena, but came too late, an attachment was refused on motion, and the party referred to his remedy by action. *Collier v. Morris*, Ca. T. Hardw. 180.

(c) *By fine.*

A witness, though he be a peer, may be fined for refusing to be sworn to give evidence to the grand jury at the quarter sessions on an indictment of high treason. *King v. Lord Preston*, Holt, 752.

VIII. REMEDY AGAINST A WITNESS FOR GIVING FALSE EVIDENCE.

Case lies not against a witness for swearing falsely. Cro. Eliz. 530.

IX. LIABILITY OF A WITNESS FOR MISBEHAVIOUR.

A witness cannot be indicted for insolent behaviour while under examination in a court of justice, but he may be committed for the contempt, or bound over to his good behaviour. *Rex v. Rogers*, 7 Mod. 29.

WOMEN.

I. OF THE APPOINTMENT OF WOMEN TO OFFICES, p. 1542.

II. RELATIVE TO THE OFFENCE OF FRAUDULENT ABDUCTION OF WOMEN;—

(a) *At common law*, p. 1542.

(b) *By the statute* 3 H. 7. c. 2, p. 1542.

(c) *By 4 & 5 Ph. & Mary*, c. 8, p. 1542.

III. MISCELLANEOUS, p. 1542.

I.* OF THE APPOINTMENT OF WOMEN [*1542] TO OFFICES.

1. A woman is capable of being elected to the office of sexton, and may vote at the election of a candidate for such office. *Oliver v. Ingram*, 7 Mod. 263. 2 Str. 1114. S. C.

2. A woman may be appointed governor of a workhouse, and may act by deputy. *Anon.* 2 Ld. Raym. 1014.

II. RELATIVE TO THE OFFENCE OF FRAUDULENT ABDUCTION OF WOMEN;—

(a) *At common law.*

1. The taking away a young woman under sixteen from a guardian appointed by Chancery, and marrying her to her disparagement, though with her consent, and without force, is an offence at common law, and punishable by information. *Rex v. Pierson and others*, Andr. 310.

2. Attempting to carry away forcibly a woman of great fortune, is a great misdemeanour. *Rex v. Pigot*, Holt, 758.

(b) *By the statute* 3 H. 7. c. 2.

1. The word "so" in the body of the act has made the preamble a part of the body. *Burton v. Morris*, Hob. 182, 183.

2. The taking away a woman against her will, if she have nothing, nor his heir-apparent, is not within this act. *Baker and Hall's case*, 12 Co. 100.

3. Neither is it felony within the statute, unless followed by marriage or defilement. *Ibid.* 12 Co. 20. 1 And. 115. S. P.

4. By the act, the accessory, both before and after, is made a principal, &c., but by construction of law the receivers of the woman are principals, but not receivers of them who took the woman, for they are but accessories. *Baker v. Hall*, 12 Co. 100. Cro. Car. 489. 12 Co. 12.

5. Clergy is taken away from principals and procurers before, by statute 59 Eliz. c. 9. *Baker v. Hall*, 12 Co. 100.

6. But altered to transportation for seven years or a longer time, or imprisonment for

seven years or a shorter time, by 1 G. 4. c. 115.

7. A wife forcibly married contrary to this statute, shall be admitted to give evidence against her husband. *Brown's case*, 1 Vent. 244. *Fulwood's case*, 1 Hale, 661. Cro. Car. 488.

(c) *By 4 & 5 Phil. & Mary, c. 8.*

1. To make it an offence against this act, there must be a legal guardian, and the infant ought to be in his actual custody. *Rez v. Bastian*, 1 Sid. 362.

2. Taking away an heiress under sixteen from the custody of a guardian appointed by the court of Chancery, and marrying her to her disparagement, is punishable by information within this act, although the parties concerned have been committed to the Fleet by the court of Chancery. *Rez v. Pierson*, Andr. 310.

3. A bastard is within the meaning of this statute. *Rez v. Cornesforth*, 2 Stra. 11162.

III. MISCELLANEOUS.

1. If a feme sole having 1400*l.* stock, convey it to trustees to the use of her intended husband and herself for life, with power to dispose of 200*l.*, this power survives to the wife on the death of her husband. *Horne v. Bendloes*, 9 Mod. 335.

2. On a devise of so much money to a feme sole, provided she marry with the consent of her father and mother, or the survivor of them, the marriage is a condition precedent to the payment of the legacy. *Garbut v. Hilton*, 9 Mod. 210.

3. A married woman, though a feme sole trader, by the custom of London, cannot sue or be sued in the superior courts without her husband; but *quære*, if she may not by force of the custom in the courts of the city of London. *Macklin v. Packman*, 1 Mod. 26.

4. The wife of a person banished by parliament, or abjured, can have an action without her husband. 1 Ro. 400.

5. A feme covert may be made defendant in ejectment, where a pretended husband is lessor of the plaintiff. *Fenwick v. Gravenor*, 7 Mod. 71.

6.* If a wife plays and loses [*1543] the husband's money, he can have trover and conversion against the gamester. 1 Sid. 122.

7. The wife cannot be charged with her husband for conversion of goods to the use of them. Cro. Car. 254. 494, 495, 519.

8. If a feme covert be sued as a feme sole, it cannot be taken advantage of on a writ of error. 2 Ro. 53.

9. If a feme covert within age appear by attorney, where she ought to appear by guardian, or in proper person, the fine may be reversed on error. 2 Ro. 85.

10. If a plaint be levied against a feme covert in an inferior court, and she remove it by *habere corpus*, and put in bail as a feme sole, yet, if the plaintiff declare against her

as such, she may plead coverture in bar. *Etherington v. Reynolds*, 11 Mod. 142.

11. After the husband's death, the widow can have trespass for damage done to her land during the coverture. 2 Ro. 265.

12. A feme covert may be convicted on a penal statute without joining her husband. *Rez v. Crofts*, 7 Mod. 397.

13. A feme covert may be committed for disobeying an order of maintenance. *Rez v. Taylor*, 7 Mod. 399.

14. A feme covert may plead alone to a writ of excommunication, for the proceedings in such case are of a criminal nature. *Rez v. Canterrell*, 7 Mod. 69.

15. A feme covert indicted for a misdemeanor shall not be bound with her bail. *Anon.* 7 Mod. 63.

16. The King's Bench will prohibit the spiritual court from granting probate of a will made by a feme covert, although by marriage articles she was authorised to make an appointment. *Taylor v. Rains*, 7 Mod. 148.

17. If a feme obligee takes one of the obligors to husband, it is a discharge of all the obligors. Cro. Car. 551.

WORDS.

I. GENERAL RULES AS TO THE CONSTRUCTION OF WORDS, p. 1543.

II. WHEN DIFFERENT PARTS OF THE SAME WRITING ARE OPPOSED TO EACH OTHER, p. 1544.

III. CONSTRUCTION OF PARTICULAR WORDS, p. 1544.

IV. WHAT WORDS ARE TREASONABLE, p. 1545.

V. WHAT WORDS ARE A SUFFICIENT JUSTIFICATION FOR MANSLAUGHTER, p. 1545.

VI. WHAT WORDS ARE ACTIONABLE. See *ante*, tit. SLANDER, Vol. II. p. 1278.

I. GENERAL RULES AS TO THE CONSTRUCTION OF WORDS.

1. It is the office of judges to expound words according to the intent of the parties. *Finch's case*, 6 Co. 64 b.

2. The effect of all words rests in a reasonable sense and construction of them, and in such sense they ought always to be taken. Plow. 329.

3. Words are to be so construed as to uphold the acts of the parties. 3 Lev. 439.

4. *Utile per inutile non vitiatur.* *Tbod v. Hasling*, 2 Saund. 306, 307.

5. Where words are capable of different expositions, that sense shall be taken which supports the declaration, deed, agreement, or verdict, and not that which defeats it. Salk. 324, 325. *Burges v. Bracher*, 8 Mod. 240.

6. *Quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba expressa fienda est.* *Lanyon v. Carne*, 2 Saund. 167.

7. Words are to be taken according to the common and ordinary understanding of them. 2 Mo. 183. 4 Mod. 186.

8. *Expressio eorum qua tacite in sunt nihil operatur.* *Peters v. Opie*, 2 Saund. 351.

9. Naked powers are to be taken strictly, but not if clothed with an interest. *Carter*, 103.

10. *Verba idem sonantia* (as *nunne* for *nonne*) are to be construed to be the same. *Nonne v. Mazey*, T. Jones. 219.

11. General words are to be [* 1544] construed "according to the subject-matter. *Grange v. Tiving*, Orl. Bridg. 116. 147.

12. *Expressio unius est exclusio alterius.* 2 Saund. 370.

II. WHEN DIFFERENT PARTS OF THE SAME WRITING ARE OPPOSED TO EACH OTHER.

1. Subsequent words may explain a former sentence in a deed; but in wills, the first words guide all which follow. *Friend v. Bouckier*, 3 Mod. 82.

2. Words tending to enlargement shall not be construed a restraint of a former clause. *Winter v. Loveden*, 1 Ld. Raym. 269.

3. The word *postea* is in many case sufficient, notwithstanding a repugnant *scilicet*, where it is alleged in point of fact, but not where the law is mistaken. *Duppa v. Mayo*, 1 Saund. 287.

III. CONSTRUCTION OF PARTICULAR WORDS.

1. As to the construction of the word "*adhuc*," see *Carter v. Calthrop*, 4 Mod. 153.

2. "*Adtunc et ibidem*" refers to the last time and place. 1 Ld. Raym. 576.

3. The word "contract," in the statutes against usury, extends to all personal things. *Bush v. Gower*, C. T. Hardw. 233.

4. The words "*absque destructione*," ought to have a reasonable construction, and the grantee is at liberty to take estovers for his necessary use. 2 Ro. 74.

5. "*Domus*" est *nomen collectivum*, and contains many buildings, as barns, stables, &c. 4 Leon. 16.

6. "*Factum*" implies sealing and delivering. 1 Leon. 310.

7. "From the date," and "from the day of the date," are of one sense. *Clayton v. Tresenham*, 5 Co. 1 a.

8. The word "estate" in legal parlance, carries both the quantity and substance of the estate. *Anon.* Skin. 194.

9. The word "growing," though it sound in the present tense, yet it shall be taken also in the future tense. 4 Leon. 36.

10. The word "hereditament" will not pass a fee. *Smith v. Tindal*, 11 Mod. 91.

11. The word "issue" is *nomen collectivum*, and comprehends *omnes qui exeunt de corpore*, as well the immediate as the mediate issue, in *infinitum*. *Holland v. Fisher*, Orl. Bridg. 214. *Warner v. Seaman*, Poll. 117.

12. The word "issue" may be referred to the immediate issue only. *Holland v. Fisher*, Orl. Bridg. 214.

13. A garden will pass in a conveyance by the name of a "messuage." 2 Saund. 401.

14. The word "*placitum*" includes a demurrer. *Wilson v. Law*, Skin. 550. 554.

15. The word "*quamdiu*" implies a duration without interruption. *Holland v. Fisher*, Orl. Bridg. 202.

16. "Samuel" and "Samul" shall be intended the same names. *Fenn v. Alston*, 11 Mod. 284.

17. A man conveys by a Latin deed, "*seniori puero*" of his body, and afterwards levies a fine to the same uses, which is done to the eldest child; *senior* shall now be construed of either sex, and an elder daughter shall take before a younger son. 3 Dy. 337. pl. 36.

18. The words "*ad sequendum*" signify not only simply *ad prosequend.*, but also *ad defendend.*, and may be indifferently applied, either to the demandant or plaintiff, or to the defendant. *Hesketh v. Lee*, 2 Saund. 95.

19. "*Tenementum*" is of an uncertain signification. 3 Leon. 102.

20. The words "them" and "when," in wills, are often taken *expletive*. *Holland v. Fisher*, Orl. Bridg. 214.

21. The word "*testum*" does not signify a close, but the ground whereon a house formerly stood. 2 Show. 93.

22. The word "toll" includes stallage, picage, &c. *Hill v. Priour*, 2 Show. 34.

23. A lease "until" Michaelmas, includes the feast-day. 3 Leon. 211.

24. The word "until" is sometimes a word of exclusion. *Wicker v. Norria*, C. T. Hardw. 116.

25. "*Usque*" is to be construed exclusively in pleading. 2 Mod. 280.

IV. WHAT WORDS ARE TREASONABLE. [* 1545]

No words are treasonable, unless made so by some statute. *Cro. Car.* 125.

[See ante, tit. TREASON, div. I. pl. 21, 22. div. II. pl. 2. Vol. II. p. 1407.]

V. WHAT WORDS ARE A SUFFICIENT JUSTIFICATION FOR MANSLAUGHTER.

1. If two quarrel in words, and after a reasonable time fight, and one is killed, it is murder. *Lord Morley's case*, J. Kely. 56. 8th res.

2. Words are no provocation sufficient to justify killing a man, nor will they lessen a crime from murder to manslaughter. *S. C.* J. Kely. 55. 7th res. 1b. 65.

WRECK.

1. All right to wreck was originally in the crown. 6 Mod. 149. *Vaugh.* 164.

2. And therefore not chargeable with any

custom. Vaugh. 164. 1 Ld. Raym. 388. 501.

3. A grant of wreck to the lord admiral, as appertaining to his office, will not pass wreck belonging to the king's manor by prescription. 1 Ld. Raym. 473.

4. Wreck of the sea granted to a man in all his lands, shall not extend to land whereof he was disseised at the time of the grant, and into which he afterwards re-enters. Plow. 130.

5. The person who has a right to wreck, has, in construction of law, the possession of it before seizure. 6 Mod. 149.

6. If a man either by grant or prescription have a right to wreck thrown upon another's land, of necessary consequence he has a right of way over the same land to take it. Anon. 6 Mod. 149.

7. The court of Admiralty has no jurisdiction of wreck, but it has of flotsam, jetsam, and lagan; wreck may be claimed by prescription. *Constable's case*, 5 Co. 106 a.

8. Nothing shall be said *wreccum maris*, but such goods only which are cast or left on the land by the sea. Id. *ibid*.

9. Wreck of the king's goods shall not alter the property of them. Plow. 243.

10. The act *de prerog. quod Rex hab. wrecc. maris per tot. reg.*, is but a declaration of the common law, and notwithstanding it a man may prescribe to have wreck. *Constable's case*, 5 Co. 106 a.

11. If a commission to inquire of wreck be awarded, or action brought within the year and day, a verdict given afterwards for the owner is sufficient. Id. *ibid*.

12. A custom where the ship perishes, that

the lord of the manor shall have the best cable, is void. *Geere v. Burkenshaw*, 3 Lev. 85.

13. But a custom of taking care of the goods wrecked for the benefit of the owners, and providing for the persons wrecked, &c., and in consideration thereof to have the best anchor and cable, was held good. *Simpson v. Bithwood*, 3 Lev. 307.

WRITING.

1. Where things are required to be in writing, it must be averred in pleading that they are so. 1 Saund. 276 c, f. n. [c].

2. If an award be averred to be under the hand and seal of the arbitrator, it shall be intended to be in writing. 2 Saund. 62.

3. By an averment of an award being in writing, it is not to be intended to be pursuant to a submission requiring it "in writing under the hands" of the arbitrators. 2 Saund. 62. n. [c].

4. An indictment for forging a writing containing "a certain writing obligatory" is bad, for it does not allege a forging of the obligation. *Rex v. Neck*, 2 Show. 472.

5. A contract in writing can only be proved by the writing itself. 1 Saund. 325. n. [b].

YEAR* AND DAY. [*1546]

1. Infants, femmes covert, executors, men in prison and beyond sea, are bound by nonclaim, within the year and day of estrays and wreck. *Constable's case*, 5 Co. 106 a. 1 And. 36. S. C.

2. The year and day in case of wreck shall be accounted from the seisure of the goods as wreck. Id. *ibid*.



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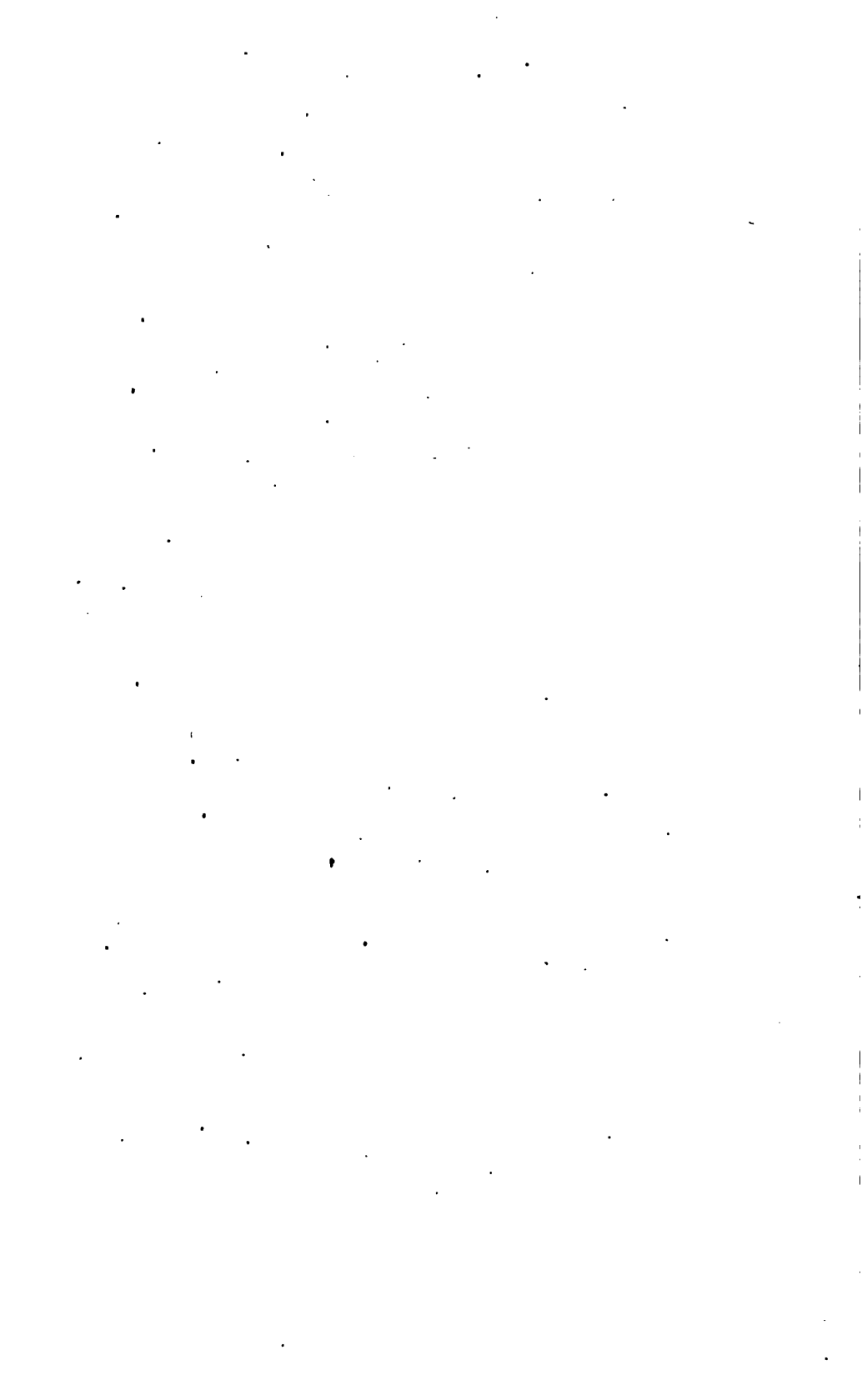
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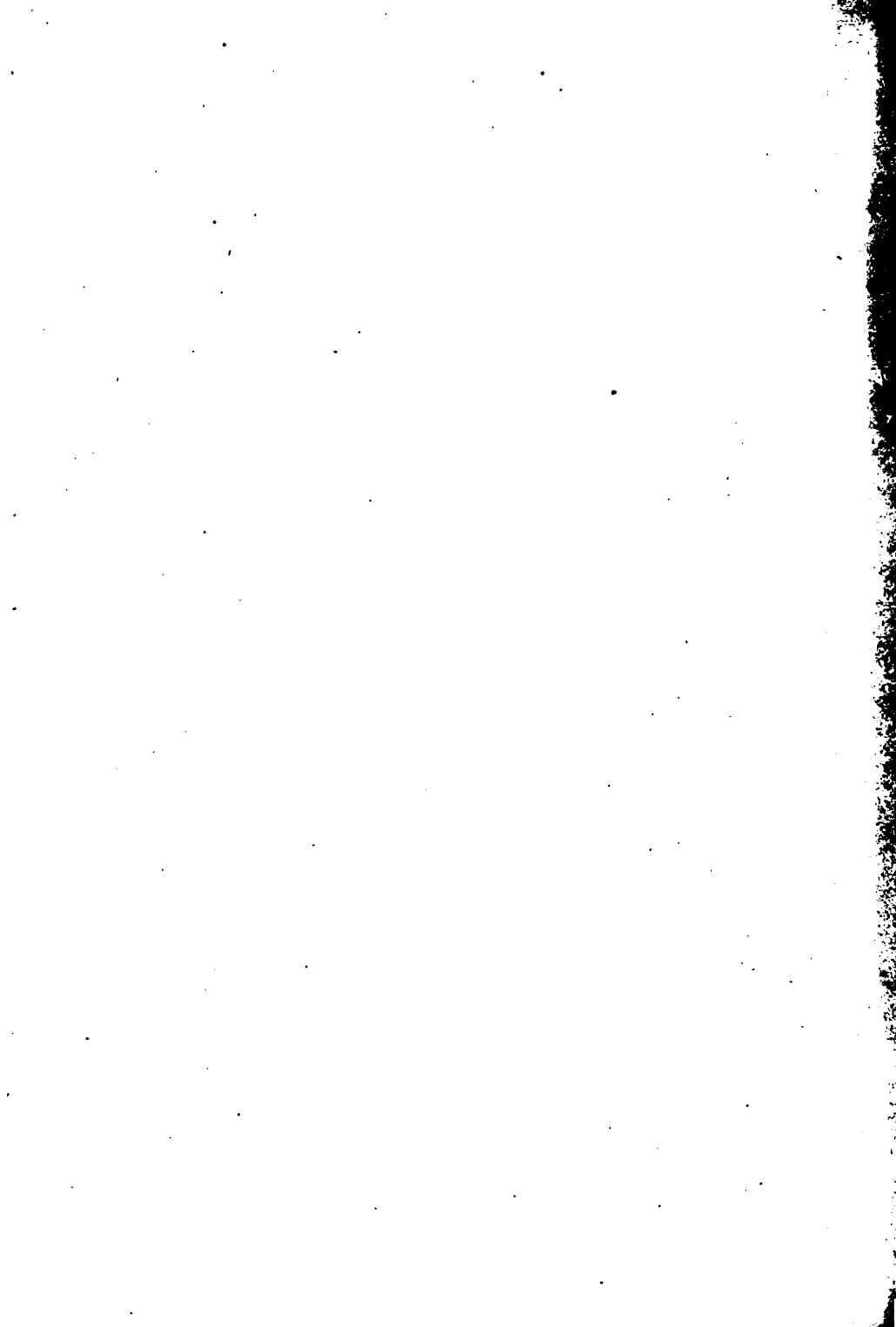
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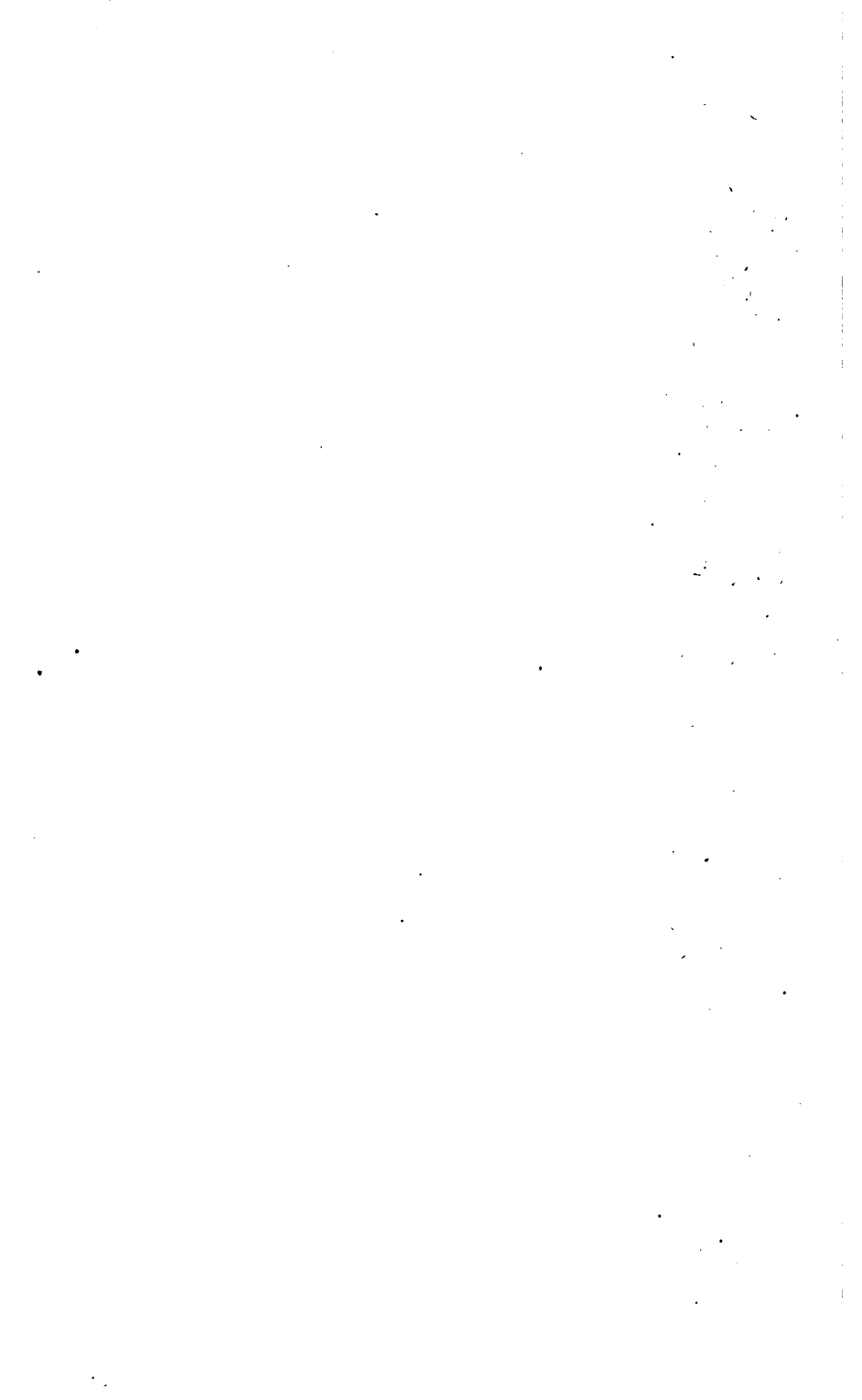
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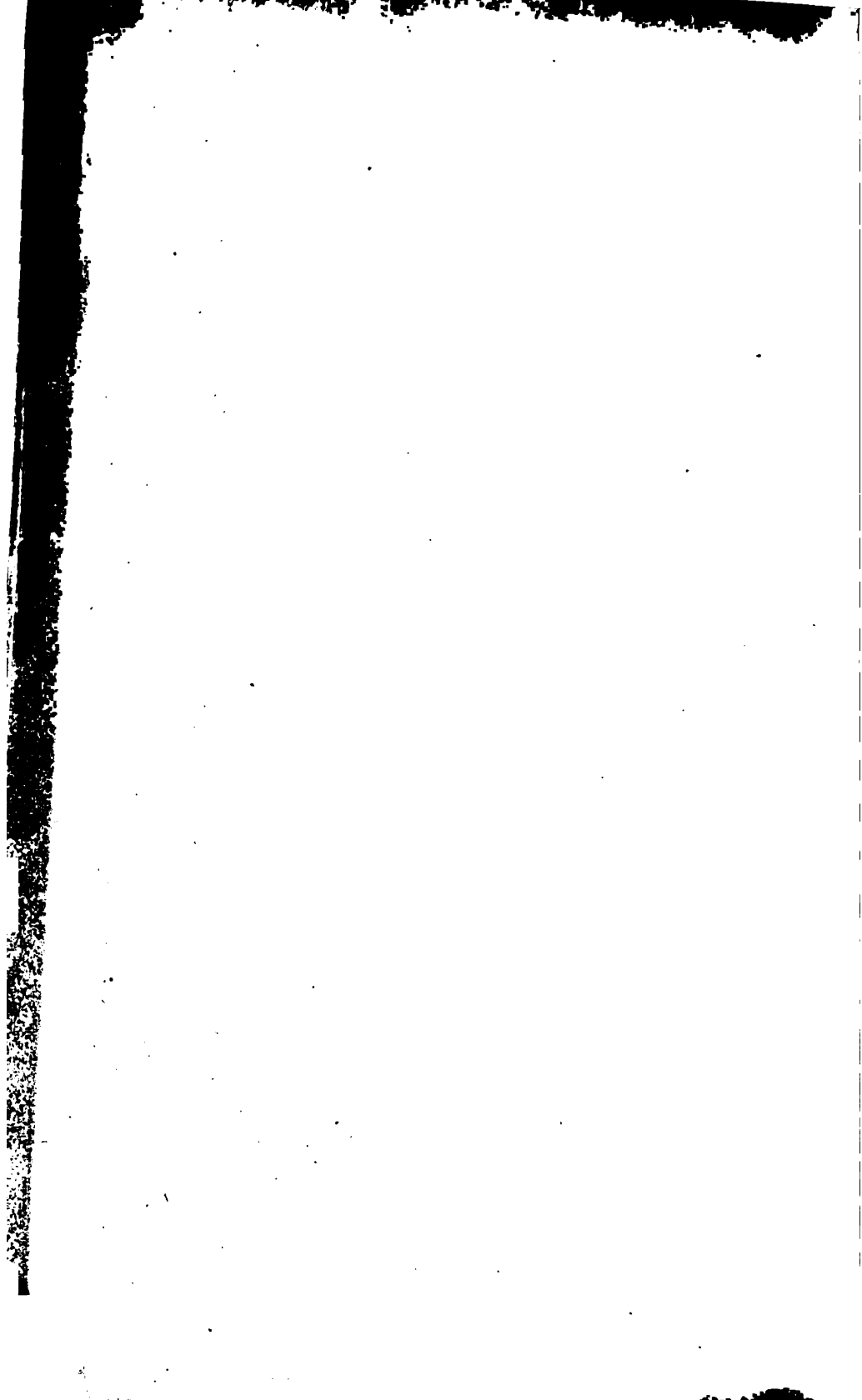












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